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
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STUDENT HEARING OFFICE
2009 APR 20 AM 10:37

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), hereinafter referred to as the "Academy", a private school, located in the District of Columbia. The student is only entitled to receive general education services, 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 Mental Retardation (MR).

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, and received information regarding the proposed placement; and (2) provide the student speech and language services.

The due process hearing convened on April 10, 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. 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, and received information regarding the proposed placement?

(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. On March 12, 2009, the Hearing Officer issued a Pre-hearing Conference Notice scheduling the Pre-hearing Conference for March 23, 2009 at 4:00 p.m... The pre-hearing conference convened on March 23, 2009, at 4:30 p.m... On March 23, 2009, the Hearing Officer issued a Pre-hearing Conference Order, confirming the hearing for April 10, 2009 at 11:00 a.m...

On March 23, 2009, DCPS filed "District of Columbia Public Schools' Response to Parent's Administrative Due Process Complaint Notice". On April 2, 2009, Petitioner filed disclosures; and on April 3, 2009, Respondent filed a disclosure statement. The due process hearing convened on April 10, 2009 at 11:00 a.m., as scheduled.

VII. PRELIMINARY MATTERS

There were no preliminary matters introduced by the parties, or addressed by the court, prior to proceeding with a hearing 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 13; 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), hereinafter referred to as the "Academy", a private school, located in the District of Columbia. The student is only entitled to receive general education services 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 Mental Retardation (MR).

3. On October 24, 2008, the student was referred by the to the Office of Special Education, District of Columbia Public Schools, The C.A.R.E. Center, because the student struggled in reading/readiness and mathematical concepts on grade level; is behind in phonics; and according to the referral should exhibit more skills for her age level.

4. 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. The scholarship fund does not provide funding for special education and related services. The student receives special education and related services pursuant to the District of Columbia Public Schools, Office of Special Education, Individualized Service(s) Plan for Parentally Placed Private/Religious School Students.

5. On December 16, 2008, DCPS completed a "Confidential Report of Psychological Evaluation". The results obtained from the evaluation suggest overall weaknesses cognitively; additional assessments of non-verbal cognitive functioning will be completed; an data obtained related to adaptive functioning.

6. On December 30, 2008, DCPS completed a Psychological Evaluation; and on January 22, 2009, an "Addendum to Psycho-educational Evaluation". The student was referred for evaluation because of concerns regarding her academic progress, and results from earlier testing revealed overall cognitive functioning in the very low range, with overall academic achievement also in the very low range. Broad reading, broad written language, and written expression skills were in the very low range, with better developed skills in mathematics, though still being below her age/grade peers at that time.

According to professional guidelines, the student's current Vineland-II results, the results from the Woodcock-Johnson III Tests of Cognitive Abilities and from the Test of Nonverbal Intelligence, suggest a classification of mental retardation.

7. On December 30, 2008, DCPS completed a Speech and Language Evaluation. The student was referred to the C.A.R.E. Center for evaluation as part of a multidisciplinary team evaluation to determine eligibility for special education services. Results of assessments reveal that the student's general, receptive and expressive vocabulary skills are in the below average range. Language skills were assessed using the CELF-4, and determined to be in the low average range.

Significant deficits were identified in core, receptive and expressive language skills most likely impacting upon her ability to utilize communication skills necessary for academic success. Articulation, voice and fluency are appropriate for her age, gender and linguistic environment, and the student's performance throughout the assessment was not indicative of a hearing loss.

Results of the evaluation indicated that the student demonstrates an academically significant language impairment; and her scores indicated that she is eligible for speech and language services.

8. On January 23, 2009, DCPS convened an Individualized Education Program (IEP) meeting, to discuss the results of the student's speech and language and psycho-educational evaluations, 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 disability classification of mental retardation; and developed an IEP recommending 15 hours per week of specialized instruction, and 1.5 hours per week of speech therapy.

The team discussed the student's educational setting and placement, rejected a general education setting on the basis that the setting is unable to provide specialized instruction, while implementing the accommodations and modifications; and the out of general education setting, on the basis that the setting is too restrictive at that time and the student would not be able to receive access to the general education curriculum, while being educated with non-disabled peers. The team accepted the combination general education/resource setting, as an appropriate educational setting for the student; on the basis that the setting is able to fully implement the student's IEP, providing specialized instruction, while being educated with non-disabled peers.

