

**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 5<sup>th</sup> St., S.E., Washington, D.C. 20003  
Phone: (202) 698-3819      Facsimile: (202) 442-5556

**In Re the Matter of :** )  
) )  
**Parent on behalf of Student,** )  
) )  
**Petitioner,** )  
) )  
) )  
**v.** )  
) )  
**The District of Columbia Public Schools** )  
) )  
**825 North Capitol Street, N.W.** )  
**Washington, D.C. 20002** )  
**("DCPS" or "District")** )  
) )  
**Respondent.** )  
\_\_\_\_\_ )

**Date of Complaint:** March 25, 2009  
**Date of Pre-hearing:** April 6, 2009  
**Date of Hearing:** April 29, 2009  
  
**Student Identification Number:**

OSSE  
STUDENT HEARING OFFICE  
2009 MAY -7 AM 11:17

**HEARING OFFICERS' DECISION (HOD)**

**Hearing Officer:** Attorney Ramona M. Justice

**Attorney for Petitioner:** Attorney Roberta Gambale  
James Brown and Associates, PLLC  
1220 L Street, Suite 700  
Washington, D.C. 20005

**Attorney for Respondent:** Daniel McCall, Assistant Attorney General  
Office of the Attorney General  
825 North Capitol St., N.E., 9<sup>th</sup> Floor  
Washington, D.C. 20002

1 Personally identifiable information is provided in the "Record of Proceeding" which is located on the last page of this Order and must be removed for 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 \_\_\_\_\_ Academy, a private school located in the District of Columbia. The student's tuition at \_\_\_\_\_ Academy 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 made pursuant to the District of Columbia Public Schools, Office of Special Education, Individualized Services Plan for Parentally Placed Private/Religious School Students.

The student is a resident of the District of Columbia; and identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA)". According to the student's May 15, 2006 IEP, his disability classification is learning disabled (LD).

On March 25, 2009, Petitioner's Attorney initiated an "Administrative Due Process Complaint" with the D.C. Public Schools ("DCPS"), Student Hearing Office (SHO), on behalf of parent and the student. The due process complaint alleged that DCPS denied the student a free appropriate public education (FAPE), by failing to: (1) develop an Individualized Education Program (IEP) for the student; and (2) comprehensively evaluate the student in all areas of suspected disability.

The due process hearing convened on April 29, 2009, at 9:00 a.m.; at Van Ness Elementary School, located at 1150 5<sup>th</sup> 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**

Petitioner's Attorney waived a formal reading of parent's due process rights.

#### **IV. ISSUES**

The following issues are identified in the *March 25, 2009* due process complaint:

- (1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to develop an Individualized Education Program (IEP) for the student?
- (2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to comprehensively evaluate the student in all areas of suspected disability?

#### **V. RELIEF REQUESTED**

- (1) A finding that DCPS denied the student a FAPE, by failing to fully evaluate and/or develop an Individualized Educational Program ("IEP").
- (2) DCPS shall conduct or fund the following evaluations for the student: (a) psychiatric, (b) speech and language, (c) clinical, and (d) occupational therapy.
- (3) Upon completion of the evaluations, DCPS shall convene an MDT/IEP meeting for the purpose of developing an IEP; discussing compensatory education; discussing and determining placement for the student.
- (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 the student.
- (5) Until such time as evaluations are completed and the student has an appropriate program and placement, DCPS shall fund the provision of special education tutoring services for this student at his current educational placement.
- (6) The student shall be entitled to compensatory education for denials of FAPE that have occurred.
- (7) That DCPS agrees to pay counsel for the parent's reasonable attorney's fees and related costs incurred in this matter.
- (8) All meetings shall be scheduled through counsel for the parent, Roberta L. Gambale, Esq., in writing, via facsimile, at 202-742-2097 or 202-742-2098.

#### **VI. DISCLOSURES**

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

**VII. DISCLOSURES SUBMITTED BY PARENT AS PETITIONER AND ADMITTED INTO THE RECORD AS EVIDENCE**

Petitioner's Exhibits 01 through Petitioner's Exhibits 16; and a witness list dated April 21, 2009.

**VIII. DOCUMENTS SUBMITTED BY DCPS AS RESPONDENT AND ADMITTED INTO THE RECORD AS EVIDENCE**

Respondent's Exhibits 01 through Respondent's Exhibits 02; and a witness list dated April 22, 2009.

