

**THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA),
REAUTHORIZED AS THE INDIVIDUALS WITH DISABILITIES EDUCATION
IMPROVEMENT ACT OF 2004 (IDEIA), (Public Law 108-446)**

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS
IMPARTIAL DUE PROCESS HEARING**

I. INTRODUCTION

The student is _____ years of age, and attends _____ a private school located in the District of Columbia. The student's tuition at _____ is funded by the Washington Scholarship Fund. The student resides in a transitional residential facility, with his mother and siblings, in the District of Columbia. The student is identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)". The student's disability classification is developmentally delayed (DD).

On June 5, 2009, Petitioner, through her Attorney, 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) make speech services available to the student; (2) comprehensively evaluate the student, pursuant to parent's request; and (3) provide parent meaningful participation in the placement decision, and/or identify an appropriate placement for the student; in violation of "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

The due process hearing convened on September 17, 2009, at 9:00 a.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

II. JURISDICTION

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

III. PARENT'S 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 DCPS denied the student a free appropriate public education (FAPE); by failing to comprehensively evaluate the student, pursuant to parent's January 6, 2009 request for evaluations?
- (2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide parent "meaningful" participation in the placement decision?

V. RELIEF REQUESTED

- (1) A finding that DCPS denied this student a FAPE by failing to timely fully evaluate the student and/or develop an appropriate Individualized Educational Program (IEP); and/or provide an appropriate placement, with parental participation.
- (2) DCPS shall conduct or fund the following evaluations for the student: a) clinical evaluation; b) social history;
- (3) Upon completion of the evaluations, DCPS shall convene an MDT/IEP team meeting for the purpose of reviewing the evaluations and revising the IEP; discussing compensatory education; discussing and determining placement for the student; and
- (4) That at the aforementioned meeting; DCPS shall secure the participation of all necessary IEP team members to include but not limited to the appropriate personnel required to review assessments and develop an appropriate program for this child;
- (5) The student shall be entitled to compensatory education for denial of a FAPE;
- (6) That DCPS agrees to pay counsel for the parent's reasonable attorney's fees and related costs incurred in this matter;
- (7) All meeting shall be scheduled through counsel for the complainant in writing, via facsimile, at 202-742-2098.
- (8) DCPS shall send all notices to counsel for the parent, Attorney Roberta L. Gambale, in writing, via facsimile, at 202-742-2097 or 202-742-2098.

VI. PROCEDURAL POSTURE

On June 5, 2009, Petitioner, through her Attorney, 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) make speech services available to the student; (2) comprehensively evaluate the student, pursuant to parent's request; and (3) provide parent meaningful participation in the placement decision; in violation of "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

Note: At the hearing, Petitioner withdrew Issue 1 of the complaint; and the court dismissed "without" prejudice, that portion of Issue 3 pertaining to identification of an appropriate placement for the student.

The hearing was initially scheduled by the SHO for August 7, 2009, at 9:00 a.m.. On June 9, 2009, after the due process hearing notice was issued by the SHO, DCPS filed a waiver of resolution meeting, requiring adjustment of the timeline from 75 days to 45 days; to complete the hearing and issue a decision. To ensure compliance with the 45 day timeline the Hearing Officer changed the hearing date to July 14, 2009, at 11:00 a.m..

On June 11, 2009, the Hearing Officer issued a Pre-hearing Conference Notice, scheduling the pre-hearing conference for July 7, 2009, at 4:30 p.m. . Due to the parties' unavailability, the pre-hearing conference was changed to July 17, 2009 at 10:00 p.m.. A Pre-hearing Conference Order was issued on July 17, 2009 confirming the due process hearing for August 7, 2009.

The attorneys were unavailable for the due process hearing on July 14, 2009; and on July 14, 2009 Petitioner's Attorney filed a Motion for Continuance of the July 14, 2009 hearing, indicating need to change hearing because of waiver and neither the parent nor the DCPS Attorney were available on July 14, 2009. During the July 17, 2009 pre-hearing conference, the parties agreed to continue the hearing to August 7, 2009, at 9:00 a.m.. On July 16, 2009, Respondent filed "District of Columbia Public School's Response".

