District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
State Enforcement and Investigation Division
Student Hearing Office
Van Ness Elementary School
1150 5th St., S.E., Washington, D.C. 20003
Phone: (202) 698-3819 Facsimile: (202) 698-3825

OSSE
STUDENT HEARING OFFICE
2009 APR 20 AM 10: 41

In Re the Matter of :	
Parent on behalf of Student,[1]	
Petitioner,	
v.	
The District of Columbia Public Schools **825 North Capitol Street, N.W.** **Washington, D.C. 20002** **(DCPS" or "District")**	**Date of Complaint:** March 6, 2009 **Date of Pre-hearing:** March 23, 2009 **Date of Hearing:** April 10, 2009
Respondent.	

HEARING OFFICERS' DECISION

Hearing Officer: Attorney Ramona M. Justice

Counsel for Petitioner: Attorney Roberta Gambale
The Law Offices of James E. Brown and Associates
1220 L Street, N.W., Suite 700
Washington, D.C. 20005

Counsel for Respondent: Attorney Daniel Kim, Assistant Attorney General, D.C. Office of the Attorney General
825 North Capitol St., N.E., 9th Floor
Washington, D.C. 20002

1 Personally identifiable information is provided in the "Index" which is located on the last page of this Order and must be removed prior to public distribution.

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

I. INTRODUCTION

The student is years of age, and a grade student attending the (Lower), a private school, located in the District of Columbia. The student receives general education services at the school, pursuant to the D.C. Washington Scholarship Fund; and is entitled to receive special education and related services pursuant to the District of Columbia Public Schools, Office of Special Education, "Individualized Services Plan for Parentally Placed Private/Religious School Students".

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

On March 6, 2009, Attorney, 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) ensure parent participation in the placement decision for the student; and (2) provide the student speech and language services.

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

II. JURISDICTION

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

III. DUE PROCESS RIGHTS

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

IV. ISSUES

The following issues are identified in the *March 6, 2009* due process complaint:

(1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to ensure parent participation in the placement decision for the student?

(2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student speech and language services?

V. RELIEF REQUESTED

Relief Requested:

(1) A finding that DCPS denied this student FAPE by failing to include parent it the placement decision or provide services;
(2) DCPS shall fund related speech services and instructional services at for the remainder of the school year.
(3) DCPS shall reconvene the MDT to address placement and provide the parent with detailed information regarding every placement proposed by the public agency;
(4) That DCPS agrees to pay counsel for the parent's reasonable attorney's fees and related costs incurred in this matter.
(5) All meetings shall be scheduled through counsel for the parent, Roberta L. Gambale, Esquire, in writing, via facsimile, at 202-742-2098.

VI. PROCEDURAL POSTURE

On March 6, 2009, Petitioner, through Counsel, filed a due process complaint. March 12, 2009, the Hearing Officer issued a Pre-hearing Conference Notice scheduling the Pre-hearing Conference for March 23, 2009 at 4:30 p.m.. The pre-hearing conference convened as scheduled, and on March 23, 2009, the Hearing Officer issued a Pre-hearing Conference Order.

On March 23, 2009, DCPS filed "District of Columbia Public Schools' Response to Parent's Administrative Due Process Complaint Notice". On April 6, the parties filed disclosure statements. The due process hearing convened on April 10, 2009 at 9:00 a.m., as scheduled.

VII. PRELIMINARY MATTERS

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

IIX. DISCLOSURES

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

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF PETITIONER

- Petitioner's Exhibits 01 through Petitioner's Exhibit 9; and a witness list dated April 2, 2009.

DISCLOSURES ADMITED INTO EVIDENCE ON BEHALF OF RESPONDENT

- A witness list dated April 3, 2009.

IX. STATEMENT OF CASE

1. The student is years of age, and a grade student attending the (Lower), a private school, located in the District of Columbia. The student receives general education services at the school, pursuant to the D.C. Washington Scholarship Fund; and is entitled to receive special education and related services pursuant to the District of Columbia Public Schools, Office of Special Education, Individualized Services Plan for Parentally Placed Private/Religious School Students.