**IX. PROCEDURAL POSTURE**

The due process complaint was filed on March 25, 2009. On April 1, 2009, the Hearing Officer issued a Notice of Pre-Hearing Conference, scheduling the pre-hearing conference for April 6, 2009, at 3:30 p.m.. The pre-hearing conference failed to proceed as scheduled, due to Respondent's failure to appear for the pre-hearing. A Pre-hearing Conference Order was issued on April 6, 2009, confirming the due process hearing for April 29, 2009, at 9:00 a.m..

On April 21, 2009, Petitioner filed "Petitioner's Motion for Default Judgment and/or Judgment on Pleadings". Disclosures were filed by Petitioner on April 21, 2009; and Respondent on April 22, 2009. The due process hearing convened on April 29, 2009, at 9:00 a.m., as scheduled.

**X. PRELIMINARY ISSUES**

As a preliminary matter, Petitioner renewed its Motion for Default Judgment and/or Judgment on the Pleadings, representing that DCPS' failure to respond to the complaint, impedes parent's ability to prepare for the hearing, and generally in a civil action such a failure would constitute an admission; and because DCPS failed to deny any of the facts, judgment on the pleadings is appropriate.

DCPS responded by agreeing that it failed to file a response because it had no documents to support it, is unable to challenge the complaint; and because there is no IEP, it rests on the record. DCPS also requests that the court consider established timeframes for completing an IEP, in deciding the appropriate relief.

DCPS withdrew its Motion to Compel parent's appearance at the hearing, because parent appeared at the hearing.

## XI. STATEMENT OF CASE

1. The student is \_\_\_\_\_ years of age, and an \_\_\_\_\_ grade student, attending \_\_\_\_\_ Academy, a private school located in the District of Columbia. The student's tuition at \_\_\_\_\_ Academy 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 made pursuant to the District of Columbia Public Schools, Office of Special Education, Individualized Services Plan for Parentally Placed Private/Religious School Students.

2. The student is a resident of the District of Columbia; and identified as disabled and eligible to receive special education and related services, 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)". The student's May 15, 2006 IEP identifies the student's disability classification as learning disabled (LD).

3. On May 15, 2006, DCPS developed an IEP for the student, providing for 10 hours per week of specialized instruction, and 1 hour per week of speech and language services. The student was placed in a combination general education and resource classroom.

4. The student was referred for evaluations by parent and the \_\_\_\_\_ Academy to the District of Columbia, Office of Special Education, \_\_\_\_\_ Center at \_\_\_\_\_ School; to assess the student's cognitive, emotional, and social functioning related to poor academic progress. The \_\_\_\_\_ Center interviewed parent on October 21, 2008; and completed a Social History Report.

The report indicates that it appeared that the student struggled academically since elementary school based on his mother's description of him being unfocused in the classroom, experiencing visual perception and written expression difficulties. The report also indicates that based on current information the student has an attendance problem which may be contributing to his academic difficulties.

5. On November 17-18, 2008, DCPS completed a Psychological Evaluation. The student was referred to the \_\_\_\_\_ Center by his mother and the \_\_\_\_\_ Academy to assess the student's cognitive abilities and levels of academic achievement for the purpose of determining his eligibility for special education services.

The report indicates that the student's psychological profile suggests the presence of a learning disability within the following academic areas: phonics, reading comprehension, spelling and written expression.

6. On January 6, 2009, Petitioner's Attorney forwarded to the Acting Principal, \_\_\_\_\_ Academy 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.

7. On January 6, 2009, Petitioner's Attorney forwarded to the Acting Principal, Academy 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 request was accompanied by a "Parental/Guardian Consent to Evaluate", executed by parent on December 11, 2008.

8. On January 9, 2009, DCPS convened a MDT meeting to review the current assessments and determine the student's eligibility for special education and related services. The team determined that if the student is found eligible, the team will develop the IEP and discuss placement. The student was determined eligible for special education services, as a student with a learning disability, in the areas of phonics, reading comprehension, spelling, and written expression. According to the general education teacher the student has difficulties across all areas; is unable to place thoughts on paper; and requires one on one instruction. According to the MDT meeting notes the student's teacher reports that the student is below the grade level.

9. On February 2, 2009, DCPS forwarded to parent a Letter of Invitation inviting parent to attend a Multidisciplinary Development Team (MDT) meeting to develop/review the student's IEP, discuss placement, discuss eligibility, discuss compensatory education, consider transition services needs, and review records to support the completion of services.

The Letter of Invitation proposed February 19, 2009 at 8:30 a.m. or 11:00 a.m., or February 29, 2009, at 8:30 a.m., to convene the MDT meeting.