The team proposed hereinafter referred to as as the student's placement, indicating that the placement can implement the student's IEP; provide accommodations and modifications for the student; and that the school has certified general educators and special educators. The MDT meeting notes reflect that after receiving the information, parent advised the team that the student would remain at the .

The team also issued 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 disability of mental retardation; and would begin receiving speech and language, 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 mental retardation, and recommended a combination general education/resource room setting as an appropriate setting for the student. The team identified the student's placement as the Amidon.

9. On February 3, 2009, the MDT reconvened to develop the student's Individual Service Plan (ISP) for the student. 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 ISP for the student recommending 1 hour per week of speech therapy, indicating that the location of the services was to be determined, and the services would begin on February 4, 2009 and end on February 4, 2010. The ISP also indicated that services will likely be provided at the nearest DCPS school to the student's attending school; and other service location options would be determined between the parent and related services supervisor.

10. The student's mid-term, first advisory report for the 2008/09 school years, from reflects that the student is performing satisfactory in all subject areas, except math, reading, and the student fail to meet her required reading goal.

The student's mid-term second advisory report, for the 2008/09 school years, from reflects that the student is performing satisfactory in all subjects, except SSR; and fails to meet her required reading goal.

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 year; and the school referred the student to the C.A.R.E. Center for evaluations, because the student exhibited academic deficits.

Parent testified that she attended an IEP team meeting on January 23, 2009, and DCPS recommended as a placement for the student, and no other placement. Parent further testified that DCPS advised the team that could provide the services the student requires, and as recommended on the student's IEP, however, failed to present any information verifying that the school could meet the student's needs.

Parent testified that the staffs from are the same staff at therefore, she doesn't believe that is appropriate for the student. Parent testified that she would like to have had information regarding the class size at to ensure that the student can focus, or additional information regarding the special education teachers. Parent testified that she failed to agree with the placement proposed by DCPS.

Parent testified that she understood that speech and language services would be provided at however, she was advised by the team that if she rejected the proposed placement at she would be responsible for identifying speech and language services for the student.

Parent also testified that she visited several weeks after the IEP team meeting, and communicated with the Speech and Language Pathologist, Special Education Coordinator, and staff regarding the student's admission. Parent testified that she inquired regarding the special education program at the school, and requested to observe the special education classes. Parent testified that she failed to observe the classrooms, is uncertain the reason she failed to observe the special education classes, and perhaps it was because the students were recessing for lunch.

Parent testified that advised her that they can provide the services the student requires; and she received a telephone call from the the week prior to the hearing, to discuss the student's attendance at the school, and to schedule an appointment for the student to begin receiving speech and language services.

Parent testified that she didn't want the student in the setting at because of the classroom size; which would be "too much" for the student; and the Principal at is now the Principal at Parent testified that although she was not provided an opportunity to observe the special education classes, she knew the classroom size would be overwhelming for the student; and because the student is behind academically.

Parent also testified that she was dissatisfied with the teaching at and because of her dissatisfaction, pursued a private placement for the student; and that she had concerns regarding the effect on the student to change schools at this time of year, and although the student would adjust, she would still be agitated.

During cross-examination, parent testified that DCPS agreed to provide the student speech and language services; the student's IEP was developed on January 23, 2009; and the team reconvened in February, 2009, to discuss the ISP; agreeing that DCPS would provide the student services at

Parent testified that at the January 23, 2009 meeting she directed questions to the team regarding the services at and the class size, however, decided to maintain the student's placement at the Parent testified that she was unaware that she could request DCPS to provide additional placement options.

Parent testified that during her visit at she understood that the student would receive services once she transferred to the school, and agreed to transfer the student the following week; however, after visiting she "didn't feel good about the school", and was uncertain whether the student would receive the services on her IEP. Parent testified that she had no further communication with DCPS or regarding her concerns; and failed to notify the school that she decided that the student would not attend the school. Parent testified that she failed to commit to the speech and language services, and was unaware of the number of students in the classes at

Parent testified that she agreed with the January 23, 2009 IEP, and the speech and language services, and agreed to reduce the services from 1.5 hours per week to 1.0 hours per week. On redirect, parent testified that she preferred that the student maintain the same classroom size at that she has at the Academy; and the student's teacher at the Academy is a special education teacher.