On July 17, 2009, an Interim Order of Continuance was issued continuing the hearing from July 14, 2009 to August 7, 2009. On July 29, 2009, Petitioner filed a "Disclosure Statement". On July 30, 2009, Respondent filed a "Disclosure Statement". On August 3, 2009, Petitioner filed an amended five day disclosure. On August 5, 2009, Petitioner's Attorney contacted the Hearing Officer by email, accompanied by a second motion to continue the hearing, indicating that two (2) of parent's necessary witnesses were not available for the August 7, 2009 hearing; and requested continuance to September 3, 2009.

On August 7, 2009, as a follow-up to the August 5, 2009 email, Petitioner's Attorney filed a second written Motion for Continuance. The Hearing Officer responded expressing concern regarding the second continuance, and further delay. In the interim, pursuant to the request of Petitioner's Attorney, the student's sibling's complaint ([REDACTED]) was returned to the Hearing Officer and the hearing continued to September 17, 2009.

Petitioner's Attorney requested that instead of continuing the student's complaint to September 3, 2009, for the convenience of the parent and witnesses who will participate in both cases, that the student's complaint also be continued to September 17, 2009. Finding the presence of good cause, no opposition from Respondent; and in the interest of judicial economy, and the court granted Petitioner's Request to continue the student's and his siblings' hearings to September 17, 2009, at 9:00 a.m. and 12:00 p.m., respectively.

On September 9, 2009, Petitioner and Respondent filed supplemental disclosures; and a witness list. The due process hearing convened on September 17, 2009, at 9:00 a.m..

VII. PRELIMINARY MATTERS

As a preliminary matter, Petitioner advised the court that on June 15, 2009, after filing of the complaint, DCPS issued an Independent Educational Evaluation (IEE) letter authorizing parent to obtain an independent comprehensive psychological evaluation, at its expense; and its withdrawal of Issue 1 of the complaint. The court also dismissed "without" prejudice, provisions of Issue 3 of the complaint pertaining to an appropriate placement for the student. The court agreed to retain jurisdiction in this matter, should Petitioner file a subsequent complaint regarding the appropriateness of the student's placement.

IX. 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. Petitioner objected to the introduction into evidence Respondent's Supplemental Disclosure dated September 14, 2009, consisting of a Proposed Compensatory Education Plan; as untimely. After hearing arguments from the parties, the court overruled Petitioner's objection finding that Petitioner was not unduly prejudiced by allowing the disclosure into evidence, admitting into evidence the Proposed Compensatory Education Plan, identified as Respondent's Exhibit #5.

Respondent objected to the introduction into evidence Petitioner's Exhibit 17, as irrelevant because it was issued after the complaint was filed. The court allowed the exhibit merely for the purpose of demonstrating that the evaluation was completed, albeit after filing of the due process complaint. Receiving no further objections, the following disclosures were admitted into the record as evidence:

DISCLOSURES ADMITTED INTO THE RECORD AS EVIDENCE, ON BEHALF OF PETITIONER

- Petitioner's Exhibits 01 through Petitioner's Exhibit 19; and a witness list dated September 9, 2009.

DISCLOSURES ADMITTED INTO THE RECORD AS EVIDENCE, ON BEHALF OF RESPONDENT

- Respondent's Exhibits 01 through Respondent's Exhibits 05; and witness list dated September 9, 2009.

IX. STATEMENT OF CASE

1. The student is _____ years of age, and a kindergarten student, attending a private school located in the District of Columbia. The student's tuition at _____ is funded by the D.C. Washington Scholarship Fund, entitling the student to general education services. The student's entitlement to special education and related services is authorized pursuant to the District of Columbia Public Schools, Office of Special

Education, and Individualized Services Plan for Parentally Placed Private/Religious School Students.

2. The student resides in a transitional residential facility, with his mother and siblings, in the District of Columbia. The student is identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)". The student's disability classification is developmentally delayed (DD).

