

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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2009 JUL 30 AM 10:30
STUDENT HEARING OFFICE
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In Re the Matter of :)
) ¹
Parent on behalf of Student,)
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Petitioner,)
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v.)
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The District of Columbia Public Schools)
825 North Capitol Street, N.W.)
Washington, D.C. 20002)
(DCPS" or "District"))
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Respondent.)
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Date of Complaint: April 27, 2009
Date of Prehearing: May 27, 2009
Dates of Hearing: June 8, 2009
June 17, 2009, and July 7, 2009

Student Case Number:
Student Identification Number:

HEARING OFFICERS' DECISION (HOD)

Hearing Officer: Attorney Ramona M. Justice

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

Attorney for Respondent: Attorney Daniel Kim, Assistant Attorney
General, 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 an _____ grade student at _____ a District of Columbia public charter school, located in the District of Columbia. The student is a resident of the District of Columbia, and is identified as disabled and eligible to receive special education 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 Multiple Disabilities (MD), to include: Other Health Impaired (OHI), Learning Disabled (LD); and Emotionally Disturbed (ED).

On April 27, 2009, Petitioner’s Attorney, initiated a due process complaint, on her behalf; alleging that the District of Columbia Public Schools, hereinafter referred to as “DCPS” or “Respondent”, denied the student a Free Appropriate Public Education (“FAPE”), by failing to:

- (1) comply with a Hearing Officer’s Decision (HOD), dated November 13, 2008;
- (2) comply with 34 C.F.R. §300.306 of the IDEIA, which requires that an IEP team include individuals qualified to review evaluations;
- (3) comply with the parent’s request for an independent educational evaluation; and
- (4) develop an appropriate Individualized Education Program (IEP). Petitioner also requests that the court determine whether the student is entitled to compensatory education services.

The due process hearings were held on June 9, 2009, at 9:00 a.m., June 17, 2009 at 11:00 a.m., and July 7, 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 before the court:

1. Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to comply with the Hearing Officer's Decision, dated November 13, 2008?
2. Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to comply with 34 C.F.R. §300.306 of the IDEIA, which requires that an IEP team include qualified professionals to review evaluations?
3. Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate individualized education program (IEP)?
4. Whether the student was denied a FAPE, and is entitled to receive compensatory education services?

V. REQUESTED RELIEF

1. The Hearing Officer shall find that DCPS denied the student a free and appropriate public education by failing to comply with the November 13, 2008 decision and order.
2. A finding that DCPS denied the student a free appropriate public education by failing to comply with 34 C.F.R. §300.306 of the IDEIA, and have a qualified person present at the student's MDT meeting to review the psychiatric evaluation.
3. A finding that DCPS failed to comply with the parent's request for an independent educational evaluation made pursuant to 34 C.F.R. §502(b)(2) of the Individuals with Disabilities Education Improvement Act.
4. A finding that DCPS denied the student FAPE; by failing to develop an appropriate IEP.
5. A finding that DCPS denied the student FAPE; by failing to provide the student compensatory education services.
6. DCPS shall fund the parent's independent educational evaluation.
7. DCPS shall fund the parent's proposed compensatory education program.

** Note: During the pre-hearing conference, Petitioner withdrew Issue "C" of the April 27, 2009 due process*

complaint.

8. DCPS shall reconvene the student's MDT meeting within ten (10) business days upon receipt of the educational evaluation to review the findings of the educational evaluation and incorporate the findings of the assessment into the student's IEP. The IEP shall also call for the student to receive 2 hours of family therapy a month.
9. DCPS shall ensure at the student's MDT meeting, the participation of a Psychiatrist, to review the findings of the Psychiatric Evaluation.
10. DCPS shall ensure that the IEP team, at the conclusion of the student's MDT meeting, discuss and determine placement and if a change in placement is recommended, DCPS shall have five (5) school days to issue a Prior Notice of Placement to a DCPS school and thirty (30) calendar days to issue a Prior Notice of Placement to a nonpublic or private school.
11. DCPS agrees to pay counsel for the parent's reasonable attorney's fees and related costs incurred in the matter.
12. DCPS shall schedule all meetings through counsel for the parent in writing, via facsimile at 202-742-2098.
13. Pursuant to D.C. Mun. Regs. Tit. 5, §3000 et. seq., DCPS shall ensure that Jennifer's rights and the complainant's rights are protected, and consistent with the Hearing Officer's preamble to all due process hearing that, the hearing officer will rule on the evidence as presented at the hearing and will ACT in the BEST INTEREST of the child," and make a ruling consistent with the obligation of DCPS at the hearing officer's responsibility.
14. The hearing officer shall find that the parent is the prevailing party in this action.
15. DCPS shall reimburse the parent reasonable attorney's fees and related costs.

VI. PROCEDURAL POSTURE

On April 27, 2009, Petitioner's Attorney, filed a due process complaint, on her behalf. On April 29, 2009, Respondent filed "DCPS' Resolution Session Waiver". On May 1, 2009, the Hearing Officer issued a Pre-hearing Conference Notice scheduling the Pre-hearing Conference for May 26, 2009, at 3:00 p.m..

On May 12, 2009, Respondent filed "District of Columbia Public Schools' Response to Parent's Administrative Due Process Complaint Notice". The pre-hearing conference convened on May 26, 2009, at 3:00 p.m., as scheduled; and on May 27, 2009, the Hearing Officer issued a Pre-hearing Conference Order, confirming the due process hearing for June 9, 2009, at 9:00 a.m..

On May 27, 2009, Petitioner filed an unopposed "Letter Motion of Continuance" requesting to convene the June 29, 2009 due process hearing on June 9, 2009, at 9:00 a.m.; instead of June 29, 2009, to ensure compliance with the 45 day timeframe to convene a hearing and issue a decision. On May 27, 2009, the Hearing Officer issued an "Interim Order on Continuance Motion", granting Petitioner's motion and rescheduling the due process hearing to June 9, 2009, at 9:00 a.m..

On June 2, 2009, Petitioner submitted five-day disclosures, on behalf of Petitioner; and the student; and on June 3, 2009, Respondent submitted five-day disclosures on behalf of Ideal Academy Public Charter School. On June 10, 2009, Respondent filed a "Supplemental Disclosure Statement". On June 10, 2009, Respondent submitted a "Supplemental Disclosure Statement"; and on June 30, 2009, Respondent submitted a "Second Supplemental Disclosure Statement"; which was admitted into the record as evidence

The due process hearing convened on June 9, 2009, at 9:00 a.m., as scheduled, however, the amount of time initially requested for the hearing was insufficient; and the due process hearing was continued. On June 9, 2009, the Hearing Officer issued an Interim Order on Continuance Motion continuing the due process hearing to June 17, 2009, at 11:00 a.m.. The due process hearing reconvened on June 17, 2009, at 11:00 a.m., as scheduled. However, additional time was warranted, and a second continuance was granted. On June 18, 2009, the Hearing Officer issued a Revised Interim Order of Continuance Motion continuing the due process hearing to July 7, 2009, at 11:00 a.m.. The due process hearing reconvened on July 7, 2009, at 11:00 a.m..

Prior to conclusion of the July 7, 2009 due process hearing, the parties requested, and the court granted, the parties the opportunity to submit written closing statements. The due date for Petitioner's initial closing statement was by 5:00 p.m. on July 14, 2009; Respondent's response was due July 20, 2009; and Petitioner's final closing statement was due by 5:00 p.m. on July 23, 2009. The parties submitted written closing statements in a timely manner; and as ordered by the court. The record in this matter officially closed on July 23, 2009, at 5:00 p.m..

VII. PRELIMINARY MATTERS

At the June 9, 2009 due process hearing, there were no preliminary matters introduced by the parties, or addressed by the court, prior to proceeding with a hearing on the merits.

At the June 17, 2009 due process hearing, Respondent requested parent's authorization for the student to participate and/or testify at the hearing, because she failed to reach the age of majority. Via teleconference, parent authorized student to participate and testify at the hearing.

Respondent requested permission to submit supplemental disclosures, including the curriculum vitae of the student's Therapist. After hearing argument from both parties, the court allowed the supplemental disclosures.