2. 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 learning disabled (LD).

3. The student began attending the during the 2008/09 school year, and tuition for the general education program is paid through the D.C. Washington Scholarship Fund.

4. On October 23, 2008, the student was referred by a teacher to the Office of Special Education, District of Columbia Public Schools, The
because the student lacked grade appropriate skills in all areas of reading and language. The teacher indicated that if the student failed to receive the adequate assistance recommended, she will continually be behind and unsuccessful.

5. On October 24, 2008, the Office of Special Education, District of Columbia Public Schools, determined that the student struggles in reading fluency, spelling, written expression and basic phonetic skills; and completed a "Private-Religious School Student Referral for Special Education Services" form, referring the student for special education instruction.

6. On or about December 16, 2008, DCPS completed a "Confidential Report of Psychological Evaluation". The assessment procedures and information sources included: Review of Records, Woodcock Johnson III Tests of Cognitive Abilities, Woodcock Johnson III Tests of Achievement, and Classroom Observation.

The evaluator determined that "it is likely" that her cognitive potential lies somewhere within the low average/average range; and academically the student is achieving at levels much below her age/grade peers at that time, specifically in all the areas related to language arts. The evaluator also determined that math skills are relatively better developed at this time, while still below grade expectations; visual-motor integration skills were in the low range, and she had difficulty with more complex ones. The evaluator recommended monitoring of her functioning in this area.

The evaluator concluded that results obtained from this evaluation suggests that the student satisfied the eligibility criteria under the IDEA as a student with a learning disability (LD); and the MDT would however, render the final determination of her eligibility for special education services after careful consideration of all available current data, including the psycho-educational and speech and language evaluation reports, the social history, teacher report and parent report.

7. On December 22, 2008, DCPS completed a "Speech and Language Evaluation Report". The student was referred to the for a speech and language evaluation as part of the multidisciplinary evaluation to determine eligibility for special education services. It was reported that the student was demonstrating academic difficulties, especially in the areas of comprehension.

Results of the evaluation indicated that the student demonstrates an academically significant speech or language impairment; and the student's scores indicated that she may be eligible for speech and language services according to the guidelines of the Washington, D.C. Public School District detailed in the Speech and Language Eligibility/Dismissal Criteria Standards. The evaluator also determined that eligibility for services, however, is dependent on review of the student's MDT, which may or may not present further evidence of impairment.

8. On January 23, 2009, DCPS convened a MDT meeting to discuss the results of the student's speech and language and psycho-educational evaluation to determine whether the student presents with a disability warranting special education services. MDT participants included parent, the student's special education teacher, school Psychologist, Speech Pathologist, and the Assistant Principal/Teacher.

The team determined that the student meets the eligibility criteria for a student with a specific learning disability; and would reconvene to develop the student's IEP on February 3, 2009, at 9:30 a.m., at

9. On February 3, 2009, the MDT reconvened to develop the student's Individual Service Plan (ISP) for the student; and IEP. Meeting participants included the student's Case Manager/Special Education Coordinator, Speech and Language Pathologist, Psychologist, General Education Teacher, and parent. Parent signed the IEP, indicating that she agreed with the contents of the IEP; she had an opportunity to be involved in the development of the IEP; received a copy of the IEP and consent to the implementation of the services in the IEP; and received a copy of the procedural safeguards and parent rights pertaining to special education.

The student's IEP recommends 15 hours per week of specialized instruction, and per the Services Agreement for Private-Religious Schools, the student is entitled to one hour of speech and language intervention services per week.

The team discussed the student's placement, rejected a general education and out of general education setting; and accepting a combination general education/resource setting, as an appropriate educational setting for the student. The team proposed as the student's placement, indicating that the placement can implement the student's IEP; provide FAPE; and the school has certified general educators and special educators who can implement the student's IEP. The MDT meeting notes reflect that after receiving the information, parent elected to maintain the student's placement at

The team also determined that services will likely be provided at the nearest DCPS school to the student's attending school; and other service location options will be determined between parent and the related services supervisor. The team completed an "Individualized Services Plan for Parentally Placed Private/Religious School Students", recommending 1 hour per week of speech therapy.