Assistant Principal,

The witness testified that the is a private school, located in the District of Columbia, the student was placed at the school in September, 2008, by the parent through the Washington Scholarship Fund. The witness testified that she referred the student to the C.A.R.E. Center for a determination regarding eligibility for special education services.

The witness testified that she the student requires one on one assistance, is easily frustrated, and fail to progress in certain areas; and the student was evaluated for special education services in December, 2008. The witness testified that she participated in the MDT meeting by telephone, and the student was determined eligible for special education and related services, as a student with a disability of mental retardation. The team recommended 15 hours per week of specialized instruction and 1.5 hours per week of speech and language services, on a pull out basis, within a general education classroom.

The witness testified that the DCPS Placement Specialist proposed as the student's placement; and the MDT determined that the school can provide the specialized instruction and speech and language services. The witness also testified that the team failed to receive information regarding the student teacher ratio, and advised the team that the school can implement the student's IEP and has certified special education and general education teachers.

The witness testified that parent advised the team that she was familiar with the school, and elected to maintain the student's placement at the Academy. The witness testified that the information provided by the DCPS Placement Specialist regarding the proposed placement, was insufficient; and the team received no information regarding the classroom size and was only advised that the school could provide the student the speech and language services.

The witness testified that the Placement Specialist failed to provide information regarding the specialized instruction and related services; and the team was only advised that the student would receive speech and language services at The witness testified that the student is unfocused and requires a small class size and one on one instruction.

The witness testified that DCPS failed to ensure that a representative from attended the meeting, and the team failed to receive information regarding the Placement Specialist's familiarity with the school. The witness testified that the student was not placed at because parent declined the placement, and parent agreed with the placement because DCPS recommended however, she was uncertain regarding the size of the classes at Amidon.

The witness testified that she understood that DCPS would provide individualized special education services and speech and language services, however, not at the Academy because the Academy failed to receive the funding for the student; and if the school receives the funding it can provide the student the specialized instruction and speech and language services she requires. The witness testified that currently the student receives no special education or related services at the Academy.

During cross-examination, the witness testified that at the January 23, 2009 meeting, the MDT discussed the setting appropriate for the student, and developed an IEP for the student; and DCPS recommended and advised the team that the school can implement the student's IEP, and had certified instructors.

The witness testified that the student's teacher expressed no concerns regarding the class size; and that she posed no questions to DCPS regarding or how the Placement Specialist was familiar with The witness testified that she merely advised the team that the student would benefit from a small class; and parent raised concerns regarding being too crowded.

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?

In the due process complaint, 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. Petitioner further represents that "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 it is evident that the student requires significant assistance, according to the Speech and Language Evaluation, has severe deficits, and the December, 2008 evaluation and addendum in January, 2009. Petitioner represents that the student is mentally retarded and her educational programming is more important now than ever to accommodate her disability. Petitioner represents that at the January, 2009 MDT the team agreed to 15 hours of specialized instruction and 1.5 hours of speech and language services, and the student has received no services.

Petitioner represents that she was unable to make an informed decision regarding the placement; and parent was advised that the student cannot receive the services she requires unless she attends a neighborhood school, however, she failed to receive the information necessary to make a decision regarding the placement.

Petitioner represents that it was requested that she relinquish the scholarship at the Academy, and the student's special education teacher; without providing information whether is appropriate. Petitioner represents that the class size is a concern and the school is overcrowded; and it failed to appear that Amidon could meet the needs of the student.

Petitioner further represents that DCPS failed to provide information regarding the proposed placement, precluding meaningful input; the MDT notes reflect no discussion, and DCPS advising the team that can implement the student's IEP. Petitioner represents that DCPS failed to provide information regarding the educational placement/setting, teacher-qualifications, service providers, and other disabilities serviced at the school; which is crucial information which would have made her more comfortable with the placement decision.

Petitioner represents that she is not opposed to the student attending a public school, otherwise she would not have enrolled the student; and because failed to provide her information, she changed her mind regarding the student attending the school. Petitioner concludes that she was denied the right to participate in the meeting; and because it is the end of the school year, the student would be best served if she remained at the Academy, and receive the specialized instruction and related services.

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.

DCPS also concludes that the student's educational setting was discussed at the MDT meeting, the IEP drives the placement, parent participated throughout the process; and agreed with the recommended services. DCPS concludes that parent participated in development of the student's IEP, and had an opportunity to review the evaluations, and decide the student's eligibility for services at the January 23, 2009 IEP team meeting; and location where services were to be provided.