In addition, Respondent requested permission to introduce a rebuttal witness, not previously identified in its disclosures. Petitioner objected to introduction of the witness, due to lack of notice and sufficient opportunity to prepare for the witness testimony. After hearing argument from both parties, the Hearing Officer determined that the witness testimony is relevant granted a continuance to provide Petitioner an opportunity to prepare its case, in response to Respondent's introduction of the additional witness; and file supplemental disclosures.

At the July 7, 2009 due process hearing, the court accepted into evidence Petitioner's Supplemental Five-Day Disclosure, consisting of Petitioner's Exhibits 50 through Petitioner's Exhibits 53, and a witness list dated June 29, 2009. The court also accepted into the record as evidence, Respondent's "Second Supplemental Disclosure Statement", submitted on June 30, 2009.

VIII. 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. Respondent objected to Petitioner's Exhibits 5-24, representing that the disclosures were not material and relevant to the issues in the instant complaint, however, were relevant to the issues in the prior complaint. Petitioner represented that the disclosures are relevant to the issues in the complaint, by providing the court relevant case history.

The Hearing Officer admitted into evidence Petitioner's Exhibits 5-24, for the limited purpose of providing the court a chronological history of the case; and deferred a ruling of whether the exhibits are relevant to the issues in the instant complaint, pending presentation of all evidence. The court finds the exhibits relevant to the issues in the complaint, by providing a chronological history of the case.

Receiving no further objections to the disclosures, 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 Exhibits 53; and witness lists dated June 2, 2009; and June 29, 2009.

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT

- Respondent's Exhibits 01 through Respondent's Exhibits 12; and witness lists dated June 2, 2009, June 10, 2009, and June 30, 2009.

IX. STATEMENT OF CASE

1. The student is _____ years of age, and an _____ grade student at _____ a District of Columbia public charter school, located in the District of Columbia. The student is a resident of the District of Columbia, and is identified as disabled and eligible to receive special education 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 Multiple Disabilities (MD), to include: Other Health Impaired (OHI), Learning Disabled (LD); and Emotionally Disturbed (ED).

2. On January 10, 2008, DCPS completed a “Confidential Educational Assessment”. The evaluation provides that that student’s English oral language skills were average when compared to others at her age level; her overall level of achievement was low average; her fluency with academic tasks was average; and her academic skills and ability to apply those skills were both within the low average range.

The evaluation also provides that when compared to others at her age level, the student’s performance was average in broad reading, written language, and written expression; low in mathematics; and very low in math calculation skills. The evaluator concluded that when a selected set of the student’s achievement areas were compared, she demonstrated a significant relative weakness in Mathematics.

3. On April 21, 2008, Diagnostic Consultants-DiCon, LLC completed a “Social Work Evaluation Report”. The evaluation recommended academic tutoring (especially in Mathematics); counseling to address substance abuse, and grief and loss issues; medication management, to assist with ADHD and possible depression in order to work on behavioral techniques, concentration difficulties, and coping skills for the academic setting.

4. On May 11, 2008, Diagnostic Consultants-Di-Con, LLC completed a “Clinical Psychological Evaluation”. The student was diagnosed with Depressive Disorder, Attention Deficit Hyperactivity Disorder, previous diagnosis Rule out Anxiety Disorder, Asthma, migraine headaches, excess stomach acid, academic problems, peer pressures, history of abusive romantic relationships.

The evaluation recommended: the MDT consider all up to date information including parent and teacher input in order to render a final determination regarding the student’s individualized needs; and eligibility for special education services under the Other Health Impaired disability classification, if the team finds that her ADHD results in limited alertness with respect to the educational environment. The evaluator also indicated that the student may be eligible for services under the emotionally disturbed disability classification if it is determined that her depression interferes with her ability to make academic progress.

The evaluation recommended that the MDT consider the appropriateness of the student's current educational placement; and school based counseling services to assist the student in learning more adaptive ways of handling her emotions. The evaluation recommended opportunities for the student to capitalize on her personal strengths in order to assist in bolstering her self-esteem. The evaluation also recommended that parent reconsider psychopharmacological treatment for the student.

5. On May 12, 2008, Diagnostic Consultants-Di-Con, LLC completed a "Speech and Language Evaluation", on the student's behalf. Test results indicate age and gender appropriate voice and fluency skills; average single-word receptive vocabulary skills and below average single-word expressive vocabulary skills. Receptive and expressive language skills scores were within the mean.

The evaluation concluded that the student demonstrated average single-word receptive vocabulary skills and below average single-word expressive vocabulary skills; average receptive and expressive language skills. The evaluator also concluded that considering input from team members and other evaluation reports, direct speech-language intervention is not recommended.

The evaluator recommended reevaluation with formal and informal assessment measures on a triennial basis or upon request of parent or educational team to monitor gains in skills and determine the student's present level of functioning in overall communication skills and to determine the need to modify any services to best address the student's educational needs.

6. On August 11, 2008 and September 9, 2008 due process complaints were filed in this matter. According to an Interim Order issued on October 20, 2008, the two (2) complaints were consolidated, and the hearing was scheduled for November 3, 2008, at 11:00 a.m... On August 29, 2008, DCPS proposed to resolve the issues in the August 11, 2008 due process complaint, by settlement agreement.

7. According to an "Interim Order" issued on October 20, 2008, the hearing on the September 9, 2008 complaint was scheduled for November 3, 2008, at 11:00 a.m.. The due process hearing convened on November 3, 2008, as scheduled.

On November 13, 2008, a Hearing Officers' Decision was issued incorporating terms of a Settlement Agreement reached by the parties, at the November 3, 2008 due process hearing. According to the November 13, 2008 Hearing Officers' Decision, at the November 3, 2008 hearing, Counsel for the parties entered into a Settlement Agreement on the record; and requested that the court incorporate the terms of the Settlement Agreement into a Hearing Officers' Decision, which the court granted. The Hearing Officer's Decision and Order incorporated the terms of the Settlement Agreement; and the terms are as follows:

- DCPS shall fund an independent Psychiatric Evaluation;
- An MDT meeting shall be convened within 20 school days of receiving the evaluation or shall be scheduled within 15 school days of receipt of the evaluation;

- At the MDT meeting, the team shall review the evaluation, revise the IEP as necessary, discuss compensatory education (to include the August 29th proposal) and develop a compensatory education plan, if warranted;
- Any delay caused by the parent or parent's counsel shall extend the above referenced timeline by one day for every day of delay;
- The MDT meeting shall be scheduled through counsel and correspondence addressed to James Brown and Associates.

8. On October 31, 2008, Psychological Assessment Solutions, LLC completed a "Psychological Evaluation". *Recommendations for ADHD* included regular visits with a Psychiatrist for monitoring and considering restarting ADHD medications; ADHD medications combined with therapy; school accommodations to include: one on one tutoring or supervision when needed or a quiet environment free from distractions for learning or testing. Activities should be structured and tasks broken down into simple steps to aid with executive functioning difficulties.

Recommendations for Emotional Problems/Substance Abuse included: Any form of rehabilitation treatment for marijuana and/or nicotine including groups for teens; weekly psychotherapy; a motivational approach; Psycho-education on substances and real life consequences for patients substance use; contracts for safety.

9. On December 18, 2008, Interdynamics, Inc., completed a "Psychiatric Evaluation Report", on the student's behalf. The report reflects that the student is reported by parent as having much difficulty with learning; and was referred for evaluation to assist with her age appropriate academic planning. The report also indicates that the student has a history of Attention Deficit Hyperactivity Disorder; and the student is very depressed due to losing four of her friends to murder in the previous six months.

According to the evaluator, parent reported that the student attended repeated the 9th grade because she was absent nearly the entire school year, because she was overwhelmed. Parent also reported that the student initially exhibited difficulty with school during the 5th grade, particularly in Mathematics; she currently has attendance difficulties; is inattentive and engage in much conversation; and is of the impression that a class of 20-25 students is too large for the student. Parent also reported that the student has a history of physical and sexual abuse; foster care, and neglect of the student's older sister. The report indicates that the student smokes marijuana; enjoys music, dancing, and drama.