The team also issued to parent a "Prior Notice" notifying parent that the student is eligible and continue to be eligible to receive special education services, as a student with a learning disability; and will begin receiving speech as a related service. The notice also advised parent that the MDT reviewed evaluations/reports and determined that the student is eligible for special education services as a student with a disability classification of learning disabled and recommended a combination resource room/general education classroom as an appropriate setting for the student. The team also identified the student's placement as the

10. The student's mid-term first advisory report, for the 2008/09 school years, from reflects that the student is performing satisfactory in math, science, social studies, Physical Education; and performed unsatisfactory in language, reading, and SSR. The student's mid-term, second advisory report for the 2008/09 school years, from reflects that the student is performing satisfactory in all subject areas.

11. On March 6, 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) ensure parent participation in the placement decision for the student; and (2) provide the student speech and language services.

X. WITNESSES

Witnesses for Petitioner

Parent
Assistant Principal,

Witnesses for Respondent

Respondent presented no witnesses.

Witness Testimony

Parent

Parent testified that the student began attending the during the 2008/09 school years; and since attending the school, she requested student evaluations. Parent testified further that she was advised by the school that it failed to offer speech and language service, and recommended student evaluations to determine whether the student has a learning disability.

Parent also testified that she communicates with the student's teacher once or twice a week; and that it was her decision to request evaluation for services; and that the evaluated the student.

Parent testified that she attended the February 3, 2009, MDT meeting, the team determined that the student was learning disabled; and recommended 15 hours of specialized instruction, and 1 hour of speech and language services, per week. Parent also testified that she was not represented at the meeting.

Parent also testified that at the MDT meeting, there was no agreement to change the student's placement; and the team advised her that the student would have to attend and the school can implement the student's IEP, however failed to advise her of the services the student would receive. Parent also testified that the team failed to include a member from and that was the only school proposed by the team.

Parent testified that because DCPS advised her that had to be the student's school, and the student failed to receive services at in February, 2009, she visited the school, so that the student could receive the services she requires. Parent testified further that she also visited the school to admit the student into school, and observe the program; she completed the enrollment forms; and although requested, was denied a tour of the school.

Parent also testified that she met with the Speech and Language Therapist, and Special Education Coordinator, and although requested, was denied the opportunity to observe the special education classes. Parent testified that the school is overcrowded and some of the staff at Amidon, was also at a prior school attended by the student, and she is not confident that the staff at Amidon can provide the services the student requires.

Parent testified that she considered identifying another DCPS school, however, "missed out of boundary process". Parent also testified that at the February 3, 2009 MDT meeting, the team discussed where the student's special education services would be delivered; and that she failed to inquire, and was unaware that she could request DCPS to provide an alternate placement. Parent also testified that she failed to advise DCPS of concerns regarding the student's placement at the

Parent testified that she was contacted the week prior to the hearing by DCPS, advising her that the student can begin receiving special education services at every Tuesday. Parent also testified that she advised the school that she would telephone the school regarding the student's start of school, and would have the student begin the following week, however, after visiting the school decided that she desired that the student remain at

Assistant Principal,

The witness testified that she is familiar with the student as the Assistant Principal and the student's 4th grade teacher; and she participated in the February 3, 2009 MDT meeting. The witness also testified that a DCPS representative was present at the meeting; however, a representative from was not present at the meeting. The witness testified that she is uncertain of the team's impressions regarding the appropriateness of as a placement for the student. The witness testified that the student's current placement provides a small group setting, and is more appropriate for the student.

