

DC Office of the State Superintendent of Education
Office of Compliance & Review

State Enforcement & Investigation Division

STUDENT HEARING OFFICE

Van Ness Elementary School

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Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

CONFIDENTIAL

In Re the Matter of:

Parent on behalf of Student *

Petitioner,

vs.

The District of Columbia Public Schools

Respondent.

CASE NO.

Complaint Date: 01/22/09

Hearing Date: 03/24/09, 04/23/09

Hearing Site:

Van Ness Elementary School

1150 5th Street, S.E., 1st Floor

Washington, D.C. 20003

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HEARING OFFICER DETERMINATION

Petitioner's Attorney:

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Chevy Chase, MD 20815

Respondent's Attorney:

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*Personally identifiable information is attached as an Index to this decision and must be removed prior to public distribution.

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JURISDICTION

The Due Process Hearing was convened and this Hearing Officer Determination ("HOD") and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA; 34 C.F.R. Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations (D.C.M.R.).

INTRODUCTION

On 01/22/09, a Due Process Complaint Notice ("Complaint") was filed by the maternal grandmother and legal guardian ("Parent" or "Petitioner") on behalf of the 11 year old student ("Student") alleging that the District of Columbia Public Schools ("DCPS") denied Student a Free Appropriate Public Education ("FAPE") in violation of IDEIA when DCPS failed to evaluate Student in all areas of suspected disability, when DCPS failed to develop an appropriate Individualized Education Program ("IEP"), when DCPS failed to implement Student's IEP, when DCPS failed to convene a valid IEP Team meeting, when DCPS wrongfully exited Student from special education, and when DCPS failed to provide an appropriate education during the 2008-2009 school year. Petitioner further contends that as a result of each of these failures, Student was denied a FAPE.

The parties did not engage in mediation or the resolution process prior to the due process hearing.

On 02/17/09, DCPS filed DCPS' AMENDED Response to Parent's Administrative Due Process Complaint Notice and Motion to Dismiss. DCPS moved for dismissal of the Complaint on the grounds that (1) some of the issues had previously been litigated and (2) there was no genuine issue of material fact on other issues. The Motion to Dismiss was addressed in an Interim Order (on DCPS' Second Motion to Dismiss) issued on 03/15/09, which identified the following issues that would go forward for litigation: (1) whether DCPS failed to conduct a speech and language assessment and an auditory processing evaluation; (2) whether DCPS took no action regarding the recommendations contained in the September 2006 psycho-educational evaluation and the August 2007 neuropsychological evaluation; (3) whether DCPS failed to implement Student's 06/11/07 IEP; (4) whether DCPS failed to convene a valid IEP Team meeting because a regular education teacher was not present at the meeting; (5) whether DCPS wrongfully exited Student from special education; and (6) whether DCPS failed to provide Student with an appropriate education during the 2008-2009 school year.

THE DUE PROCESS HEARING

The due process hearing convened on 03/24/09, but did not conclude due to an insufficient amount of time allotted for the hearing. The due process hearing reconvened and concluded on 04/23/09.

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Petitioner was represented by Carolyn Houck, Esq. ("Petitioner's Attorney") and DCPS was represented by Laura George, Esq. ("DCPS' Attorney"). Petitioner attended the due process hearing.

The attorneys discussed settlement prior to the due process hearing, but an agreement could not be reached.

Disclosures:

Petitioner's disclosure letter dated 03/17/09, contained Petitioner's Exhibits #1-37. DCPS objected to the wholesale admission of the exhibits at the beginning of the hearing, seeking instead to admit each exhibit one by one as it was referred to during the course of testimony. Petitioner's Exhibits #1-37 were admitted over objection. Petitioner's Supplemental Disclosure Letter dated 04/15/09, containing Petitioner's Exhibit #38, was admitted into evidence without objection.

DCPS' Disclosure Statement dated 03/17/09, contained DCPS' Exhibits #1-19, which were admitted into evidence without objection. DCPS' Supplemental Disclosure Statement dated 04/15/09 contained DCPS' Exhibits #20-22, which were admitted into evidence without objection.

Witnesses:

Witnesses for Petitioner included: (1) Petitioner, (2) Nicole Zietlin, expert psychologist, (3) Director of Clinical Coordinator at _____ and (4) _____ (via telephone).

DCPS did not present any witnesses.