10. On February 17, 2009, Petitioner's Attorney forwarded to the Special Education Coordinator or Designee at Academy a letter acknowledging receipt of its letter of invitation to convene a meeting on the student's behalf. The letter indicated parent's unavailability on the dates proposed and recommended two (2) alternate dates, and three (3) times to convene the meeting, on the dates proposed. The letter concluded by requesting confirmation of one of the proposed dates by close of business on February 20, 2009.

11. On February 27, 2009, DCPS forwarded to parent a Letter of Invitation inviting parent to attend a Multidisciplinary Development Team (MDT) meeting to develop/review the student's IEP, discuss placement, discuss eligibility, discuss compensatory education, consider transition services needs, and review records to support the completion of services. The Letter of Invitation proposed March 17, 2009 at 9:30 a.m., or 11:00 a.m., to convene the MDT meeting.

12. On March 3, 2009, the Education Advocate forwarded an email to parent's Attorney indicating that the Center had made efforts to convene a MDT meeting on behalf of the student, however, was unable to contact anyone at the law firm of Petitioner's Attorney; and inquiring whether it was necessary that she coordinate a meeting, on behalf of the student.

13. On March 4, 2009, Petitioner's Attorney forwarded a letter of representation to the Special Education Coordinator at \_\_\_\_\_ Academy, notifying the school of a change in counsel for parent; acknowledging the Letter of Invitation; accepting March 17, 2009, as the proposed date for the MDT meeting; and requesting confirmation of the proposed date and time for the meeting.

14. On March 9, 2009, DCPS forwarded to parent a "Confirmation of Meeting Notice", confirming the MDT meeting for March 17, 2009, at 1:00 p.m., at \_\_\_\_\_ Academy.

15. On March 11, 2009, Petitioner's Attorney forwarded a letter to the SEC at \_\_\_\_\_ Academy, acknowledging receipt of the letter of invitation, however, indicating the Education Advocate's unavailability on the date proposed for the MDT meeting. The letter proposed the afternoon of April 2, 2009, or April 3, 2009; and requested confirmation of the proposed date and time for the meeting.

16. On March 13, 2009, Petitioner's Attorney forwarded a letter to the SEC at \_\_\_\_\_ Academy, documenting a telephone conversation on that date, and an understanding that the SEC would fax copies of all evaluations completed for the student, meeting notes, with confirmation of one of the dates discussed for the MDT meeting.

17. On March 25, 2009, Petitioner's Attorney initiated an "Administrative Due Process Complaint" with the D.C. Public Schools ("DCPS"), Student Hearing Office (SHO), on behalf of parent and the student. The due process complaint alleged that DCPS denied the student a free appropriate public education (FAPE), by failing to: (1) develop an Individualized Education Program (IEP) for the student; and (2) comprehensively evaluate the student in all areas of suspected disability; in violation of "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")".

## **XII. WITNESSES**

### **Witnesses for Petitioner**

Parent  
Education Advocate

### **Witnesses for Respondent**

Respondent presented no witnesses.

## Witness Testimony

### Petitioner's Witnesses

#### Parent

Parent testified that the student is      years of age; an      grade student at the      Academy; and that the student was retained in the 1<sup>st</sup> grade. Parent testified that the student's teacher recommended evaluation of the student; and she requested evaluation of the student for special education services, in October, 2008, although uncertain of the date of the request. Parent testified that the student was evaluated at the school; although she is uncertain of the dates of the evaluations.

Parent testified that she attended a meeting on behalf of the student on January 9, 2009, without representation, and the student was determined learning disabled. Parent testified that the meeting's facilitator had an emergency and was unable to continue the meeting; and an IEP was not developed for the student. Parent also testified that she was subsequently contacted by DCPS to reconvene the meeting, although uncertain of the date of contact.

Parent testified that on March 13, 2009, she participated in a conference call with the Special Education Coordinator (SEC) at      Academy, to request the student's educational records; and discuss dates for a MDT meeting, on the student's behalf. Parent testified that she resides in a shelter, therefore, is unable to indicate for certain whether she received letters of invitation for a meeting at the shelter.

#### Education Advocate

The advocate testified to having a Masters Degree in Special Education, ten years of teaching children with special needs, reviewing evaluations, and conducting IEP team meetings. The advocate testified to experience reviewing student case files, IEPs, assessments, evaluations, and classroom observations.

The advocate testified that she reviewed the student's November, 2008 Psychological Evaluation and prior IEP team meeting notes dated January 9, 2009; and that on January 6, 2009, a request for evaluations was forwarded to DCPS.