3. While attending the student was referred for initial evaluation by parent and the to the District of Columbia, Office of Special Education, The Central Assessment Referral Evaluations Center (C.A.R.E.) evaluated the student in October, 2008 and/or November, 2008.

4. On January 6, 2008, parent attended an MDT/IEP team eligibility determination meeting, without representation, wherein the student was identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)". The student's disability classification is developmentally delayed (DD).

An IEP was developed for the student, recommending 15 hours of specialized instruction; and 1.5 hours of speech/language services, weekly; in a combination general education/special education resource room academic environment, 21%-60% of the time. The MDT meeting notes reflect that the IEP would include accommodations/modifications.

DCPS completed an "Initial Placement" form, signed by parent, indicating that the student's initial placement was identified as Simon Elementary School, the student's neighborhood school; and that the parent would "look for a school instead of Simon to enroll her son". An Individualized Services Plan for Parentally Placed Private/Religious School Students was developed recommending 1 hour of speech/language intervention, weekly.

5. On November 12, 2008, DCPS completed a "Speech and Language Evaluation Report". The report indicates that the student is repeating kindergarten, and was referred to the C.A.R.E. Center for a speech and language evaluation as part of a multidisciplinary team evaluation to determine the student's eligibility for special education services. It was also noted that the student was demonstrating academic difficulties in addition to unclear speech and hyperactivity. The results of the evaluation reflect that the student demonstrates an academically significant speech and language impairment; and is eligible for speech and language services.

6. On December 10, 2008, DCPS prepared a "Psycho-educational Evaluation" Report. The Report indicates that "This report is valid only if signed by a qualified professional". The report was not signed by the evaluator; and failed to include recommendations.

The evaluation report reflects that the student was referred for evaluation because of described concerns regarding speech difficulties and a suspected learning disability. The evaluation report reflects that the student's teacher reported that there were particular academic

difficulties with written expression, math, remaining on task, organization, expressing his thoughts, following directions, and completing assignments.

The evaluator determined that within a one on one testing session, the student displayed good effort and motivation toward presented; however, there were issues with articulation as well as some receptive aspects of language. Cognitively, the student displayed borderline ability; demonstrated verbal and nonverbal reasoning abilities that were well below his same age peers. According to the report, the student displayed strength within the processing speed domain, with a particular strength in visual-to-visual paired learning; and in regard to the working memory area, displayed weak overall performance.

On a test of perceptual motor functioning, the student performed in the average range; educationally, he displayed fairly consistent skill develop; his basic reading skills presented as low average, as he displayed similar performances across tasks that required phonetic decoding, word recognition, and comprehension. The evaluator noted that the student was not reading at sentence level; and in math he exhibited low average performances; his skills with calculation and applied aspects of math generally suggested skills that were limited to single digit addition and subtraction with some lack of proficiency.

The student's writing skills were characterized by average spelling skills and weak writing skills; and although his spelling skills were average, he was unable to spell any actual words correctly.

7. On January 6, 2009, Petitioner's Attorney forwarded to the Acting Principal, a written request for the student's educational records, accompanied by an authorization for release of information. A copy of the request was reportedly forwarded to the D.C. Public Schools, Deputy Chancellor, Office of Special Education, and DCPS Office of General Counsel.

8. On January 6, 2009, Petitioner's Attorney forwarded to the Acting Principal, a written request for comprehensive reevaluations of the student, to include: psycho-educational, clinical psychological, speech and language, social history, formal classroom observation, vision and hearing screenings; and if warranted, a psychiatric, neuropsychological, occupational therapy, physical therapy, and medical assessment.

9. On January 6, 2009, a MDT eligibility determination meeting was held. The student was determined eligible to receive special education services. DCPS issued a "Prior Notice" to parent, notifying parent that the student is identified as disabled and eligible for receive special education services, as a student with a disability classification of developmentally delayed (DD); and its intent to provide the student speech/language services in a combination general education/special education Resource room environment.