The witness testified that the student's scholarship provides funding for general education instruction; and the school can provide the student a resource combination program at the Academy, with appropriate funding to provide a special education teacher and Speech and Language Pathologist. The witness testified that the team developed an ISP for the student, and agreed that DCPS would provide the student speech and language services. The witness testified that the team identified as a placement for the student, and parent failed to agree with the placement, however agreed that the student would remain at the Academy.

During cross-examination the witness testified that at the meeting, DCPS agreed to provide the student speech and language services at and parent elected to maintain the student's placement at

XI. DISCUSSION AND CONCLUSIONS OF LAW

ISSUE 1

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to ensure parent participation in the placement decision for the student?

Petitioner represents that DCPS failed to identify a suitable placement for the student for the 2008/09 school years and/or failed to allow the parent meaningful participation in the placement decision for the child. "According to 34 C.F.R. §300.116:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that—

(a) The placement decision—

(1) Is made by a group of persons, including the parents, and persons knowledgeable about the child, the meaning of evaluation data, and the placement options; and
(2) Is made in conformity with the LRE provisions of this subpart, including 300.114 through 300.118—

(b) The child's placement—

(1) Is determined at least annually;
(2) Is based upon the child's IEP; and
(3) Is as close as possible to the child's home..."

Petitioner further represents that the placement and program for each disabled student must be reasonably calculated to confer educational benefit to the child. See, Board of Education of the Hendrick Hudson Central School District Westchester County et al. v. Rowley, 458 U.S. 276, 102 S. Ct. 3034 (1982). "However, due to lack of available information about the placements proposed by the public agency, the team could not make a determination that the placement was reasonably calculated to confer educational benefit to this individual child."

"Finally, the parent is a necessary participant in the placement decision for a disabled student under the IDEA, and the failure to provide the parent with sufficient information about the placements proposed by DCPS prevents the parent from having meaningful participation in the placement decision proposed by the public agency. Courts in other jurisdictions have held that failing to include representatives from the proposed placement denied the parent a meaningful participation in the placement decision. See Werner ex rel Werner v. Clarkstown Central School District, 43 IDELR 59 (S.D.N.Y. 2005)."

Petitioner represents that because DCPS failed to identify a suitable and appropriate placement that can address and/or provide for this student's unique needs the funding of a private placement would be an appropriate remedy. *See, Burlington v. Department of Education, 472 U.SW. 359, 105 S. Ct. 1996. Florence County School District v. Carter, 510 U.S. 7, 114 S.Ct. 361; Roca v. District of Columbia, 43 IDELR 58, (March 24, 2005).*

"Failure to include the parent as a participant in the placement meeting and/or placement decision for her child is a procedural violation that affects this student's substantive rights in that the parent's opportunity to participate in the process is being seriously hampered. *See Kruvant v. District of Columbia, 99 Fed Appx. 232, 233 (D.C. Cir. 2004); Lesesne v. District of Columbia No. 05-7123 (D.C. Cir. 2006) & Scott v. District of Columbia, 45 IDELR 160 (2006).*

Petitioner further represents that in this matter, DCPS seriously hampered the parent's ability to participate in the placement decision for her child when they failed to include the parent as a necessary participant in the placement decision for her child by failing to provide parent any information regarding the placement selected for the child.

Petitioner concludes that DCPS failed to provide parent information regarding the proposed placement, the team failed to include an individual to provide parent information regarding the placement, and such failure represents more than a procedural violation, it represents denial of a FAPE. Petitioner also represents that parent is familiar with the staff at from a prior school, however, the team failed to provide information regarding whether the school can implement the student's IEP. Petitioner represents that the MDT meeting notes reflect no information provided regarding the program at and parent was not comfortable with the information provided, supporting a decision to remove the student from a small setting to a different setting.

Petitioner concludes that she was advised that for the student to receive services and make progress, the student must relinquish her scholarship and enroll the student in the neighborhood school. Petitioner concludes that parent visited with the intent of enrolling the student at the school, however the school failed to provide parent information or a tour of the special education classes. Therefore, parent was not comfortable, and did not have sufficient information that the school was appropriate, so she decided not to proceed with the enrollment. Petitioner also concludes that the information was also insufficient for the MDT to render a decision regarding the appropriateness of the proposed placement at .