The student was diagnosed with Attention Deficit Hyperactivity Disorder, predominantly inattentive type; Learning Disorder, Cannabis Abuse, Adjustment Disorder, with depressed mood; Asthma, Gastroesophageal reflux disease, seasonal rhinitis.

Evaluation recommendations include:

- Resume medication to treat Attention Deficit Hyperactivity Disorder.
- Grief counseling to address loss.
- Substance abuse counseling and urine screening.

- Individual therapy to address the student's decisions and consequences.
- Small structured learning environment.

10. On January 15, 2009, _____ prepared a Second Advisory Report, on the student's behalf. The Report reflects grades of "F" in Algebra II, English Literature, and Physics. The Report also reflects grades of "C" in U.S. History and French 1; and "B" in Drama.

11. On January 28, 2009, Petitioner's Attorney forwarded a copy of the student's "Psychiatric Evaluation Report" to the DCPS Placement Specialist for requesting review of the evaluation, a copy of results of the review, and a Letter of Invitation.

12. On February 10, 2009, the Education Advocate forwarded a letter to the Special Education Coordinator at _____ regarding a MDT meeting scheduled to convene with parent on February 11, 2009, and DCPS' failure to confirm the meeting with Petitioner's Attorney. The advocate proposed March 2nd, 3rd, 5th, at 9:30 a.m., or 11:00 a.m.; or on March 5th at 1:30 p.m., for the student's MDT to discuss the student's educational programming; and requested written confirmation of the meeting.

13. On February 11, 2009, _____ faxed to Petitioner's Advocate notification of acceptance of the proposed MDT meeting date of March 3, 2009, at 11:00 a.m.; and attached a Letter of Invitation, the students' attendance record, and secondary advisory report card.

14. On March 3, 2009, _____ convened a MDT meeting, to review the student's Psychiatric Evaluation. Meeting participants included: the Special Education Coordinator, the students' English Teacher, Compliance Manager, the students' Special Education Teacher, Licensed Professional Counselor, DCPS LEA Representative, parent, student, and the Education Advocate. According to the MDT meeting notes, the evaluation was reviewed by a Licensed Professional Counselor (LPC).

The Advocate requested a change in the student's disability classification consistent with recommendations included in the Psychiatric Evaluation; and the MDT agreed to change the student's disability classification from learning disabled/emotionally disturbed, to multiple disabilities, to include LD/ED, and Other Health Impaired (OHI). According to the MDT meeting notes, the Psychiatric evaluation recommended grief and substance abuse counseling; and the team agreed to increase the amount and frequency of counseling services, in the student's IEP.

Parent and the Advocate requested tutoring and/or small group instruction in the area of Mathematics. _____ responded that the student would receive assistance in Mathematics from the schools' Mathematics Resource Teacher, upon request; and the student would receive Mathematics instruction in a pull-out setting as part of inclusive settings.

The Advocate requested that the student's Therapist participate in the meeting to address the student's social/emotional needs; and expressed concerns regarding the unavailability of the student's Therapist at the meeting, particularly in view of the fact that the team was meeting to review the results of the student's Psychiatric Evaluation. The Advocate recommended increasing the student's counseling services in response to recommendations in the Psychiatric Evaluation, for grief and substance abuse counseling.

Parent and the Advocate disagreed with implementation of the student's IEP, because the counseling goals were not addressed to reflect current social emotional needs of the student. The Advocate recommended a behavior management plan to address the student's self advocacy, self esteem and attendance. The student expressed that her lack of attendance is due to lack of understanding in class and its impact upon her grades.

The Special Education Coordinator indicated that compensatory education services were not warranted, because the Psychiatric Evaluation recommendations had already been included in the IEP. The team agreed that the student would receive 7 hours of specialized instruction, and 1.5 hours of psychological counseling weekly.

The parent and the Advocate were not in agreement that compensatory education services were not warranted, and reserved the right to address compensatory education services after reconvening with the student's Therapist to address the student's social emotional needs.

The MDT also developed an IEP for the student, providing for 7.0 hours of specialized instruction, and 1.5 hours of psychological counseling, weekly. The MDT also issued a "Prior Notice", indicating that based on a review of recent evaluations, a change in the student's disability classification is warranted. The notice documented a change in the student's disability classification from emotionally disturbed to Multiple Disabilities, to include OHI, LD, and ED.

15. On March 5, 2009, the Education Advocate forwarded a letter to Special Education Coordinator, as a follow-up to the March 3, 2009 meeting, indicating that there remained several matters regarding the student's educational programming, requiring attention.

The Advocate expressed concern that the Licensed Professional Counselor was not qualified to review the Psychiatric Evaluation; a qualified professional is necessary to review the student's evaluation, and provide insight regarding the student's emotional status and its impact on her learning. The Advocate also indicated that the student continues to struggle emotionally, and the evaluation is integral to the educational program planning for the student.

The Advocate also expressed concern regarding the unavailability of the student's Therapist at the meeting, to address the student's social emotional program needs; review counseling goals and objectives, and revision of said goals and objectives based on the student's expressed feelings at the meeting. The Advocate reiterated that the Therapist's insight and experience with the student during counseling sessions, and necessary changes to her goals are in desperate need of review.

The Advocate indicated parent's disagreement with the academic testing presented at the meeting, and requested an independent Educational Evaluation to address the student's academic level of functioning. The Advocate also reiterated parent's right to address compensatory education services subsequent to the review and revision of the student's counseling goals and objectives.

The Advocate concluded that parent initially requested services for her daughter academically and emotionally in September 2007, and as of January, 2008, the student failed to receive evaluations to address any of parent's concerns; and the student failed to receive appropriate services in these areas.

The Advocate also concluded by requesting that the MDT reconvene with the appropriate qualified professionals to review the Psychiatric Evaluation and address the student's social emotional level of functioning; in addition to addressing the warranted compensatory education services for the student.

16. On March 5, 2009, the Advocate forwarded a letter to the Special Education Coordinator at _____ thanking her for following-up with her letter regarding reconvening the MDT meeting; and the necessity of an appropriate professional (psychologist), to review the Psychiatric Evaluation. The Advocate requested a Letter of Invitation with three (3) proposed dates and times for reconvening the MDT meeting.

17. On March 6, 2009, the Advocate faxed a letter to the Special Education Coordinator at _____ advising of its attempts to conduct a classroom observation for the student on March 12, 2009, at 8:30 a.m.. The letter also included a request for copies of the student's educational records.

18. On March 12, 2009, the Special Education Coordinator at _____ forwarded a Letter of Invitation to the Education Advocate, to reconvene the MDT meeting for a second review of the student's evaluations. The letter proposed April 3, 2009, at 11:00 a.m., April 6, 2009, at 1:00 p.m., or April 9, 2009, at 11:00 a.m.. The letter also indicated that the student's educational records would be forwarded by mail; and all other records were previously provided.

19. On March 12, 2009, the Education Advocate forwarded a letter to the Special Education Coordinator at _____ indicating that the student had absconded from her residence, and failed to attend school. The Advocate indicated that the student is experiencing social emotional issues; requesting that a Psychologist review the student's Psychiatric Evaluation and discusses the impact of the findings. The Advocate concluded by requesting that the school notify the appropriate authorities in addition to parent immediately when it is apparent that the student is truant from school.

20. On March 17, 2009, the Advocate forwarded a letter to the Special Education Coordinator at _____, indicating that the student was absconding from her residence and failing to attend school. The Advocate indicated that parent was available on April 9, 2009, at 11:00 a.m., to reconvene the MDT to review the student's Psychiatric Evaluation. The Advocate concluded by requesting that the school notify the appropriate authorities in addition to parent immediately when it is apparent that the student is truant from school.

21. On April 8, 2009, _____ prepared a 2nd Advisory Report, on the student's behalf. The Report reflects grades of "F" in Algebra II, English Literature, and Physics. The Report also reflects grades of "C" in U.S. History and French 1; and "B" in Drama; which are identical to the grades the student received in the January 15, 2009 2nd Advisory Report.

22. On April 9, 2009, _____ reconvened the MDT meeting to review the student's Psychiatric Evaluation; and address revision of the student's social emotional goals. Participants included: Education Advocate, Special Education Coordinator, Psychologist, student, parent, Special Education Teacher, and English Teacher. A DCPS LEA representative was not present at the meeting.