According to the MDT meeting notes, a review of the Speech and Language Evaluation reflect below average scores in receptive and general vocabulary; average scores in expressive vocabulary. The Clinical Evaluation reflects very low scores in all areas (core language skills, expressive language skills, language content, and language structure skills).

The evaluation reflects that the student exhibited 22 error sounds that impact on listener comprehension; and results of the assessment reveal significant speech and language deficit that impact the student's ability to utilize communication skills necessary for academic achievement. The team determined that based on the evaluation, the student qualifies for speech and language intervention services, pursuant to DCPS guidelines.

The team also reviewed results of the Psycho-Educational Evaluation; indicating that it would be considered to determine whether special education services are warranted. In discussing the student's placement, the team determined that the student can access the general education curriculum and would receive the appropriate educational supportive services for his academic areas of less proficiency and participate with non-disabled peers; at his neighborhood school.

10. On May 4, 2009, Petitioner through her Attorney, forwarded a letter to requesting a Social History and Clinical Evaluation, to address the student's need for counseling; and in preparation for an IEP team meeting.

11. On June 5, 2009, Petitioner, through her Attorney, 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) make speech services available to the student; (2) comprehensively evaluate the student, pursuant to parent's request; and (3) provide parent meaningful participation in the placement decision, and/or identify an appropriate placement for the student; in violation of "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

12. The due process hearing convened on September 17, 2009, at 9:00 a.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

X. DISCUSSION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

ISSUE 1

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to comprehensively evaluate the student, pursuant to parent's January 6, 2009 request for evaluations?

Petitioner represents that the IDEA, require that evaluations for a student be conducted upon parent's request for evaluations and/or upon referral of a child with a suspected disability by his teacher. *See, 34 C.F.R. §300.302.*

Petitioner also represents that evaluations to be conducted for the purpose of identifying the student's educational needs are to be at no cost to the parent and must be sufficiently comprehensive so as to provide "relevant functional, developmental, and academic information... To assist in developing the content of the child's IEP".

Petitioner represents that there is an obligation to ensure that a child is assessed in all areas of suspected disability. See, 20 U.S.C. 1414 (b)(1)-(3), 1412 (a)(6)B). Parent concludes that in the case at hand, the parent is concerned regarding the student's social emotional functioning and has requested that DCPS evaluate the student to address whether the student has need for related counseling services.

Respondent represents that a Psycho-educational and Speech/Language Evaluation was completed, to address the student's suspected areas of disability; and there was no evidence of concerns regarding the student's attention or social/emotional functioning; and at the time of the initial evaluations, it was comprehensive. Respondent also represents that no other evaluations were requested until after the complaint was filed; parent participated in the MDT/IEP eligibility determination meeting; and failed to advise the team that she disagreed or failed to comprehend the information discussed or decision rendered.

Respondent represents that DCPS authorized an independent Comprehensive Psychological Evaluation on June 15, 2009; and comprehensive evaluations are based on the suspected areas of disability at the time that initial evaluations are conducted, and the student was evaluated in those areas. Respondent concluded that Petitioner failed to present evidence of harm to the student, due to any delay in completing comprehensive evaluations.; and Petitioner's witness testified that counseling services would be of assistance to the student, at this time, as well as a special education teacher; however, Petitioner failed to present any evidence consistent with the standard in *Reid*.

Discussion

"Child Find"

IDEA, at 34 C.F.R. Section 300.111, entitled "***Child Find***", requires that the LEA must have in effect policies and procedures to ensure that all children with disabilities residing in the State, and who are in need of special education and related services, are ***identified, located, and evaluated***. In addition, subparagraph (c) of the "***Child Find***" provisions provide that "***Child find***" must also include children who are ***suspected*** of being a child with a disability under Section 300.8, ("***Other Health Impairment***"), and in need of special education, even though they are advancing from grade to grade.

Before the initial provision of special education to a child the agency must conduct full and individual initial evaluations; which 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. See, IDEIA, 34 C.F.R. §300.15.