DCPS provides a general denial of allegations that it denied the student a FAPE; and specifically denies the allegation that it denied the student a FAPE; by failing to ensure parental participation in the placement decision for the student.

DCPS asserts that parent was provided meaningful opportunity to participate in development of the student's IEP; parent was a participant in the January 23, 2009 MDT meeting, with a DCPS representative, school psychologist, speech/language pathologist, assistant principal, and/or classroom teacher.

"Additionally, parent was a participant in the IEP meeting for the student on February 3, 2009; and at that time, DCPS representative provided parent with information regarding and represented its ability to service the student and implement the student's IEP. DCPS contends the parent rejected DCPS' proposed placement opting to continue the student's current placement at the DCPS contends the student has not been denied a FAPE."

DCPS concludes that parent was not denied a FAPE, was provided opportunity for meaningful participation in the placement decision, and according to the MDT meeting notes of February 3, 2009, parent rejected the proposed placement. DCPS also concludes that parent failed to testify that the information received at the meeting was insufficient to make an informed decision regarding the proposed placement; and parent elected to maintain the student's placement at the Academy. Therefore, it is inappropriate to thereafter, represent that the student was denied a FAPE.

ANALYSIS

According to *Schaffer v. Weast, 546 U.S. 49, 56-57 (2005)*; the burden of proof is properly placed upon the party seeking relief; and in this matter the burden of proof is upon Petitioner. IDEIA provides that a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence. 20 U.S.C. §1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005).

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

(a) The placement decision—

(1) Is made by a group of persons, ***including the parents***, and other persons ***knowledgeable about*** the child, the meaning of the evaluation data, and the ***placement options***; and...

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

The record reflects that on January 23, 2009, DCPS convened a MDT meeting to discuss the results of the student's speech and language and psycho-educational evaluation; and determine whether the student presents with a disability warranting special education services. MDT participants included parent, the student's special education teacher, school Psychologist, Speech Pathologist, and the Assistant Principal/Teacher.

The team determined that the student meets the eligibility criteria for a student with a specific learning disability; and would reconvene to develop the student's IEP on February 3, 2009, at 9:30 a.m., at Parent expressed no concerns to the team regarding the evaluation results.

The record also reflects that on February 3, 2009, DCPS convened an IEP team meeting to develop the student's Individual Service Plan (ISP) for the student; and Individualized Education Program (IEP). Meeting participants included the student's Case Manager/Special Education Coordinator, Speech and Language Pathologist, Psychologist, General Education Teacher, and parent. The DCPS representative familiar with Amidon ES, provided the team information regarding the school, its ability to implement the student's IEP, and provide a FAPE.

The team discussed various options for the student's educational setting and placement. The team rejected a general education setting for the student on the basis that such a setting has not been able to completely meet the student's needs in reading, reading comprehension, math reasoning, and spelling. The team also decided that a general education setting is not appropriate for the student because the student would not have access to special education services.

The team also rejected an out of general education setting for the student on the basis that the setting is too restrictive and fail to provide the student the opportunity to be educated with nondisabled peers, which receives specialized instruction. The team decided that after reviewing evaluations/reports, a combination general education/resource setting is appropriate for the student, on the basis that the setting is able to provide the student with specialized instruction while continuing to provide the student access to the general curriculum; and a school offering a combination setting, can implement the student's IEP; accommodations and modifications.

The team also determined that services will likely be provided at the student's neighborhood school, and the nearest DCPS school to the student's attending school; and that other service location options will be determined between parent and the related services supervisor. The MDT proposed as the student's placement, indicating that the school can implement the student's IEP; provide FAPE; and the school has certified general educators and special educators who can implement the student's IEP.