According to the Advocate's MDT meeting notes, parent requested a referral of the student to a psychiatric professional to address medication management. The Advocate indicates that the social emotional goals were reviewed and revised to address substance abuse, grief counseling and coping skills.

The Advocate recommended 60 minutes of group family therapy; 30 minutes of individual therapy; and medication reevaluation. Parent and the Advocate requested the IEP to reflect recommendations of family therapy at least 1 hour each week; and a goal to address time management in the student's IEP. _____ disagreed with parent's request, indicating that they are unable to implement the recommendation in the IEP, until after the student is on medication.

_____ recommended goals to address increasing the student's independence. The MDT notes also indicate that parent and the Advocate will contact the DCPS LEA Representative for _____ regarding a qualified professional to review the Psychiatric Evaluation and address the compensatory education issue. The Advocate concludes that parent agrees with implementation of the IEP, however, not its content.

23. On April 9, 2009, _____ prepared an official Transcript, on the student's behalf. The student's Grade Point Average (GPA) is 1.42; and during the 2008/09 school year the student received a grade of "F" in Geometry, "C" in Health, World History, and Geometry (Summer School); and "B" in Chemistry, and Drama.

24. On April 10, 2009, Petitioner's Attorney forwarded a letter to the DCPS LEA Representative for _____ regarding the necessity of a Psychologist to review the student's Psychiatric Evaluation; the MDT's failure to have a qualified professional at the April 9, 2009 MDT meeting to review the evaluation; or address compensatory education services, without DCPS' participation.

The Advocate concluded by requesting three (3) dates and times for the student's MDT to reconvene to review the Psychiatric Evaluation; and address compensatory education services, by close of business on April 15, 2009.

25. On April 27, 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) comply with a Hearing Officer's Decision (HOD), dated November 13, 2008; (2) comply with 34 C.F.R. §300.306 of the IDEIA, which requires that an IEP team include individuals qualified to review evaluations; (3) comply with the parent's request for an independent educational evaluation; and (4) develop an appropriate Individualized Education Program (IEP). Petitioner also requests that the court determine whether the student is entitled to compensatory education services.

X. ISSUE 1

Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to comply with the November 13, 2008 Hearing Officers' Decision?

Petitioner represents that on or about November 13, 2008, an Order was issued in which DCPS was required to do, among others, discuss and determine the student's right to receive compensatory education services, when the student's MDT meeting reconvened.

Petitioner represents that "as stated in the aforementioned, as part of the Hearing Officer's determination and order, DCPS, at the student's MDT meeting was to discuss and determine the amount of compensatory education, if any, the student was owed. When the student's MDT meeting was reconvened on April 9, 2009, the IEP team was unable to discuss and determine the amount of compensatory education services the student was owed because DCPS failed to appear thus depriving the IEP team of the right to make any decision with respect to compensatory education services in violation of the order."

Petitioner further represents that "according to the Blackman/Jones Consent Decree there exists a rebuttable presumption of harm whenever DCPS fails to do, inter alia, comply with hearing officer determinations. *See also* Hawkins v. District of Columbia. Because DCPS failed to comply with the November 13, 2008 Order the student has been denied a free appropriate public education".

Petitioner represents that the student's needs are not met, she is the last in her class and failing academically, and the cumulative effect entitles the student to compensatory education services. Petitioner reiterated that on April 9, 2009, DCPS was not present, as a result, the MDT decided not to continue with a discussion of compensatory education services.

Respondent generally denies allegations that DCPS denied the student a free appropriate public education ("FAPE"); and specifically denies the allegation that it denied the student a FAPE, by failing to comply with the November 13, 2008 Hearing Officer Determination (HOD).

Respondent also represents that Petitioner's claim must fail as an MDT meeting convened on March 3, 2009 with the participation of parent and the parent's advocate; and that at the meeting, compensatory education could have been discussed but for parent and the parent's advocate's position to reserve the compensatory education discussion to some point in the future.

Respondent represents that it complied with the HOD; and on March 3, 2009, the MDT convened, the Psychiatric Evaluation was reviewed; and the team discussed compensatory education services; and determined that services were not warranted.

Respondent concludes that Petitioner cannot prevent the discussion of compensatory education and subsequently assert that it violated the HOD. Respondent denies the student was denied a FAPE.

Discussion

The Blackman/Jones Consent Decree consists of two subclasses. The first subclass referred to as the "Blackman class" refers to that part of the class addressing a public agency's failure to timely conduct due process hearings; and the "Jones" subclass refers to that portion of the class addressing the public agency's failure to timely implement Hearing Officer Determinations and Settlement Agreements. The "Jones" portion of the consent decree is applicable in this matter.

The Blackman/Jones Consent Decree requires *full and timely implementation* of Hearing Officer Determinations; and agreements concerning a child's identification, evaluation, educational placement, or provision of a FAPE. Timely implementation of a HOD is significant in ensuring the provision of a FAPE to a student; and that the student receives the services he/she is entitled to receive under the IDEA; and any delay in completely and timely implementing a HOD compromises that entitlement, and harms the student.

The Blackman/Jones Consent Decree creates a *rebuttable presumption of harm to the student*; therefore, harm to the student is presumed, and a showing of harm to the student by Petitioner at the hearing, is not required until after DCPS rebuts the presumption of harm to the student.

The rebuttable presumption of harm is created when there is an untimely HOD or untimely implementation of an HOD or SA; and the burden is then placed upon DCPS to present evidence rebutting the presumption of harm to the student. In establishing a rebuttable presumption of harm to the student, as a result of any delay or failure to timely implement an HOD, the courts not only consider the period of time associated with the delay or failure to timely implement the HOD, however, the courts also consider the total amount of time involved since the initial violation; and the services the student is entitled to receive under the IDEA, however failed to receive during this period.

According to paragraph 78 of the Blackman/Jones Consent Decree, in order to rebut the presumption of harm; at the hearing, DCPS *will* have the *burden of proving* one of the following situations:

- (1) DCPS has already provided or agreed to provide compensatory education to the class member for Blackman/Jones delays;
- (2) the issue of compensatory education has already been determined by a Hearing Officer and the Hearing Officer has either ordered compensatory education or has determined that the child is not entitled to compensatory education for Blackman/Jones delays;
- (3) the class member has been found ineligible for special education services;
- (4) the student graduated with a regular diploma;
- (5) the student no longer is a resident of the District of Columbia;
- (6) the student graduated with a certificate of IEP completion;
- (7) the student has been in general education on a full-time basis for at least one academic year because the student met his/her IEP goals;
- (8) the student has been in a non-public general education school for at least three consecutive grading periods or (27) weeks, whichever is greater; or
- (9) the sole unimplemented HOD or SA provision pertained to reimbursement for services the parent obtained privately.

In addition, paragraph 78 of the Consent Decree further provides that *“if the defendants introduce evidence at a hearing to rebut the presumption, the student shall have the opportunity, at the same hearing, to present evidence to show that he/she has been harmed.*

As indicates supra, according to the Blackman/Jones Consent Decree, Petitioner has the initial burden of proof, to establish that DCPS failed to timely implement the November 13, 2008 HOD. A rebuttable presumption of harm is only created once Petitioner has satisfied its burden, by proving that DCPS failed to implement the November 13, 2008 HOD, in a timely manner.

If Petitioner establishes that DCPS failed to implement the November 13, 2008 HOD in a timely manner; the burden of proof is then placed upon DCPS to present evidence rebutting the presumption of harm to the student, by satisfying the criteria set forth above. Parent is not required to present evidence that the student has been harmed, until after DCPS introduces evidence at the hearing to rebut the presumption of harm to the student. In such case, DCPS may then present evidence, at the same hearing, to defend against the claim of harm.