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.). It is also the reason that IDEA, 34 C.F.R. §300.304(c) (4) and (6) provides that in evaluating a child, the public agency must ensure that the child is assessed in ***all*** areas-

related to the *suspected* disability; and that the evaluations are *sufficiently comprehensive* to identify *all* of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified; which Petitioner alleges failed to occur in this matter.

Reevaluations

According to IDEA, at 34 C.F.R. §300.303 (a) (1)(2), a public agency *must* ensure *reevaluation* of each child with a disability is conducted in accordance with Sections 300.304 through 300.311—

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

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

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

In addressing the timeline for reevaluating a student, neither the IDEA, at 34 C.F.R. §300.303, nor the D.C. Code of Municipal Regulations, §3005.7, establishes a timeframe in which an LEA must reevaluate a student. Absent an established timeframe to reevaluate the student, the Hearing Officer applies the "reasonableness" standard. Applying the "reasonableness" standard, DCPS was required to reevaluate the student within a reasonable period of time after receiving parent's January 6, 2009 request for comprehensive evaluations.

Findings of Fact

1. On or about October, 2008, while attending _____, the student was referred for initial evaluations by parent and the _____ to the District of Columbia, Office of Special Education,

The Central Assessment Referral Evaluations Center (C.A.R.E.) completed a Speech and Language Evaluation on October 22, 2008; and on October 8, 2008 and October 27, 2008 completed a Psycho-educational Evaluation, however, the December 10,

2008 Psycho-educational Evaluation report, is incomplete, and therefore, deemed invalid.

The initial evaluations completed by DCPS are not sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified; or satisfy the initial evaluation requirements of the IDEA.

2. On January 6, 2009, Petitioner, through her Attorney forwarded to the Acting Principal, _____ a written request for comprehensive reevaluations of the student, to include: psycho-educational, clinical psychological, speech and language, social history, formal classroom observation, vision and hearing screenings; and if warranted, a psychiatric, neuropsychological, occupational therapy, physical therapy, and medical assessment.
3. On May 4, 2009, Petitioner through her Attorney, forwarded a follow-up letter to _____ requesting a Social History and Clinical Evaluation, to address the student's need for counseling; and in preparation for an IEP team meeting.
4. DCPS failed to reevaluate the student, within a reasonable period of time of receiving parent's January 6, 2009, request for comprehensive evaluations; or May 4, 2009, request for a Social History and Comprehensive Evaluation.

Conclusions of Law

1. There is no evidence that the student was evaluated more than once in a given year, or that parent's request for reevaluation, totaled more than one per year. Therefore, according to 34 C.F.R. §300.303 subparagraph (b)(1)(2), and the D.C. Code of Municipal Regulations, §3005.7 (2006), DCPS *must* reevaluate the student, within a reasonable period of time, of receiving parent's request for reevaluation.
2. DCPS failed to *reevaluate* the student within a reasonable period of time of receiving parent's January 6, 2009 and May 4, 2009, requests for evaluation, in violation of IDEA, 34 C.F.R. §300.303, and the D.C. Code of Municipal Regulations, §3005.7 (2006).
3. DCPS failed to ensure that the student was is assessed in *all areas related to the suspected disability*, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities; in violation of IDEA, 34 C.F.R. §300.304(c)(4).
4. DCPS failed to ensure that in evaluating the student, the evaluations were *sufficiently comprehensive* to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified, in violation of IDEA, 34 C.F.R. §300.304 (c) (6).

Decision

It is the Hearing Officers' decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS failed to comprehensively evaluate the student, pursuant to parent's January 6, 2009 request for evaluations, in violation of 34 C.F.R. §300.304(c)(4) and (6) of "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)"; and the D.C. Code of Municipal Regulations, §3005.7 (2006).

ISSUE 2

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

Petitioner represents that in determining the *educational placement* of a child with a disability, including preschool child with a disability, each public agency must ensure that—

- (a) The placement decision—
 - (1) Is made by a group of persons, *including the parents*, and other persons *knowledgeable about* the child, the meaning of the evaluation data, and the *placement options*; and
 - (2) Is made in conformity with the *Least Restrictive Environment (LRE)* provisions of this subpart, including Sections 300.14 through 300.118;
- (b) The child's placement—
 - (1) Is determined at least annually;
 - (2) Is *based on the child's IEP*; and
 - (3) Is as close as possible to the child's home;

Petitioner also 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.