There is no information that during the meeting, parent advised the team that the information received regarding the proposed placement was insufficient for her to provide "meaningful" input in the placement decision; communicated concerns regarding the proposed placement; or requested an opportunity to consider an alternate DCPS placement for the student. Parent testified that although she advised her Attorney of concerns regarding the placement decision, she failed to communicate her concerns to DCPS at the meeting, or after visiting Instead, after receiving the information regarding the proposed placement at

parent advised that team that she was rejecting the proposed placement at and elected to maintain the students' placement at

The team issued to parent a "Prior Notice" notifying parent that the MDT reviewed evaluations/reports and determined that the student is eligible for special education services as a student with a disability classification of learning disabled and recommended a combination resource room/general education classroom as an appropriate setting for the student. The team identified the student's placement as the

Parent signed the IEP, indicating that she agreed with the contents of the IEP; she had an opportunity to be involved in the development of the IEP; received a copy of the IEP and consent to the implementation of the services in the IEP; and received a copy of the procedural safeguards and parent rights pertaining to special education.

The Hearing Officer finds that Petitioner failed to present evidence that on February 3, 2009, she was denied the opportunity to provide "meaningful" input in the placement decision for the student. There is also no evidence that on February 3, 2009, or after visiting parent advised the team of concerns regarding the proposed placement; lacked the information necessary to provide "meaningful" input in the placement decision; requested additional information to ensure that she could provide "meaningful" input in the placement decision; or inquired regarding alternative placements.

During the hearing, parent reiterated her familiarity with the staff at appearing that parent had personal knowledge and information regarding the school and its staff, sufficient to make an informed decision regarding the student's placement; and that such information served as the basis for her decision to reject the proposed placement at and maintain the student's placement at

On February 3, 2009, and during her visit at parent had the opportunity to participate in the placement decision; and provide meaningful input in the placement decision, however, failed to avail of the opportunity. Instead, on both occasions, parent rejected as a proposed placement for the student, and elected to maintain the student's placement at

Parent also testified that after the IEP team meeting, she visited with the intent of enrolling the student at the school and observe the program, which is contrary to any representation that parent failed to have information sufficient to provide "meaningful" input in the placement decision. Parent testified that during her visit, she communicated with the Speech and Language Pathologist regarding the provision of services, and the Special Education Coordinator, who advised her that the school could offer the student inclusion and pull out services. Parent also testified that although she was denied the opportunity to observe the special education classes, she completed the enrollment documents, and advised the school that the student would begin attending the school the following week, however, subsequently decided to maintain the student's current placement.

Parent testified that is overcrowded; and she had reservations regarding transferring the student from Parent also testified that she was unaware that she could request an alternate DCPS placement; and had considered identifying an alternate DCPS school for the student, however, "missed the out of boundary process".

At the hearing, parent failed to testify that the information she received at the February 3, 2009 IEP team meeting, was insufficient to provide "meaningful" input in the placement decision, or that she was denied the opportunity to participate in the placement decision. In fact, parent testified that at the February 3, 2009 IEP team meeting, and after visiting she elected to maintain the student's placement at the Academy, because she was familiar with the staff at from a prior school; the school is overcrowded; and she was not confident that the staff could meet the needs of the student.

The Hearing Officer finds that any concerns of parent regarding the placement decision, pertain to the appropriateness of as a placement for the student, and not that she was denied the opportunity to provide "meaningful" input in decisions regarding the student's placement; or information necessary to provide "meaningful" input in the placement decision. However, Petitioner presented evidence regarding the appropriateness of the student's placement at and no evidence that parent was denied the opportunity to provide "meaningful" input in the placement decision; or information regarding the proposed placement.

Furthermore, IDEA requires that unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. 34 C.F.R. §300.116(c). To the maximum extent appropriate, children with disabilities, including children in public or private institutions with other care facilities, are to be educated with children who are nondisabled. See, 34 C.F.R. §300.114(2)(i).

In the District of Columbia, special education placements shall be made in the following order of priority, provided, that the placement is appropriate for the student and made in accordance with the IDEA:

(1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
(2) Private or residential District of Columbia facilities; and
(3) Facilities outside of the District of Columbia.