In this matter, the record reflects that on November 13, 2008, a Hearing Officers' Decision was issued incorporating the terms of the Settlement Agreement, entered into by the parties at the November 3, 2008 due process hearing. The parties requested that the court incorporate the terms of the Settlement Agreement into a Hearing Officers' Decision. The terms of said agreement are identified herein:

- DCPS shall fund an independent Psychiatric Evaluation;
- An MDT meeting shall be convene within 20 school days of receiving the evaluation or shall be scheduled within 15 school days of receipt of the evaluation;

- At the MDT meeting, the team shall review the evaluation, revise the IEP as necessary, discuss compensatory education (to include the August 29th proposal) and develop a compensatory education plan if warranted;
- Any delay caused by the parent or parent's counsel shall extend the above referenced timeline by one day for every day of delay;
- The MDT meeting shall be scheduled through counsel and correspondence addressed to James Brown and Associates.

There is no dispute that DCPS funded the independent Psychiatric Evaluation, as ordered by the court on November 13, 2008. An independent Psychiatric Evaluation Report was completed by Interdynamics, Inc., on December 18, 2008; the evaluation was faxed by Interdynamics, Inc. to Petitioner's Attorney on January 26, 2009; and on January 28, 2009, Petitioner's Attorney faxed a copy of the independent Psychiatric Evaluation to the Placement Specialist for the _____, Office of Special Education, D.C. Public Schools.

According to the HOD, DCPS was required to convene an MDT no later than February 26, 2009, within 20 school days of January 28, 2009, the date DCPS received the evaluation; *or* schedule the MDT no later than February 19, 2009, within 15 school days of receiving the evaluation.

On February 10, 2009, the Education Advocate forwarded a letter to the Special Education Coordinator at _____ regarding a MDT meeting scheduled to convene with parent on February 11, 2009, and DCPS' failure to confirm the meeting with Petitioner's Attorney. The advocate proposed alternate dates and times for the meeting, specifically, March 2nd, 3rd, 5th, at 9:30 a.m., or 11:00 a.m.; or on March 5th at 1:30 p.m., for the student's MDT to discuss the student's educational programming; and the Advocate requested written confirmation of the meeting.

On February 11, 2009, _____ faxed to Petitioner's Advocate notification of acceptance of the proposed MDT meeting date of March 3, 2009, at 11:00 a.m.; and attached a Letter of Invitation, scheduling the MDT for March 3, 2009, at _____ to review the student's Psychiatric Evaluation. The MDT meeting was scheduled by February 19, 2009, within 15 school days of January 28, 2009, the date DCPS received the Psychiatric Evaluation.

The MDT meeting reflect that the MDT meeting convened on March 3, 2009, at 11:00 a.m., and the purpose of the meeting was to review the December 18, 2008 Psychiatric Evaluation. Additionally, the MDT meeting notes and Education Advocate's notes, reflect that the Psychiatric Evaluation was reviewed, with the team, by a Licensed Professional Counselor, from _____

The MDT meeting notes also reflect that without any discussion, the Special Education Coordinator (SEC), *advised* the team that "compensatory education was not needed because the Psychiatric Evaluation recommendations had already been included in the IEP." The Special Education Coordinator's determination that compensatory education services were not-

warranted, thwarted the MDT engaging in a full discussion of compensatory education (to include the August 29 proposal); and a determination of whether development of a compensatory education plan was warranted.

Although DCPS represents, that Respondent's Exhibit 2-3 includes a statement that the MDT discussed compensatory education services, according to the November 13, 2008 HOD; and "the team was in agreement" that compensatory education services were not warranted, the context in which this statement was made, and included in the MDT meeting notes, is unclear, as well as, the exact nature of that which the team agreed.

Nonetheless, Respondent's Exhibit 2-3 also indicates that "Advocate and parent are not in agreement that comp ed is not warranted and reserve the right to address issue after meeting with Psychologist"; and Respondent's Exhibit 2-5 indicate that "Advocate and parent reserve the right to address comp ed after reconvening w/student's therapist re: social-emotional concerns"; clearly indicating that the advocate and parent was not in agreement that compensatory education was not warranted; and reserved its right to discuss the issue.

Furthermore, after the March 3, 2009 MDT meeting, the Education Advocate repeatedly forwarded letters to DCPS reiterating the necessity of reconvening the MDT meeting to review the student's Psychiatric Evaluation; and discuss compensatory education.

Assuming arguendo the MDT discussed compensatory education at the March 3, 2009 and April 9, 2009 MDT meetings; there is no indication in the MDT meeting notes on March 3, 2009 or April 9, 2009, that the team discussed compensatory education (to include the August 29th proposal), as ordered by the court, in the November 13, 2008 HOD. This fact was corroborated during testimony of the DCPS Case Compliance Manager who testified that the August 29, 2008 proposal was not available or produced by DCPS or parent at the March 3, 2009 MDT meeting; and as a result, the MDT failed to discuss compensatory education (to include the August 29th proposal).

The Case Manager also testified that she had no further involvement in discussions regarding the student's education, indicating that she could not testify regarding additional efforts to comply with this provision of the prior HOD.

Although the SEC advised the team that compensatory education was not warranted, this decision was made unilaterally. The SEC failed to ensure that the MDT discussed compensatory education (to include the August 29th proposal); as ordered in the November 13, 2009 HOD.

Findings of Fact

1. DCPS funded an independent Psychiatric Evaluation, in accordance with the November 13, 2008 HOD.
2. DCPS scheduled the MDT no later than February 19, 2009, within 15 school days of receiving the Psychiatric Evaluation; in accordance with the November 13, 2008 HOD.

3. On March 3, 2009, DCPS convened a MDT meeting. The MDT reviewed the student's independent Psychiatric Evaluation; and revised the student's IEP; in accordance with the November 13, 2009 HOD. However, DCPS failed to fully comply with the November 13, 2008 HOD; by failing to *discuss* compensatory education (to include the August 29th proposal); prior to determining that compensatory education services were not warranted.

The MDT's failure to comply with the November 13, 2008 HOD, in its entirety, results in a determination that DCPS failed to comply with the November 13, 2008 HOD.

4. DCPS failed to rebut the presumption of harm to the student, resulting from its delay in fully implementing the November 13, 2008 HOD; which may be met by satisfying the criteria set forth in the Blackman/Jones Consent Decree. Therefore, harm to the student is presumed, and Petitioner is not required to present evidence to show that he/she has been harmed.

Conclusion of Law

It is the Hearing Officers' decision that Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to fully comply with the November 13, 2008 HOD; and that the violation represents a continued denial of a FAPE, entitling the student to compensatory education services.

ISSUE 2

Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to comply with 34 C.F.R. §300.306 of the IDEA, which requires that an IEP team include qualified professionals to review evaluations?

Petitioner represents that pursuant to 34 C.F.R. §300.306 of the IDEA, upon completion of the administration of assessments and other evaluation measures, a group of qualified professionals and the parent of the child determines whether the child is a child with a disability...and the educational needs of the child...If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child...

Petitioner further represents that, at the student's MDT meetings of March 3, 2009, and April 9, 2009, DCPS failed to ensure the presence of a person qualified to review the findings of the student's Psychiatric Evaluation. "As of today, DCPS has failed to review the student's psychiatric evaluation thereby depriving the parent and the rest of the IEP Team with the ability to make appropriate educational decisions on behalf of the student".

At the hearing, Petitioner reiterated that DCPS failed to provide an individual qualified to review the student's Psychiatric Evaluation; and the Psychology Intern provided by

at the MDT meetings was not qualified to review the evaluation, in violation of 34 C.F.R. §300.306 of IDEA.

Respondent specifically denies the allegation that DCPS denied the student a FAPE by failing to have a qualified person present at the MDT meeting to review the student's psychiatric assessment. DCPS represents that the March 3, 2009 MDT included the appropriate team members and the Psychiatric Evaluation was reviewed by a Licensed Professional Counselor, of "As such, DCPS asserts the student has not been denied a FAPE".

Discussion

According to IDEIA, 34 C.F.R. §300.15 evaluations are procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services the child needs. A full evaluation of a child is an integral part of developing an IEP for a student, which is the reason IDEIA at 34 C.F.R. §300.301(a) requires public education providers to conduct a full and individual initial evaluation of a child. See, T.X. ex rel. Skrine v. District of Columbia, 2007 WL 915227 (D.D.C.)

IDEA, 34 C.F.R. §300.306 of the IDEA, provides that upon completion of the administration of assessments and other evaluation measures, a group of **qualified professionals and the parent** of the child determines whether the child is a child with a disability...and the educational needs of the child...If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child...