DCPS concludes that parent had an opportunity to participate in the February 3, 2009 meeting, however, parent raised no concerns with the MDT regarding the proposed placement at DCPS concludes that although parent has the right to maintain the student's placement at the Academy, is qualified to implement the student's IEP. DCPS also concludes that the student was not 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 determining the educational placement of a child with a disability, including a preschool child with a disability, IDEA, 34 C.F.R. § 300.116, provides that 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 an Individualized Education Program (IEP) team 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. IEP team 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 disability of mental retardation; and developed an IEP for the student recommending 15 hours per week of specialized instruction, and 1.5 hours per week of speech therapy.

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 DCPS representative proposed as the student's placement, indicating that the school can implement the student's IEP; provide accommodations and modifications for the student; 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 advised the team that the student would remain at the

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.

On February 3, 2009, the IEP team reconvened to develop the student's Individual Service Plan (ISP) for the student. 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 ISP for the student recommending 1 hour per week of speech therapy, indicating that the location of the services was to be determined, and the services would begin on February 4, 2009 and end on February 4, 2010. The ISP also indicated that services would likely be provided at the nearest DCPS school to the student's attending school; and other service location options would be determined between the parent and related services supervisor.

At the hearing, parent testified regarding the inappropriateness of as a placement for the student, and not that she was denied the opportunity to provide "meaningful" input in the placement decision, or failed to receive information regarding the proposed placement.

Parent testified that at the January 23, 2009 IEP team meeting she advised the team that was overcrowded, and directed questions to DCPS regarding the class size, however, failed to testify whether DCPS provided information regarding the class sizes at Parent also testified that although she would prefer having information regarding the class size at and failed to observe the special education classrooms during her visit at she knew the classroom size would be overwhelming for the student.

Parent testified that after the IEP team meeting, she visited with the intent of enrolling the student at the school and observe the program; and during her visit met with the Speech and Language Therapist, Special Education Coordinator, and staff; and discussed the school and its educational program. Parent testified that she was advised by the school that the school could implement the student's IEP, and offer the student inclusion and pull out services.

Parent also testified that although she failed to observe the special education classes at 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 placement at the

Parent testified regarding her participation in the February 3, 2009 IEP team meeting, indicating that she advised the team that is overcrowded, disagreed with the proposed placement, and elected to maintain the student's placement at the Academy. In addition, during testimony, parent reiterated her familiarity with the Principal and staff at from the student's prior school; that the school is overcrowded; and she was not confident that the staff could meet the needs of the student. Parent testified that the staff at are from the student's prior school, and because of her dissatisfaction with the teaching at the prior school, she pursued a private school education for the student.

Parent testified further that she also had reservations of transferring the student from the Academy to near the end of the school year; and although she was confident the student would adjust to the change, she would be agitated. Parent testified that although she advised her Attorney of concerns regarding the placement decision, and advised DCPS that was overcrowded, she failed to communicate any other concerns regarding the placement decision, to DCPS; and instead, advised that team that she was rejecting the proposed placement at and elected to maintain the students' placement at

Parent also testified that she was unaware that she could request an alternate DCPS placement; although she considered identifying an alternate DCPS school for the student, however failed to do so because she "missed the out of boundary process".

The Hearing Officer finds that Petitioner presented no evidence that she was denied the opportunity to provide "meaningful" input in the placement decision, or that DCPS failed to provide information regarding the proposed placement. The evidence reflects that DCPS ensured that parent had an opportunity to provide "meaningful" input in the placement decision, and received information regarding the proposed placement.

It is also clear from the evidence presented, that any concerns of parent regarding the placement decision, pertain to the appropriateness of as a placement for the student, and not that parent was denied the opportunity to provide "meaningful" input in the placement decision, or DCPS failed to provide parent information regarding the proposed placement. The appropriateness of the student's placement is not an issue before the court; however, the evidence presented in this matter, pertains to the appropriateness of as a placement for the student, and not parent's participation in the placement decision.

The record reflects that on February 3, 2009, and during her visit at parent had the opportunity to participate in the placement decision, provide "meaningful" input in the placement decision, and request additional information regarding the proposed placement, including however, not limited to the class room size, special education teachers, or any other information regarding the proposed placement. However, parent failed to avail of the opportunities.