In this matter, as a form of partial relief, Petitioner requests that DCPS fund special education and related services at the which is a private school located in the District of Columbia. However, IDEA does not require DCPS to "maximize the potential" of a student. *McKenzie*, 882 F.2d at 886 (noting that the Supreme court stressed the lack of any such requirement four separate times in *Rowley*, 458 U.S. at 189, 197 n.21, 198, 199). Rather, the public agency only has to provide a "basic floor of opportunity." 882 F.2d at 886.

It is evident that Petitioner failed to make any effort to access the educational opportunities offered at identify or request an alternate DCPS public school placement, because of her preference that the student remain at her current placement, and DCPS fund the special education and related services, at the private school.

The Hearing Officer finds that absent a determination that DCPS failed to provide the student an appropriate placement, which is not the issue before the court, there can be no finding that because DCPS proposed to place the student at a public school, rather than agreeing to fund the student's services at the private school, DCPS failed to ensure parent participation in the placement decision, or provide information regarding the proposed placement, as represented by Petitioner.

The Hearing Officer concludes that consistent with IDEA, 34 C.F.R. Section 300.116, DCPS ensured that the placement decision was made by a group of persons, including the parent, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

It is the Hearing Officers' decision that Petitioner failed to satisfy its burden, by presenting evidence that failed to ensure parent participation in the placement decision; or provide parent information regarding the proposed placement.

ISSUE 2

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student speech and language services?

Petitioner represents that the IDEA guarantees children the right to receive a free, individually appropriate, public education. 20 U.S.C. §1400(d)(1)(A). "A free individually appropriate public education or a FAPE "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." See, Board of Educ. Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 188-89 (1982). "District of Columbia municipal regulations have placed the burden on the local educational agencies to "ensure that procedures are implemented to identify, locate, and evaluate all children with disabilities residing in the District who are in need of special education and related services, including children with disabilities attending private schools, regardless of the nature or severity of their disabilities." D.C. Mun. Regs. Tit. 5, §3002."

"In the case at hand, DCPS acknowledged that the student was entitled to receive related speech and language services under the services agreement for private schools but failed to make such services available to her. As a result she has been denied a FAPE."

Petitioner represents that DCPS agreed to provide the student speech and language services, and initially contacted parent the week prior to the hearing regarding the availability of services. Petitioner also represents that approximately two (2) months lapsed since the student's IEP was developed, and the student failed to receive services. Petitioner also represents that DCPS failed to provide parent information regarding the location of the provision of services.

Petitioner represents that the student requires speech and language services because of academic deficits identified in the Psychological Evaluation; the student is behind grade level; and there are concerns regarding her overall academic ability. Petitioner also represents that DCPS made the services available, however, parent wants the services at and there is o evidence that can provide the student the speech and language services, provided in her IEP.

DCPS acknowledge that it failed to provide the student speech and language therapy services, as recommended in the student's Individualized Service Plan for parentally placed private/religious school students,; and indicates that it will attempt to resolve this issue with parent in an effort to remediate the student's gap in services.

At the hearing, DCPS represents that from February 3, 2009 through March 6, 2009, the student failed to receive speech and language services; parent was provided the opportunity to receive services at the student's neighborhood school; and any delay in providing the services has had no more than a de minimis impact upon the student.

DCPS concludes that parent visited and communicated with the Speech and Language Pathologist regarding the provision of speech and language services, and the Special Education Coordinator advised parent that the student could receive inclusion or pull out services. DCPS also represents that the week prior to the hearing, the Speech and Language Pathologist contacted parent, notifying parent that the student could begin receiving speech and language services at every Tuesday; and DCPS waited for the student to begin school, which failed to occur. DCPS further represents that Petitioner failed to satisfy its burden of proof.

ANALYSIS

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

(4) A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and

(5) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

The record reflects that on February 3, 2009, DCPS reconvened the MDT meeting to develop the student's Individual Service Plan (ISP) for the student; and IEP. Meeting participants included the student's Case Manager/Special Education Coordinator, Speech and Language Pathologist, Psychologist, General Education Teacher, and parent.