The advocate recommends a psychological evaluation (clinical), because of some evidence of Attention Deficit Hyperactivity Disorder (ADHD), and to assess his social/emotional functioning; an Occupational Therapy Evaluation to assess the student's visual motor functioning and integration skills, considering the fact that the student is two grades below grade level; a Speech and Language Evaluation, to address the student's low scores in expression, and to determine if the student continue to require the services as provided in his 2006 IEP; a Vision Assessment; and Social History assessment.



During cross-examination, the advocate testified that she never met the student, is not a Speech and Language Pathologist; and is not qualified to review evaluations, however, as a special education teacher, has reviewed evaluations to review the student's academic achievement. The advocate testified that she is qualified to review the Woodcock Johnson tests of academic achievement, however, no other aspects of a Psycho-educational Evaluation.

The advocate testified that she had not observed the student in class or spoken with teachers or DCPS regarding the student; and is unable to confirm whether the student received the speech and language services provided in his 2006 IEP.

### **XIII. DISCUSSION AND CONCLUSIONS OF LAW**

#### **ISSUE 1**

**Whether DCPS denied the student a free appropriate public education (FAPE); by failing to develop an Individualized Education Program (IEP) for the student?**

#### **DISCUSSION**

Petitioner represents that IDEA guarantees to children the right to receive a free, individually appropriate public education. 20 U.S.C. §1400(d)(1)(A); and a free individually appropriate public education or a FAPE "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit from the instruction". See Board of Education Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 188-89 (1982).

Petitioner represents that District of Columbia municipal regulations have placed the burden on the local educational agencies to "ensure that procedures are implemented to identify, locate, and evaluate all children with disabilities residing in the District who are in need of special education and related services, including children with disabilities attending private schools, regardless of the nature or severity of their disabilities." D.C. Mun. Regs. Tit. 5, §3002.

Petitioner further represents that if after evaluations a student is determined to be eligible for special education services, pursuant to 34 C.F.R. §300.320(a)(4), the local and state educational agency is required to ensure that each student with a disability in need of services within its jurisdiction is provided with an IEP, consistent with the requirements of IDEA. Petitioner represents pursuant to 34 C.F.R. §300.324, in development of the IEP, certain factors must be taken into account, and the IEP team must consider:

- (i) The strengths of the child;
- (ii) The concerns of the parent for enhancing the education of their child;
- (iii) The results of the initial or most recent evaluation of the child; and
- (iv) The academic, developmental, and functional needs of the child.

Petitioner concludes that because the IEP is the mechanism through which a FAPE is delivered to disabled students, failure to provide the student with an appropriate IEP, is a denial of a FAPE. See Scott v. District of Columbia, (D.C. Cir) 03-1672 DAR (March 31, 2006)

Petitioner also concludes that the student has not been provided an IEP and/or related services made available; despite the fact that he was evaluated in November, 2008, and it is now March, and he remains without an educational program to meet his individualized needs; and is denied a FAPE.

Petitioner concludes that the Psycho-educational Evaluation indicates that the student is unfocused in class and the digit span tests fail to apply in this instance. Petitioner also concludes that the IEP was due for completion by February 9, 2009, within 30 days of the IEP team meeting, which failed to occur.

DCPS represents that efforts were made to convene a meeting to develop an IEP for the student, pursuant to 34 C.F.R. §300.323; and an IEP team meeting is necessary to determine whether additional evaluations are warranted. DCPS represents that baseline evaluations were completed; and Petitioner submitted a request for evaluations, prior to the January 9, 2009 meeting.

DCPS represents that there are no recommendations for evaluations or evidence supporting completion of the evaluations requested by parent; and there are subtests to assess attention issues, such as the digit span. DCPS represents that there is no need for the Conners assessment requested by Petitioner, because the student scored superior (16) on attention issues, therefore, there are no attention issues.

DCPS concludes that parent has not met its burden or any showing that there is a need for a speech and language evaluation, and if additional evaluations are necessary, it will be discussed at the meeting.

### **CONCLUSIONS OF LAW**

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 30.311 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.

The record reflects that on January 9, 2009, DCPS convened a MDT meeting to review the current assessments and determine the student's eligibility for special education and related services. The team agreed that if the student was found eligible, it would develop an IEP for the student and discuss placement. At the meeting, the team determined the student eligible for special education services, as a student with a learning disability, in the areas of phonics, reading comprehension, spelling, and written expression. However, the facilitator of the meeting had an emergency, and the meeting concluded without development of the student's IEP; or discussion regarding placement.