Petitioner further represents that 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 any information about the placement selected 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 parents 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 concludes that 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-

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 also concludes that in the case at hand, not only has the public agency 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 the parent with any information about the placement selected by the public agency for this child but also DCPS failed to provide an appropriate program that fully met this student's needs.

Respondent represents that parent attended the MDT meetings, the level of services and placement were discussed; and parent failed to advise DCPS that she disagreed or failed to comprehend the information communicated at the MDT meetings. Respondent also represents that parent signed documents indicating that she agreed with decisions regarding the student's educational program and placement.

Discussion

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 is made in conformity with the LRE provisions of this subpart...
 - (b) The child's placement is determined at least annually;
 - (1) Is determined at least annually;
 - (2) Is based on the child's IEP; and
 - (3) Is as close as possible to the child's home.

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).

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 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).”

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.”

According to §300.501(c) each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent’s child; and in implementing these requirements, the agency must use procedures consistent with the procedures described in §300.322(a) through (b)(1).

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 the 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).

Additionally, §300.503(c) provides that if the public agency proposed to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child, it must provide parent written notice in language understandable to the general public; and provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

Findings of Fact

1. Parent testified that she attended two (2) MDT meetings to discuss the student’s educational program and placement. Parent stated she attended the initial meeting without representation, and the meeting was abruptly terminated because of an emergency of a team member; prior to receiving adequate information.

Parent stated that she failed to comprehend information from the initial meeting, and pursuant to her request, was accompanied by an advocate from the D.C. Department of Mental Health, at the second meeting. Parent also testified that it was apparent to her and the advocate the even with his assistance she failed to comprehend the information at the second meeting, and at that time, sought legal counsel and representation.

In regard to the student's placement, parent testified that she failed to comprehend the information communicated at both meetings; and during the meeting where there was discussion regarding the student's placement, she was advised by DCPS that the student must attend his neighborhood school; there were no other placement options discussed; and she received no information regarding the educational program at

2. The evidence reflects that at the January 6, 2009 placement meeting DCPS failed to ensure that the team consisted of individuals qualified to discuss placement options and knowledgeable regarding the educational program at the proposed placement.
3. DCPS failed to issue a Prior Notice, of its intent to change the student's placement from to in the parent's native language or other mode of communication used by the parent, within a reasonable time before DCPS proposed to initiate or change the student's educational placement.
4. The January 6, 2009 MDT notes do not reflect the basis for the decision to change the student's placement from to except that the school is the student's neighborhood school, it is an appropriate placement, and will provide the student the opportunity to participate with non-disabled peers.
5. The January 6, 2009 MDT notes reflect no discussion of placement options, or information regarding the educational program at and merely reflects that the student's neighborhood was proposed as an appropriate placement for the student. The IEP indicates that the student can access the general education curriculum and will receive the appropriate educational supportive services for his academic areas of less proficiency and participate with non-disabled peers.
6. DCPS failed to provide information regarding the educational placement/setting, teacher- qualifications, service providers, and other disabilities serviced at Simon ES; which is critical information for parent in providing meaningful input in the placement decision.
7. DCPS failed to ensure that the information communicated at the January 6, 2009 placement meeting was translated orally or by other means to the parent in his or her native language or other mode of communication; that parent understands.
8. Parent was provided the opportunity to attend the placement meeting, however, was denied the parent the opportunity to provide meaningful input in the placement decision; because there was no discussion of placement options, and the parent was advised by DCPS that the student must attend the team failed to include an individual on the team knowledgeable regarding the educational program at

Additionally, parent failed to receive the information in a manner in which she could understand, precluding the opportunity to provide meaningful input in the placement decision; or the ability to make an informed decision regarding the student's placement.