The team developed an IEP for the student, recommending fifteen (15) hours per week of specialized instruction, and per the Services Agreement for Private-Religious Schools, the student is entitled to one hour of speech and language intervention services per week. The record reflects that the Speech and Language Pathologist from . initially contacted parent to advise parent that the student could begin receiving services.

The Hearing Officer finds that parent visited after the IEP team meeting, and subsequently decided that the student would not attend . and would remain at However, the fact remains that DCPS failed to ensure that as soon as possible following development of the IEP, related services were made available to the student. Approximately two (2) months lapsed from February 3, 2009, and the date DCPS initially contacted parent to advise her that the student could begin receiving services.

In addition, DCPS failed to present evidence refuting allegations that it failed to ensure that related speech and language services were made available to the student, as soon as possible following development of the IEP.

It is the Hearing Officer's decision that Petitioner satisfied its burden, by presenting evidence that DCPS failed to ensure that as soon as possible following development of the IEP, special education and related services were made available to the student, in accordance with her IEP; representing a procedural and substantive violation of IDEA.

Free Appropriate Public Education (FAPE)

IDEA requires DCPS to assure a "free appropriate public education" ("FAPE") for all disabled children. 20 U.S.C. §1412(1). A free appropriate public education "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." Bd. Of Education v. Rowley, 458 U.S. 176, 188-89, 73 L.Ed. 2d 690, 102 S.Ct.3034 (1982). DCPS is obligated to provide a FAPE " for all children residing in the state between the ages of 3 and 21, inclusive." 34 C.F.R. §300.101.

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. In other words, an IDEA claim is viable only if those procedural violations affected the student's substantive rights. *Lesesne v. District of Columbia, 447 F.3d 828, 834 (D.C. Cir. 2006).*

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."

The Hearing Officer finds that Petitioner presented evidence sufficient for a finding that as soon as possible following development of the IEP, DCPS ensured that special education and related services were made available to the child in accordance with the child's IEP, representing a procedural and substantive violation of IDEA. However, Petitioner failed to present evidence that the procedural violation impeded the child's right to a free and appropriate public education; 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 caused a deprivation of educational benefit.

Petitioner also failed to present evidence that the substantive harm occurred because the procedural violation in question seriously infringed upon the parents' opportunity to participate in the IEP process; or that the procedural violation deprived the student of an individualized education program or resulted in the loss of educational opportunity, constituting denial of a FAPE under the IDEA.

The record reflects that according to the student's mid-term first advisory report, for the 2008/09 school years, from the student was performing satisfactory in math, science, social studies, Physical Education; and unsatisfactory in language, reading, and SSR. However, the student's mid-term, second advisory report for the 2008/09 school years, from reflects that the student performed satisfactory in all subject areas.

T

There is no evidence that DCPS denied parent the opportunity to provide "meaningful" input in the placement decision, or information regarding the proposed placement. There is also no evidence that DCPS' delay in providing the student speech and language services, significantly impeded parent's opportunity to participate in the decision making process regarding the provision of a FAPE.

The record reflects that parent participated in the January 23, 2009 MDT eligibility meeting; the February 3, 2009 IEP team meeting, and was provided the opportunity to provide "meaningful" input in the placement decision. In addition, parent testified that she rejected the proposed placement by DCPS; the receipt of specialized instruction and related services at and elected to maintain the student's placement at

It is the Hearing Officers' Decision that Petitioner failed to satisfy its burden of proof by presenting evidence that the student was denied a FAPE, 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")".

XII. ORDER

Based on the aforementioned, it is hereby:

(1) **ORDERED**, that the relief requested by Petitioner is denied; 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 of this decision.

Ramona M. Justice Date Filed: *4-17-09*

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Daniel Kim, Office of the Attorney General
Attorney Roberta Gambale: Fax: 202-742-2098