Additionally, **IDEIA, 34 C.F.R. Section 300.321(a)** provides in pertinent part:

“(a) General. The public agency must ensure that the IEP Team for each child with a disability includes—

- (1) The parents of the child;
- (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
- (4) A representative of the public agency who—
 - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - (ii) Is knowledgeable about the general education curriculum; and
 - (iii) Is knowledgeable about the availability of resources of the public agency.
- (5) **An individual who can interpret the instructional implications of evaluation results**, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;
- (6) At the **discretion** of the parent or the agency, other individuals **who have knowledge or special expertise regarding the child**, including related services personnel as appropriate; and

(7) Whenever appropriate, the child with a disability.

IDEIA, 34 C.F.R. Section 300.321(a), subparagraph (e)(1) provides in pertinent part that a member of the IEP Team described in paragraphs (a)(2) through (a)(5) of this section is not required to attend an IEP Team meeting, in whole or in part, *if* the parent of a child with a disability *and* the public agency *agree in writing*, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting; which failed to occur in this instance.

The record reflects that on July 28, 2008, DCPS convened a MDT meeting; wherein the team recommended a Psychiatric Evaluation to determine whether the student presents with depressive symptoms or ADHD or both, and whether both impact her ability to compete with her peers in the regular education setting. The purpose of the evaluation was also to determine whether medication would be beneficial to have as part of her educational program.

On March 3, 2009, DCPS convened a MDT meeting to review the student's Psychiatric Evaluation; and the evaluation was reviewed with the team, by a Licensed Professional Counselor at _____ The MDT meeting notes reflect that the Advocate requested the student's Therapist to participate in the meeting to address social emotional concerns expressed at the meeting; and that the Therapist was not present to address these concerns.

The record also reflects that the Advocate requested that the student's Therapist, having personal knowledge of the student, participate in the March 3, 2009 MDT meeting to provide input in development of the student's social emotional goals; and the proposed increase in the student's counseling hours. However, the student's Therapist failed to participate in the meeting; and the student's IEP was revised, without the Therapists' participation. In addition, in several letters to DCPS, thereafter, the Advocate reiterated the necessity and urgency in reconvening the MDT with a qualified professional to review the evaluation; and to discuss compensatory education.

On April 9, 2009, the MDT reconvened to review the student's Psychiatric Evaluation. The student's Therapist, among others, participated in the MDT meeting, providing the team information regarding the student's social/emotional needs and goals; and the IEP was revised accordingly. However, the parent and advocate were informed by the Special Education Coordinator that the team failed to include an individual qualified to review the student's Psychiatric Evaluation. The SEC also advised the Advocate that recommendations of the Psychiatric Evaluation were already being met by the school. The team failed to review the Psychiatric Evaluation.

On April 10, 2009, as a follow-up to the April 9, 2009 meeting, the Education Advocate forwarded a letter to the DCPS LEA Representative for _____ regarding the necessity of a Psychologist to review the student's Psychiatric Evaluation; the MDT's failure to have a qualified professional at the April 9, 2009 MDT meeting to review the evaluation; or address compensatory education services, without DCPS' participation.

The Advocate concluded by requesting three (3) dates and times for the student's MDT to reconvene to review the Psychiatric Evaluation; and address compensatory education services, by close of business on April 15, 2009.

The record reflects that the Education Advocate forwarded several requests to DCPS, reiterating the urgency and necessity of the availability of a qualified professional to review the student's Psychiatric Evaluation. However, as of the date of this decision, the student's Psychiatric Evaluation has not been reviewed by a qualified professional, as required by IDEA.

The Psychiatric Evaluation for the student was administered, and report completed by a Licensed Psychiatrist. A Psychiatrist is a medical physician who has completed medical school and a residency program in psychiatry; who specializes in psychiatry and is certified in treating mental disorders. <http://en.wikipedia.org/wiki/Psychiatrist> - cite note-APAWhatIs-0 All psychiatrists are trained in diagnostic evaluation and in psychotherapy. In addition, as part of their evaluation of the patient, psychiatrists are one of only a few mental health professionals who may prescribe psychiatric medication, conduct physical examinations, order and interpret laboratory tests and electroencephalograms, and may order brain imaging studies such as computed tomography or computed axial tomography, magnetic resonance imaging, and positron emission tomography scanning.^[citation]

A *Psychiatrist* also specializes in the diagnosis, treatment, and prevention of mental illnesses, including substance abuse and addiction. Psychiatrists are uniquely qualified to assess both the mental and physical aspects of psychological disturbance. Often, psychiatrists work alongside psychologists, psychiatric social workers, psychiatric nurses and other mental health workers. Patients can range from mild cases of depression and anxiety to very extreme cases that may be dangerous. Their medical education has given them a full working knowledge of the many causes for a patient's feelings and symptoms. Armed with this understanding, psychiatrists can make a complete, accurate diagnosis and then recommend or provide treatment, including prescribing medication; which distinguishes them from Licensed Professional Counselors, or Therapists.

Licensed Professional Counselors are one of the six types of licensed mental health professionals who provide psychotherapy in the United States. In the United States, licensure as a Licensed Professional Counselor occurs at the state level and requires a master's degree in counseling or a related field. In addition to their education, LPCs must obtain supervised clinical experience and must pass a state licensing exam, comprising both the National Counselor Examination for Licensure and Certification (NCE) as well as The National Certified Mental Health Counselor Examination (NCMHCE).

The practice of professional counseling includes, but is not limited to, the diagnosis and treatment of mental and emotional disorders, including addictions; psycho-educational techniques aimed at the prevention of such disorders; consultation to individuals, couples, families, groups, and organizations; and research into more effective therapeutic treatment modalities. Counselors' training in the provision of counseling and therapy includes the etiology of mental illness and substance abuse disorders, and the provision of the established, research-

based “talk therapies” of cognitive-behavioral, interpersonal, and psychodynamic therapy. The Counselors’ education and training is oriented toward the adoption of a truly client-centered, and not primarily illness-centered, approach to therapy.

The evidence is insufficient to determine the professional qualifications of the Licensed Professional Counselor participating in the March 3, 2009 MDT meeting; however, it is clear that LPC’s and other Therapists generally work alongside Psychiatrist, who are medical physicians with specialized training, knowledge, and experience.

The *DCPS Therapist* is not qualified to interpret the instructional implications of results of the independent Psychiatric Evaluation completed on December 18, 2008. The Therapist is a Ph.D. *candidate* in clinical psychology; has a Masters Degree in Psychology (Research), a Bachelors Degree in Psychology, Minor: Criminal Justice; and a Bachelors Degree in Black Studies. In addition, she is a candidate for a Doctorate Degree in Psychology, has a Certificate in recognition of her participation and completion of “Diagnosis and Treatment of Attention Deficit Hyperactivity Disorder”; and provides counseling services, under the supervision of a Licensed Clinical Psychologist.

Additionally, the DCPS Therapist’ area of expertise is limited to performing the duties of a student Counselor. The Therapist testified that she works under the direct supervision of a Licensed Clinical Psychologist; who supervises her provision of services to the students. At the hearing, the Therapist also testified that she is not a Psychologist, Licensed Clinical Psychiatrist or Social Worker; had not administered a Psychiatric Evaluation; or prescribed medication. Therefore, she is unable to offer any opinions or make any recommendations, independently; which significantly impacts her ability to advise the team in developing the student’s IEP.

In summary, the Therapist is not a Psychologist, Psychiatrist or other medical professional possessing the qualifications and specialized experience necessary to interpret the instructional implications of the results of the independent Psychiatric Evaluation, completed the Psychiatrist; who is a medical physician, with specialized experience in the area of psychiatry, and most importantly, in specific areas of concern for this student (i.e. ADHD, substance abuse, medication management, adjustment disorder, with depressed mood). A certificate in ADHD is insufficient to support a finding that the Therapist is a qualified professional possessing the necessary knowledge, skills, education, and experience to interpret the evaluation.

Finally, the nature of the student’s disabilities are such that the student, and the MDT would benefit significantly from a qualified professional, capable of interpreting the instructional implications of the results of the independent Psychiatric Evaluation; discuss the impact that the student’s disabilities have upon her education; and assist in developing an individualized education program, specifically designed to address the students unique special education needs.