On February 2, 2009, DCPS forwarded to parent a Letter of Invitation inviting parent to attend a Multidisciplinary Development Team (MDT) meeting to develop/review the student's IEP, discuss placement, discuss eligibility, discuss compensatory education, consider transition services needs, and review records to support the completion of services. The Letter of Invitation proposed February 19, 2009 at 8:30 a.m. or 11:00 a.m., or February 29, 2009, at 8:30 a.m., to convene the MDT meeting. Thereafter, DCPS issued several Letters of Invitation, in an effort to reconvene the MDT meeting, however, due to the unavailability of Petitioner, parent, and the Education Advocate, the MDT meeting was not held.

The Hearing Officer finds that although DCPS exercised reasonable efforts to reconvene the MDT meeting to develop the student's IEP; and a significant aspect of the delay in reconvening the meeting is attributed to Petitioner's Attorney; the fact remains that DCPS failed to convene the IEP team meeting within the 30 day timeframe established by IDEA.

According to IDEA, 34 C.F.R. §300.323 (c)(1), DCPS was required to convene a meeting to develop the student's IEP, within 30 days of the determination that the student is disabled and is eligible to receive special education services, which occurred on January 9, 2009. Therefore, DCPS was required to convene a meeting to develop the student's IEP no later than February 9, 2009; which failed to occur. DCPS issued a Letter of Invitation inviting parent to attend an IEP team meeting to develop the student's IEP within the thirty day period, however, it proposed to convene the meeting to develop the IEP, on dates and times extending more than 30 days after the eligibility determination was rendered.

A significant period of time has elapsed since the eligibility determination, and as of the date of hearing, an IEP team meeting has not been held, the student has no IEP, and fails to receive the services he requires.

The Hearing Officer also finds that DCPS failed to ensure that a meeting to develop an IEP for the student was held within *30 days* of the January 9, 2009 determination that the student is disabled and requires special education services; and as a result, an IEP was not developed for the student, and the student fail to receive the services he is entitled to receive under the IDEIA.

In addition, according to IDEA, 34 C.F.R. §300.322 (d), an IEP team meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In such case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place.

The Hearing Officer finds that although DCPS failed to convene the IEP team meeting in a timely manner, more than reasonable efforts were made by DCPS to identify a mutually agreeable date and time to reconvene the MDT meeting with parent, to develop the student's IEP. It is well documented that the unavailability of parent, Petitioner's Attorney, and the Education Advocate, significantly hindered its efforts to reconvene the meeting. For these reasons, DCPS would be justified in convening the IEP team meeting to develop the student's IEP, without parent in attendance.

It is the Hearing Officers decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS failed to develop an IEP for the student, in a timely manner; in violation of "The Individuals with Disabilities Education Act, reauthorized as the Individuals with Disabilities Education Improvement Act of 2004", 34 C.F.R. §300.323 (c)(1).

## ISSUE 2

**Whether DCPS denied the student a free appropriate public education (FAPE); by failing to comprehensively evaluate the student in all areas of suspected disability?**

## DISCUSSION

Petitioner represents that The Individuals with Disability Act (IDEA) (P.L. 101-476) reauthorized as the IDEA Improvement Act of 1997 (IDEIA) (P.L. 105-17) 20 U.S.C. 1400 et. seq. and their current regulations, specifically the Code of Federal Regulations at 34 C.F.R. Part 300, further reauthorized as the IDEA Improvement Act of 2004 (P.L. 108-446) require that evaluations for a student be conducted upon parent's request for evaluations and/or a the referral of a child with a suspected disability by his teacher. 34 C.F.R. §300.302 provides as follows:

"(a) General. Each public agency must conduct a full and individual initial evaluation, in accordance with §§300.305 and 300.306, before the initial provision of special education and related services to a child with a disability under this part.

(b) Request for initial evaluation. Consistent with the consent requirements in §300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

Petitioner also represents that evaluations 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 individualized education-program". See, 20 U.S.C. 1414 (a); 1414 (a)(1)(e). Petitioner also represents that there is an obligation to ensure that a child is "assessed in all areas of suspected disability".

Petitioner represents that not only does the parent suspect that her child may require related services not addressed through the current evaluations conducts, but also that he may be suffering from another disabling condition in addition to a learning disability. Petitioner also represents that other health impairment is defined as "having limited strength, vitality, or alertness, including a heightened alertness to environment, that –

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder, or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child's educational performance.

Petitioner concludes that in this case at hand, the student's reported deficits in visual perception and written expression warrant the conducting of an occupational therapy evaluation, the student's deficits regarding language would warrant the conducting of a speech and language evaluation and the student's deficits regarding attention would warrant the administering of appropriate clinical measures such as the Conner's Scale or in the alternative, a psychiatric evaluation. "Here the public agency failed to conduct evaluations in these areas and as a result, the student has been denied a FAPE."