There is also no evidence that on February 3, 2009, or after visiting parent advised DCPS of concerns regarding her participation in the placement decision; that the information regarding the proposed placement was insufficient to provide "meaningful" input in the placement decision; or requested additional information to ensure that she could provide "meaningful" input in the placement decision.

Parent's decision to reject the proposed placement at not access the educational opportunities offered at , and maintain the student's placement at the Academy, was not based on representations that she was denied the opportunity to provide "meaningful" input in the placement decision, or failed to receive information regarding the proposed placement, as represented in the complaint. Parent's decision was based on her disagreement with the proposed placement, personal knowledge and information regarding the school and its staff, and ability to meet the needs of the student; and preference that the student remain at the private school, and receive DCPS funding for special education and related services at the Academy.

The Hearing Officer concludes that DCPS' proposed placement of the student at a neighborhood public school, rather than agreeing to fund the student's services at the Academy, the private school, does not equate to a finding that DCPS failed to ensure parent participation in the placement decision, or provide information regarding the proposed placement.

It is the Hearing Officers' decision that Petitioner failed to satisfy its burden, by presenting evidence that DCPS 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 IDEAL, and there is o evidence that can provide the student the speech and language services, provided in her IEP.

Petitioner represents further that it is evident that the student requires significant assistance according to the Speech and Language Evaluation and addendum; has severe deficits. Petitioner represents that the student is mentally retarded, and programming is more important at this time, than ever, to accommodate her disability. Petitioner represents that DCPS failed to include in the ISP, the location of provision of the speech and language services, indicating that that location was to be determined. Petitioner also represents that the student was entitled to the services in her IEP, even if she elected to remain at her current placement, and is not required to accept a program at a placement that parent is not comfortable that the placement can meet the student's needs.

In its response to the complaint, DCPS acknowledge that it failed to provide the student speech and language therapy services, as recommended in the student's ISP; and represents 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 at 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.

DCPS represents that parent was aware that the student could receive speech and language services at because she visited to the school to enroll the student, however, failed to inform the school that she elected to maintain the student's current placement. DCPS represents that parent is partially responsible for the student's failure to receive services, because parent enrolled the student at however, failed to advise DCPS that it elected to maintain the student's current placement, due to concerns regarding the placement, at the January 23, 2009 or February 3, 2009 meetings. DCPS represents that it received notice that parent was dissatisfied with the proposed placement, at the time the due process complaint was filed.

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—

(1) 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

(2) 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 January 23, 2009, 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, one (1) hour of speech and language intervention services per week.

On February 3, 2009, DCPS reconvened the MDT meeting to develop the student's Individual Service Plan (ISP), recommending one hour of speech and language services per week, beginning February 4, 2009, and ending February 4, 2010; and the location to be determined.

The record reflects that the Speech and Language Pathologist from . initially contacted parent during the week of March 30, 2009, more than one month after the due date established by DCPS to provide the services; advising parent of the date and time DCPS can begin providing services. Approximately two (2) months lapsed from January 23, 2009, and the date DCPS initially contacted parent regarding the availability of services.

The Hearing Officer finds that although parent decided not to access the educational opportunities offered at . it remains undisputed that DCPS failed to ensure that as soon as possible following development of the IEP, speech and language therapy services, were made available to the student, in accordance with the January 23, 2009 IEP, and as recommended in the student's Individualized Service Plan for parentally placed private/religious school students. In addition, DCPS presented no evidence refuting the allegation.

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 student's 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 failed to ensure 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 student's mid-term, first advisory report for the 2008/09 school years, from reflects that the student is performing satisfactory in all subject areas, except math, reading, and the student fail to meet her required reading goal. The student's mid-term second advisory report, for the 2008/09 school years, from reflects that the student is performing satisfactory in all subjects, except SSR; and fails to meet her required reading goal. There is no evidence that the student was harmed as a result of the delay in providing services.

There is also 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

There is no evidence that 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.

It is the Hearing Officers' Decision that although Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to ensure the availability of speech and language services to the student, representing a procedural and substantive violation of IDEA, it failed to present 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 4-19-09

Attorney Ramona M. Justice
Hearing Officer

Date Filed: _____

cc: Attorney Daniel Kim, Office of the Attorney General
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