The student’s Psychiatric Evaluation must be reviewed by a qualified professional, with the education, knowledge, skills, and experience necessary to interpret the instructional implications of the results of the independent Psychiatric Evaluation.

Findings of Fact

1. DCPS violated IDEA, 34 C.F.R. §300.306 and §300.321, by failing to convene a MDT team, which includes a qualified professional to interpret the instructional implications of the results of the December 18, 2008 independent Psychiatric Evaluation.
2. DCPS failed to ensure that individuals with *knowledge or special expertise regarding the child* (i.e. student's school Therapist) participated in the March 3, 2009 MDT meeting, and development of the student's social/emotional goals and objectives; and a determination regarding an increase in the student's therapeutic services.
3. DCPS failed to comply with IDEIA, 34 C.F.R. Section 300.321(a), subparagraph (e)(1) which provides that a member of the IEP Team described in paragraphs (a)(2) through (a)(5) of this section is not required to attend an IEP Team meeting, in whole or in part, *if* the parent of a child with a disability *and* the public agency *agree in writing*, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting; which failed to occur in this instance.

DCPS unilaterally decided that DCPS, the student's Therapist, and a qualified professional's participation in the MDT meetings were not warranted; although there was no such agreement between parent and the LEA, in writing.

Conclusion of Law

It is the Hearing Officer's Decision that Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to convene an IEP team meeting, in accordance with 34 C.F.R. §300.306, and §300.321 of "The Individuals with Disabilities Education Act", reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004".

ISSUE 3

Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate individualized education program (IEP)?

Petitioner represents that The Individuals with Disabilities Education Improvement Act ("IDEIA") of 2004 requires that all students be provided with a Free Appropriate Public Education ("FAPE"). 20 U.S.C. §1401(9), 34 C.F.R. §300.17, 30 DCMR §3001.1.

Petitioner represents further that the FAPE requirement is satisfied when the State provides personalized instruction that is reasonably calculated to permit the child to benefit

educationally. See Hendrick Hudson Board of Education v. Rowley, 458 U.S. 176, 203-204 (1982)

Petitioner represents that 34 C.F.R. §300.323(c) states that each public agency must ensure that “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 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.” 34 C.F.R. §300.323 (a) provides that a child’s IEP must be in effect at the beginning of each school year.

Petitioner argues that here, the student according to the recommendations of several evaluations, requires an IEP that includes, among others, family therapy; and goals and objectives for time management, and as of this date, DCPS failed to develop an IEP which provides these and other services for the student. Petitioner concludes that DCPS’ failure to provide the student an appropriate IEP amounts to a denial of a FAPE.

In closing, Petitioner argues that the student continues to struggle academically; the student stated that often, there are times when she fails to receive assistance; and represents that the lack of assistance is reflected in the student’s report cards. Petitioner also argues that the student’s therapist acknowledged that there were several areas of assistance the student could benefit from having as part of her IEP, such as time management and family therapy, however, because DCPS was not present and the student’s mother was reluctant to place the student on medication, the services could not be added to the IEP.

Petitioner argues further that IDEA does not require a student be medicated in order to receive an appropriate IEP, and DCPS’ failure to provide the student with areas that could improve the student’s academic performance, has further harmed the student. Petitioner concludes that at the student’s April 9, 2009 MDT meeting, where DCPS was not present, the MDT agreed that the student could benefit from having, as part of her educational program, family therapy and goals to address her time management; however, the student’s IEP fail to include these services.

Petitioner also concludes that during cross examination the student’s therapist testified that she believed that the student could benefit from family therapy and time management goals, however, IDEAL PCS could not authorize said services because DCPS’ presence at the meeting, as the LEA, was necessary; and DCPS was not present at the meeting.

Respondent denies the allegation and asserts that the student’s IEP is appropriate, and reasonably calculated to provide the student educational benefit, and as such, it asserts that the student has not been denied a FAPE. Respondent also represents that recommendations in the independent Psychiatric Evaluation were incorporated into the student’s IEP.

In closing, Respondent argues that the student’s IEP is appropriate to provide the student educational benefit; and is clearly able to access her educational programming when she makes herself available to receive her instruction; and asserts that no evidence was presented to show the student’s IEP is inappropriate or that any additional services are required to provide the student with access to her educational programming.

Respondent also argues that Petitioner failed to meet its burden of proof, by failing to demonstrate that the student was denied a FAPE; and DCPS failed to provide the student an appropriate IEP. Respondent concludes that the MDT convened in March, 2009 and April 2009, and determined the appropriateness of the student's IEP.

Discussion

A free appropriate program or FAPE means special education and related services that are provided at public expense, under public supervision, and without charge; meet the standards of the SEA, include an appropriate school; and are provide in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

To ensure that each eligible student receives a FAPE, the IDEA requires that an individualized education program ("IEP") be developed to provide each disabled student with a plan for educational services tailored to that student's unique needs. 20 U.S.C. §1414(d); 34 C.F.R. §300.300(a)(3)(ii).

According to IDEIA, 34 C.F.R. §300.15 evaluations are procedures used in accordance with §§300.304 through 300.311 as a means of determining whether a child has a disability and the nature and extent of the special education and related services the student requires. Upon completion of the administration of assessments and other evaluation measures a group of qualified professionals and the parent of the child must meet to determine whether the child is a child with a disability, as defined in §300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and... *See, IDEA, 34 C.F.R. §300.306(a).*

According to IDEA, 34 C.F.R. §300.323 (c) (1), 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.

Petitioner cited this provision of the IDEA in the complaint, however, failed to allege or present any evidence that DCPS failed to convene a meeting to develop an IEP for the student within 30 days of a determination that the student requires special education services; or that as soon as possible following development of the IEP, the student failed to receive special education or related services; according to the student's IEP.

The Advocate recommended 60 minutes of group family therapy; 30 minutes of individual therapy; and medication reevaluation. Parent and the Advocate requested the IEP to reflect recommendations of family therapy at least 1 hour each week; and a goal to address time management in the student's IEP. disagreed with parent's request, indicating that they are unable to implement the recommendation in the IEP, until after the student is on medication.

At the hearing, the School Therapist testified that at the April 9, 2009 MDT meeting the team discussed the student's medication and the impact on effectiveness of a time management goal. The Therapist testified that the student was not on medication at the time, and she recommended a medication reevaluation prior to implementing a time management goal, to ensure that the student is successful.

During cross examination the Therapist testified that a student need not be medicated before receiving time management assistance. The Therapist also testified that a time management goal was recommended by the student's advocate; and she agrees that the student requires time management assistance, however, she recommends for the student assistance with organization.

Petitioner fail to refute the MDT's representation that it adopted, implemented, and incorporated in the student's IEP, recommendations of the independent Psychiatric Evaluation; and recommendations of the Education Advocate to change the student's disability classification; include social emotional goals in the student's IEP; and increase the amount and frequency of counseling services provided the student.

The record reflects that the advocate, on behalf of the parent requested incorporation of a time management goal, and family therapy in the student's IEP; and after discussion, the team decided not to incorporate these measures into the student's IEP. However, Petitioner failed to present evidence that the student's IEP is inappropriate, because it denies her access to the general curriculum, or the opportunity to receive educational benefit. The MDTs failure to adopt *all* recommendations made by the Advocate, does not result in an inappropriate IEP; without other evidence.

In addition, although represented by Petitioner, there is no indication in the April 9, 2009 MDT, or advocates meeting notes, that the team agreed that the student could benefit from having as part of her educational program, family therapy and time management goals; however, failed to include these measures in the student's IEP because DCPS was not present at the April 9, 2009 meeting. There is also no evidence that these additional measures were supported by evaluative data, or recommended in any of the evaluations.

According to the testimony of the School's Therapist, although she recommended a medication reevaluation prior to including a time management goal in the student's IEP; and agreed that the student could benefit from a time management goal in her IEP, she believed that assistance with organization skills, would be most beneficial.