DCPS represents that an IEP team meeting is necessary to determine whether additional evaluations are warranted. DCPS represents that baseline evaluations were completed; and Petitioner submitted a request for evaluations, prior to the January 9, 2009 meeting.

DCPS represents that there are no recommendations for evaluations or evidence supporting completion of the evaluations requested by parent; and there are subtests to assess attention issues, such as the digit span. DCPS represents that there is no need for the Conners assessment requested by Petitioner, because the student scored superior (16) on attention issues, therefore, there are no attention issues.

DCPS concludes that parent has not met its burden or any showing that there is a need for a speech and language evaluation, and if additional evaluations are necessary, it will be discussed at the meeting.

## ANALYSIS

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.

Additionally, IDEA, 34 C.F.R. §300.304(c)(4) provides that DCPS shall ensure that a child 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.

Subparagraph (6) provides that in evaluating each child with a disability that the evaluation is **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.

The record reflects that on May 15, 2006, DCPS developed an IEP for the student, providing for 10 hours per week of specialized instruction, and 1 hour per week of speech and language services.

The record also reflects that in October, 2008, parent and the student's teacher at Academy referred the student to the District of Columbia, Office of Special Education, Center at School; to assess the student's cognitive, emotional, and social functioning related to poor academic progress.

On October 21, 2008, DCPS completed a Social History Report. The Social History Report indicates that the student is deficient according to school reports in reading, spelling, written language, and comprehension. According to the report, the student's mother described him as unfocused in the classroom, experiencing visual perception and written expression difficulties. The report also includes information from parent regarding in utero substance abuse.

On November 17-18, 2008, DCPS completed a Psychological Evaluation. The report indicates that the student's psychological profile suggests the presence of a learning disability within the following academic areas: phonics, reading comprehension, spelling and written expression.

The record also reflects that at the January 9, 2009, MDT meeting, parent reported that the student was not functioning at grade level; and the student's general education teacher reported that the student has difficulties across all areas; is unable to place his thoughts on paper; and requires one on one instruction. The teacher also reported that the student's academic level is below 8<sup>th</sup> grade; and there are concerns regarding the student's attendance.

The Hearing Officer finds that the student's prior IEP, evaluations, parent concerns, teacher reports, the student's academic and social history, grade retention and academic difficulties in all areas, is sufficient to warrant reevaluation of the student; and evaluations that are *sufficiently comprehensive* to identify all of the student's special education and related services needs, whether or not commonly linked to the learning disability category in which the student has been classified.

In addition, on January 6, 2009, Petitioner's Attorney forwarded to the Acting Principal, Academy 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 request was accompanied by a "Parental/Guardian Consent to Evaluate", executed by parent on December 11, 2008.

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 subparagraph (b)(1)(2), DCPS *must* reevaluate the student, if the *child's parent* requests a reevaluation.

Neither the IDEA, nor the D.C. Code of Municipal Regulations, establishes a timeframe in which an LEA must reevaluate a student. Absent an established timeframe to reevaluate the student, the Hearing Officer applies the "reasonableness" standard.

Applying the "reasonableness" standard, DCPS was required to reevaluate the student within a reasonable period of time after receiving parent's request for evaluation, on January 6, 2009. However, as of the date of hearing, DCPS failed to reevaluate the student, pursuant to parent's request. Nearly four (4) months, have elapsed since parent initiated the request for reevaluations, and provided written authorization and consent to reevaluate the student; which is-

more than a reasonable period of time to reevaluate the student. The Hearing Officer finds that DCPS failed to reevaluate the student, pursuant to parent's request, in violation of 34 C.F.R. §300.303 (a)(2).

It is the Hearing Officers' decision that Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to comprehensively evaluate the student in all areas of suspected disability, in violation of IDEA, 34 C.F.R. §300.304(c)(4) and (6).

### **Free Appropriate Public Education (FAPE)**

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

The FAPE requirement under IDEA, is applicable to substantive and procedural violations, which may result in a denial of a FAPE. In this matter, Petitioner alleged procedural and substantive violations of IDEA.

In alleging substantive violations under IDEA, a party challenges the *substantive* content of the educational services the disabled student is entitled to receive under the IDEA. The courts have also held that substantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process. Courts have also held that procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute denial of a FAPE under the IDEA. *See, Babb v. Knox County Sch. Sys.*, 965 F.2d 104, 109 (6th Cir. 1992); *W.G.*, 960 F.2d at 1484.

The procedural prong of the FAPE analysis, and the *first* prong of *Rowley*, in *The Board of Education of the Hendrick Hudson Sch. Dist. v. Rowley*, 459 U.S. 176 (1982), and *Doe*, 915 F.2d at 658, assesses whether DCPS complied with the procedural requirements of the IDEA, including the creation of an IEP that conforms to the requirements of the Act. However, a procedural violation of the IDEA, is not a per se denial of a FAPE.