9. On January 6, 2009, the placement decision was unilaterally made by DCPS. The MDT notes failed to reflect input from the student's teachers, parent, Youth Advocate/Case Manager, Speech-Language Pathologist, school Psychologist, or Case Manager regarding the student's placement.

Conclusions of Law

1. DCPS ensured that parent was afforded the opportunity to participate and serve as a member of the January 6, 2009 MDT that rendered the decision regarding the student's educational placement, consistent with the requirements of the IDEA, at 34 C.F.R. §300.322.
2. DCPS failed to ensure that parent was provided the opportunity to provide "meaningful" input in the placement decision; consistent with the requirements of the IDEA, at 34 C.F.R. §300.501 (c).
3. The placement decision was not 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*; however, was unilaterally made by DCPS.

DCPS' failure to include representatives from the proposed placement, on the MDT, denied parent "meaningful" participation in the placement decision.

4. DCPS proposed to change the student's placement from to Additionally, however, failed to provide parent written notice in language understandable to the general public; and provided in the native language of the parent or *other mode of communication used by the parent*, unless it is clearly not feasible to do so; in violation of §300.503(c).
5. Due to the lack of available information regarding the educational program and proposed placement at Simon ES, the team could not make a determination that the placement was reasonably calculated to confer educational benefit to this individual child.
6. The January 6, 2009 MDT meeting notes fail to reflect that the placement decision was made in accordance with the least restrictive requirements of the IDEA, at 34 C.F.R. §300.116.

Decision

It is the Hearing Officers' Decision that Petitioner satisfied its burden by presenting evidence sufficient for a finding that DCPS failed to provide parent "meaningful" participation in the placement decision; in violation of the IDEA, 34 C.F.R. §300.501(c) (2).

Free Appropriate Public Education (FAPE)

A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, ...in section 300.530(d). In addition, according to 20 U.S.C. 1412(a)(1)(A), a State participating in IDIEA 2004 is required "...to ensure...[that]...a free appropriate public education is available to all children- with disabilities residing in the State..." DCPS must make FAPE available to every student eligible to attend DCPS on a tuition free basis. See, 5 DCMR 2000.2(a).

According to IDEA, 34 C.F.R. §300.17 a free appropriate public education (FAPE) means special education and related services that—

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an Individualized education program (IEP) that meets the requirements of §§30.320 through 300.324.

Procedural FAPE (Compliance with Procedural Requirements of IDEA)

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.*

The court determined that DCPS failed to comply with the procedural requirements of the IDEA; by failing to comprehensively evaluate the student in all areas of suspected disability; and failing to provide parent an opportunity for "meaningful" input in the placement decision. However, a procedural violation of the IDEA, is not a per se denial of a FAPE. The courts have held that even if we find that DCPS failed to comply with the procedural requirements of IDEA, such a finding does not necessarily mean that the Petitioners are entitled to relief; nor does it end our analysis. Rather, we must inquire as to whether the procedural violations result in a denial of FAPE, causing substantive harm to the student, or his parents.

The 2004 amendments to IDEA, at Section 615(f)(ii) limits the jurisdiction of administrative Hearing Officers to make findings that a child did not receive FAPE due to procedural violations, unless there is a finding that the procedural inadequacies:

- (I) impeded 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 United States Supreme Court has held in Schaffer v. Weast, 546 U.S. 49, 56-57 (2005); that 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).

It further identified that the "default rule" which is that the burden of persuasion also belongs to the party seeking relief:

The burdens of pleading and proof with regard to most facts have and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure or proof or persuasion."

"Quoting C. Mueller & L. Kirkpatrick, Evidence §3.1, p. 104 (3d ed. 2003) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the *plaintiffs bear the burdens on the elements in their claims*")." (emphasis added)

In this matter, Petitioner has the Burden of Proof to demonstrate that DCPS' failure to reevaluate the student within a reasonable period of time of receiving parent's January 6, 2009 request for comprehensive evaluations; and failure to provide parent "meaningful" input in the placement decision, resulted in harm to the student and/or his parents, and denial of a FAPE.