Finally, according to 300.324 (a)(6) of the IDEA, changes to the IEP may be made either by the entire Team at an IEP Team meeting, or as provided in paragraph (a)(4) of this section, by amending the IEP rather than redrafting the entire IEP. Upon request, parent must be provided with a revised copy of the IEP with the amendments incorporated. In this matter, the student's current IEP is dated March 3, 2009; and additional amendments were made to the IEP at the April 9, 2009 MDT meeting.

Findings of Fact

1. In interpreting the evaluation data for the purpose of determining whether the student has a disability under IDEIA, §300.98, including the data in the December 18, 2008 independent Psychiatric Evaluation, and other evaluations, the MDT drew upon information from a variety of sources, including the student's academic and behavioral history, prior evaluations, aptitude and achievement tests, parent, teacher, Therapist, and advocate input, as well as information about the child's physical condition, psychological, emotional, social and cultural background, and adaptive behavior.
2. DCPS carefully considered the information obtained from the various sources, in accordance with IDEIA, §300.306 (c)(1)(i)(ii); and ensured that the information obtained from all of these sources was documented and carefully considered.
3. DCPS complied with the substantive requirements of IDEA, 34 C.F.R. Sections 300.320 through 300.324, in developing, reviewing, and revising the student's IEP.
4. DCPS failed to comply with the procedural requirements of IDEA, in convening an IEP team of qualified professionals; as a result, the IEP was developed without the benefit of such review.

Conclusion of Law

It is the Hearing Officer's Decision that Petitioner failed to satisfy its burden by presenting evidence that DCPS failed to provide the student an appropriate individualized education program (IEP); in violation of 34 C.F.R. §300.323 and §300.306 of The Individuals with Disabilities Education Act, reauthorized as the Individuals with Disabilities Education Improvement Act of 2004.

Free Appropriate Public Education (FAPE)

In this matter, Petitioner alleged procedural and substantive violations of the IDEA: *procedurally*, DCPS failed to convene an IEP team of qualified professionals to review the evaluations, and timely implement the November 13, 2008 HOD; and *substantively*, failed to develop an appropriate IEP for the student, and comply with the November 13, 2008 Hearing Officers' Decision.

When parents challenge the appropriateness of a program or placement offered to their disabled child by a school district under the IDEA, a reviewing court must undertake a twofold inquiry: (1) procedural compliance (Procedural FAPE); and (2) conferral of some educational benefit (Substantive FAPE). The FAPE requirement is satisfied when the State provides personalized instruction that is reasonably calculated to permit the child to benefit educationally. See, *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982)

Procedural FAPE (Procedural compliance)

The procedural prong of the FAPE analysis, and the *first* prong of *Rowley*, 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. See, *The Board of Education of the Hendrick Hudson Sch. Dist. v. Rowley*, 459 U.S. 176 (1982), and *Doe*, 915 F.2d at 658. 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.

Courts have held that substantive harm will result from a procedural violation when the procedural violation in question seriously infringe upon the parents' opportunity to participate in the IEP process. Procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute a 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.

Substantive FAPE (Conferral of Educational Benefit)

The *second* prong of *Rowley*, requires that the court determine whether the individualized education program ("IEP"), offered by the LEA, is reasonably calculated to enable the child to receive educational benefit. The benefit cannot be trivial, *Rowley*, 458 U.S. 176, at 177 206-207. For the benefit to be sufficiently meaningful, the IDEA was enacted to assure that all children with disabilities have available to them a (FAPE), which emphasizes special education and related- services designed to meet their unique needs, supported by such services, as are necessary to permit the child to benefit from the instruction.

According to *Rowley*, in order for FAPE to be offered, the school district must show it complied with the statutory elements of an IEP, and the goals and objectives in the IEP are reasonable, realistic and attainable. The special education and related services must be reasonably calculated to enable the child to receive educational benefit, and must be likely to produce progression, not regression.

Findings

1. DCPS' failure to properly convene a MDT to review the student's Psychiatric Evaluation represents a procedural violation of IDEA; however, Petitioner failed to present evidence that the procedural violation resulted in a denial of FAPE, causing substantive harm to the student, or his parents.

The record reflects, and the parties fail to dispute, that although the Psychiatric Evaluation was not reviewed by a qualified professional, as requested by parent; the recommendations included in the Psychiatric Evaluation were fully adopted, implemented, and incorporated into the student's IEP, by the MDT.

Additionally, the parent and advocate were provided the opportunity to provide meaningful input in decisions regarding development of the student's IEP. DCPS' failure to adopt *all* of the recommendations proposed by the Education Advocate, specifically, including family therapy, and a time management goal in the student's IEP, without other evidence, will not result in an inappropriate IEP.

2. Petitioner failed to present evidence that DCPS failed to comply with the statutory elements of the student's IEP, or that the goals and objectives in the IEP are not reasonable, realistic and attainable.
3. Petitioner failed to present evidence that the special education and related services in the student's IEP fail to include personalized instruction reasonably calculated to enable the child to receive educational benefit, or is likely to produce regression, and not progression.
4. Petitioner failed to present evidence that in develop, reviewing, and revising the student's IEP, the procedural and substantive violations, denies the student a FAPE.
5. Failure to timely and fully implement the November 13, 2008 HOD not only represents a procedural violation of the IDEIA, but it also affects the student's substantive rights under the IDEIA, which is the right to a free appropriate public education (FAPE). Failure to timely and fully implement the November 13, 2008 HOD, represents a procedural, and substantive violation of the IDEA, and continued denial of a FAPE.

Conclusion

Petitioner failed to satisfy its burden by presenting evidence sufficient for a finding that DCPS denied the student a FAPE, by failing to convene a team of qualified professionals to review the student's independent Psychiatric Evaluation; or develop an appropriate IEP.

Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS denied the student a FAPE, by failing to timely implement the November 13, 2008 Hearing Officer's Decision (HOD).

XI. ORDER

Based on the aforementioned, it is hereby:

1. **ORDERED**, that within fifteen (15) school days from the date of this decision and order; DCPS shall convene a MDT meeting with a qualified professional (Psychiatrist) to review and interpret the results of the December 18, 2008 independent Psychiatric Evaluation; and review and revise the student's IEP, as appropriate; and it is further
2. **ORDERED**, that at the MDT meeting referenced herein, DCPS shall review the student's revised IEP; discuss, develop, and fund a compensatory education plan for the student, placing the student in the position she would have been had she received the services she was entitled to receive under the IDEA, however, failed to receive; and it is further
3. **ORDERED**, that at the MDT meeting referenced herein, at Petitioner's discretion, the team may include the August 29, 2008, Proposed Settlement agreement, in development of a compensatory education plan for the student; and it is further
4. **ORDERED**, that within ten (10) school days from the date of this decision and order, DCPS shall convene Student Support Team (SST) meeting, to discuss, determine, and implement interventions and supports to assist the student in identified areas of deficiency; and it is further
5. **ORDERED**, that DCPS shall fund an independent Functional Behavioral Assessment, and within fifteen (15) school days of receipt of the evaluation, develop a Behavioral Intervention Plan; and it is further
6. **ORDERED**, that within fifteen (15) school days from the date of this decision and order, DCPS shall meet with parent and the student to develop a Transition Services Plan, consistent with recommendations in the student's evaluations, and IDEA; and it is further

7. **ORDERED**, that DCPS shall schedule all meetings through the parent's counsel, Attorney Domiento Hill, in writing, via facsimile at (202) 742-2098; and it is further
8. **ORDERED**, that in the event of DCPS' failure to comply with the terms of this Decision and Order, Petitioner's Counsel will contact the Special Education Coordinator at _____ and the DCPS Office of Mediation & Compliance to attempt to obtain compliance prior to filing a complaint, alleging DCPS' failure to comply with this decision and order; and it is further
9. **ORDERED**, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives; and it is further
10. **ORDERED**, that this decision and order are effective immediately.

XII. APPEAL RIGHTS

This is the **FINAL ADMINISTRATIVE DECISION**. Appeals may be made to a court of competent jurisdiction within ninety (90) days from the date this decision was issued.

Attorney Ramona M. Justice

7-29-09

Date Filed: _____

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Daniel Kim, Office of the Attorney General
Attorney Domiento Hill: Fax: 202-742-2098