The courts have held that even if we find that DCPS failed to comply with the procedural requirements of IDEA, such a finding does not necessarily mean that the Petitioners are entitled to relief; nor does it end our analysis. Rather, we must inquire as to whether the procedural violations result in a denial of FAPE, causing substantive harm to the student, or his parents. In other words, an IDEA claim is viable only if those procedural violations affected the student's substantive rights. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006).



The 2004 amendments to IDEA, at Section 615(f)(ii) limits the jurisdiction of administrative hearing officers to make findings that a child did not receive FAPE due to procedural violations, if the inadequacies:

- (I) impede the child's right to a free and appropriate public education;
- (II) significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or
- (III) caused a deprivation of educational benefit."

According to IDEA, 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 IDEA 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 failed to occur in this matter.

In addition, courts have held that although a student progresses academically, and advances from grade to grade, the public agency is not relieved of its obligation to ensure that the student receives a FAPE. In this matter, the student is not progressing academically, was retained in grade; and according to recent reports from his general education teacher, he continues to experience difficulties academically, across all areas; is unable to place his thoughts on paper, requires one on one instruction, and is academically below grade level.

The Hearing Officer finds that failure to comprehensively evaluate the student, pursuant to parent's request; and in a timely manner, is a substantive violation; not procedural such that a showing of harm is not required. *In Harris v. District of Columbia*, the court considered whether DCPS' refusal to fund a functional behavioral assessment that had been requested by the parent amounted to a denial of a FAPE. Memorandum Opinion, CA No.: 07-1422 (RCL) (D.D.C. 2008). The court, however, strongly disagreed with DCPS that the violation was procedural requiring a showing of harm holding that "[the] failure to act on a request for an independent evaluation is certainly not a mere procedural inadequacy; indeed, such inaction jeopardizes the whole of Congress' objectives in enacting the IDEA. Emphasis added. Harris at 10. Given this language, it is clear that DCPS' failure to reevaluate the student, within a reasonable period of time, is "certainly not a mere procedural inadequacy."

According to *Harris* “in an attempt to further Congress’ ambitious goals for the IDEA, the Supreme Court has focused on the centrality of the IEP as “the centerpiece of the statute’s education delivery system for disabled children.” *Honig*, 484 U.S. at 311. As such, an evaluation’s primary role is to contribute to the development of a sound IEP. *Cf. id.* at 311-12. Congress repeatedly emphasized throughout the [IDEA] the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness.” *Honig*.

DCPS’ failure to comprehensively evaluate the student, pursuant to parent’s request; and develop an IEP for the student, once determined eligible for special education services, has certainly compromised the effectiveness of IDEA, as applied to this student. The record reflects that the student is regressing and not progressing academically, and his academic and functional needs are not being met. Recent teacher reports indicate that the student has difficulties across all subject areas, and requires one on one instruction.

Recent evaluations, parent and teacher reports, and the student’s academic history clearly demonstrate that the student’s educational program is not specifically designed to address his needs, and fail to meet his academic and functional needs, warranting additional evaluations. In addition, the student’s last IEP of record is dated May 15, 2006; and there is no evidence that the student’s IEP was reviewed and revised at least annually, as required by IDEA.

The Hearing Officer finds that DCPS’ failure to comprehensively evaluate the student, pursuant to parent’s request; and develop an IEP in a timely manner, represents procedural inadequacies that impede the child’s right to a FAPE; significantly impedes parent’s opportunity to participate in all decisions regarding the student’s educational program, and the provision of a FAPE to the student; and result in deprivation of educational benefit to the student. The student

The Hearing Officer also finds that the procedural violations in question seriously infringes upon the parent’s opportunity to participate in the IEP process; and deprives an eligible student of an individualized education program specifically designed to address his special education needs, resulting in loss of educational opportunity and benefit, substantive harm to the student and parent.

It is the Hearing Officers’ Decision that DCPS’ failure to comply with the procedural and substantive requirements of IDEA, constitute denial of a FAPE to the student; in violation of “The Individuals with Disabilities Education Act (“IDEA”)”, Public Law 101-476, reauthorized as “The Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”)”.

A Motion for Judgment on the Pleadings, is a motion made after pleadings have been entered that requests the court to issue a judgment at that point. Under the Federal Rules of Civil Procedure, if matters outside of the pleadings are presented to the court when a motion for judgment on the pleadings is made, the motion will be treated as a motion for summary judgment; as in this case.