Petitioner represents that the student was harmed as a result of DCPS' delay in comprehensively evaluating the student because the student does not have the educational program he requires; he should have received counseling at the private school; and parent was denied the opportunity to provide "meaningful" input in the placement decision, as a result, she could not make an informed decision regarding the student's education.

Respondent represents that Petitioner failed to present evidence of specific harm to the student, because of the delay in completing the requested evaluations. Respondent also represents that the Clinical Psychologist merely testified that counseling services would be helpful to the student at this time; as well as a Special Education Teacher, however, Petitioner failed to present evidence of harm, consistent with the standard established in Reid.

The record reflects on January 6, 2009, Petitioner, through her Attorney, forwarded to the Acting Principal, a written request for comprehensive reevaluations of the student, to include: psycho-educational, clinical psychological, speech and language, social history, formal classroom observation, vision and hearing screenings; and if warranted, a psychiatric, neuropsychological, occupational therapy, physical therapy, and medical assessment.

The record also reflects that on May 4, 2009, Petitioner through her Attorney, forwarded a follow-up letter to _____ requesting a Social History and Clinical Evaluation, to address the student's need for counseling; and as of the date of the complaint, DCPS failed to respond or complete the requested evaluations. Approximately five (5) months lapsed since parent's January 6, 2009 request for comprehensive evaluations. On June 15, 2009, after filing of the complaint DCPS authorized parent to obtain independent comprehensive evaluations.

Findings of Fact

1. Petitioner failed to demonstrate that the five (5) month delay in conducting comprehensive initial evaluations, pursuant to parent's January 6, 2009 request for evaluations, impeded the child's right to a free and appropriate public education; or caused a deprivation of educational benefit to the student. Furthermore, absent comprehensive evaluations, it is difficult for the court to determine whether the student was harmed as a result of the procedural violation; and the extent of any such harm.

The student is not attending _____ the placement proposed by DCPS; and continues to attend _____ a private school located in the District of Columbia; with tuition funded by the Washington Scholarship Fund.

Petitioner presented no evidence that the student is denied educational services he is entitled to receive under the IDEA; or fail to receive educational benefit. Petitioner presented no evidence of educational harm to the student.

2. The court acknowledge that absent comprehensive evaluations, parent is unable to make decisions on the student's behalf, regarding his educational needs; which may hamper or impede her opportunity to participate in the decision making process regarding the student's educational program, placement, or the provision of a FAPE. However, the record reflects that the placement decision was made on January 6, 2009; and parent testified that because of her inability to understand the information provided by DCPS at the MDT and January 6, 2009 placement meeting; on this date, she retained counsel to assist her in the decision making process regarding the student's educational program, placement, and the provision of a FAPE.
3. Although the court finds that on January 6, 2009, parent was denied the opportunity to provide "meaningful" input in the placement decision, the court cannot find that the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to her child, was *seriously* harmed, or *significantly* impeded, when parent retained counsel on January 6, 2009, the same date that the placement decision was rendered, to assist her in the decision making process regarding the student's educational program, placement, and the provision of a FAPE.

Furthermore, there is no evidence that since January 6, 2009, parent is denied the opportunity to provide "meaningful" input in decisions regarding the student's educational program, placement, or the provision of a FAPE.

Decision

It is the Hearing Officers' Decision that Petitioner failed to satisfy its burden by presenting evidence sufficient for a finding that the student was denied a FAPE, by failing to comprehensively evaluate the student, pursuant to parent's January 6, 2009 request for evaluations; and provide parent "meaningful" input in the placement decision, 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")"; and the D.C. Code of Municipal Regulations.

XI. ORDER

Based on the aforementioned, it is hereby:

- (1) **ORDERED**, that the relief requested in the June 5, 2009 due process complaint is **DENIED**; and it is further
- (3) **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 of this decision.

Ramona M. Justice

9-22-09

Date Filed: _____

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Kendra Berner, Office of the Attorney General
Attorney Roberta Gambale: Fax: 202-742-2098