### **Motion for Summary Judgment**

A motion for summary judgment in United States District Court is governed by Rule 56 of the Federal Rules of Civil Procedure. Other pretrial motions, such as a "motion for judgment on the pleadings" or a "motion to dismiss for failure to state a claim upon which relief may be granted," can be converted by the judge to motions for summary judgment, if matters outside the pleadings are presented to – and not excluded by – the trial-court judge. In this matter, the court allowed the parties to present matters beyond the scope of the pleadings, therefore, the Hearing Officer converts the Motion for Judgment on the Pleadings to a Motion for Summary Judgment.

In U.S. legal practice summary judgment can be awarded by the court prior to trial, effectively holding that no trial will be necessary. Issuance of summary judgment can be based only upon the court's finding that:

1. there are no issues of "material" fact requiring a trial for their resolution, *and*
2. in applying the law to the undisputed facts, one party is clearly entitled to judgment.

Summary judgment is awarded if the undisputed facts and the law make it clear that it would be impossible for one party to prevail if the matter were to proceed to trial; and the court must consider all materials in the light most favorable to the party opposing the motion for summary judgment. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, (1970), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). *Anderson v. Liberty Lobby* enunciated the moving party's burden on summary judgment and for that reason it is so frequently cited by appellate courts when reviewing a trial court's grant of summary judgment that it is the most quoted Supreme Court case of all.

In reviewing the evidence, it is clear that DCPS had several opportunities to respond; and provide parent access to the student's educational records, however, failed in this regard. A significant period of time lapsed from January 6, 2009, the date of parent's request for the student's educational records; and the hearing, however, DCPS failed to satisfy IDEA's requirements in responding to parent's request for the student's educational records.

The Hearing Officer finds that DCPS failed to provide parent access to the student's educational records, without unnecessary delay, and no later than 45 days of the request; as required by IDEA. The Hearing Officer also considered the fact that DCPS failed to respond to the complaint; issue a Prior Notice, addressing allegations in the complaint; or present evidence or witnesses in its defense.

The Hearing Officer concludes that there are no genuine issues of material fact in this matter; and in applying the law to the undisputed facts, Petitioner is clearly entitled to judgment

as a matter of law. In considering all materials in the light most favorable to DCPS; the court finds that it is impossible for Respondent to prevail in this matter; and a Motion for Summary Judgment is warranted in this matter.

#### XIV. ORDER

Based on the aforementioned, it is hereby:

- (1) **ORDERED**, that Petitioner's Motion for Default Judgment is **DENIED**; and it is further
- (2) **ORDERED**, that Petitioner's Motion for Summary Judgment is **GRANTED**; and it is further
- (3) **ORDERED**, that DCPS shall convene an IEP team meeting within ten (10) calendar days from the date of this decision, to develop and finalize an IEP for the student, based on the Social History and Psychological Evaluations completed by the Center, parent and teacher input, and the student's academic performance; and it is further
- (4) **ORDERED**, that DCPS shall fund the following independent evaluations: Neuro-psychological, psycho-educational, formal classroom observation, speech and language, clinical, physical therapy, occupational therapy evaluations; and vision screening and test; and it is further
- (5) **ORDERED**, that within fifteen (15) calendar days of completion of the final independent evaluation, DCPS shall reconvene an MDT/IEP meeting for the purpose of reviewing and revising the student's IEP, as appropriate; discussing compensatory education; discussing and determining placement for the student; and it is further
- (6) **ORDERED**, that at the MDT/IEP team meeting referenced herein, 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 IEP, discuss compensatory education services, and placement; and it is further.
- (7) **ORDERED**, that until such time as independent evaluations are completed and the student has an appropriate program and placement, DCPS shall fund the provision of special education tutoring services for this student in areas of weakness identified in the Social History Report and Psychological Evaluation, at his current educational placement; and it is further
- (8) **ORDERED**, that in the event of DCPS' failure to comply with the terms of this Order, Petitioner's Counsel will contact the Special Education Coordinator at Academy; 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 all meetings shall be scheduled through counsel or the parent, Roberta L. Gambale, Esquire, in writing, via facsimile, at 202-742-2097 or 202-742-2098; and it is further
- (11) **ORDERED**, that this decision and order are effective immediately.

#### XV. APPEAL RIGHTS

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

*Ramona M. Justice*

5-7-09

\_\_\_\_\_  
Attorney Ramona M. Justice  
Hearing Officer

Date Filed: \_\_\_\_\_

cc: Assistant Attorney General, Daniel McCall  
Attorney Roberta Gambale (202) 742-2098