Relief requested:

Petitioner requested the following relief at the due process hearing (as modified from the relief requested in the Complaint): (1) a finding of a denial of a FAPE on issues #1-6; (2) DCPS to place and fund Student at a private school of Petitioner's choice; (3) DCPS to reimburse/fund Student's placement at _____ from the time of enrollment until Student is enrolled in an appropriate placement; (4) DCPS to convene an MDT meeting to develop an IEP and determine an appropriate placement; and (5) DCPS to fund independent speech/language and auditory evaluations.

Stipulation #1 – At an IEP meeting on 05/30/08 at _____

Student was determined to be ineligible for special education services.

Stipulation #2 – The MDT convened on 03/17/09 for an eligibility determination meeting and Parent was present with Parent's advocate. Student's evaluations were reviewed and Student was determined to be eligible for special education with a disability classification

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as a student with Multiple Disabilities ("MD"), i.e., Other Health Impaired ("OHI") and Emotionally Disturbed ("ED").

FINDINGS OF FACT

#1. The psycho-educational evaluation dated 10/05/06 (*Petitioner's Exhibit #6, Psycho-educational Evaluation dated 10/05/06*) was provided to the Special Education Coordinator at _____ on 11/28/06 with a request to conduct the neurological assessment, neuropsychological assessment, and the occupational therapy assessments recommended in the psycho-educational evaluation. (*Petitioner's Exhibit #7, Letter from Attorney John Straus dated 02/21/07*).

#2. The Complaint in this case was filed on 01/22/09. (*Judicial notice of date Complaint was filed with the Student Hearing Office*).

#3. On 05/04/07, the independent psycho-educational evaluation dated 10/05/06 was formally reviewed by DCPS and determined to be a valid and reliable assessment. (*Petitioner's Exhibit #6, DCPS Review of Independent Assessment dated 05/04/07*). On 10/23/07, the MDT reviewed the 10/03/06 independent psycho-educational assessment that was presented to the MDT by the DCPS psychologist. (*DCPS' Exhibit #5, MDT Meeting Notes dated 10/23/07*).

#4. On 10/22/07, the independent neuropsychological evaluation dated 08/20/07 was formally reviewed by DCPS and determined to be a valid and reliable assessment. (*Petitioner's Exhibit #11 and DCPS' Exhibit #2, DCPS Review of Independent Assessment dated 10/22/07*). On 10/23/07, the MDT reviewed the 08/20/07 independent neuropsychological evaluation that was presented to the MDT by the DCPS psychologist. (*DCPS' Exhibit #5, MDT Meeting Notes dated 10/23/07*). The MDT recommended that Student's diagnosis remain the same, and recommended that Student continue to receive special education services, school based counseling and a family psychologist. The MDT, after review of the neuropsychological evaluation, ultimately recommended that Student remain at the same school. (*DCPS' Exhibit #4, HOD dated 02/29/08*).

#5. On 06/09/06, while Student attended _____ School, an IEP was developed that prescribed 26.0 hours/week of specialized instruction and 1.5 hours/week of psychological services, with services provided 85% not in a general education setting. Student continued to be eligible for special education services as a student with Multiple Disabilities ("MD"), i.e., Other Health Impaired ("OHI"), Emotionally Disturbed ("ED"), and Learning Disabled ("LD"). _____ School _____ with a self-contained ED program with no more than 9 students in the program and with a certified teacher and aide, was offered as a school placement for the 2006-2007 school year. Student was granted Extended School Year Services ("ESY") because Student had problems with retaining information and processing, and ESY was deemed necessary by the MDT for continuity in order for Student to benefit from Student's education. Petitioner agreed with the provision of services contained in the IEP and signed the IEP. (*Petitioner's Exhibit #5, IEP and MDT/IEP Meeting Notes dated 06/09/06*).

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#6. On 10/23/07, while Student attended _____ an IEP was developed that prescribed 20 hours/week of specialized instruction, 1.0 hour/week of psychological services, and .5 hours/week of occupational therapy. Student continued to be eligible for special education services as a student with MD/OHI. At the time the 10/23/07 IEP was developed, Student had difficulty copying shapes and required occupational therapy. A 09/21/06 WISC IV revealed that all scores with the exception of processing speed were in the average to high average range, and the low processing speed score depressed Student's overall test score. It was noted by Student's special education teacher that Student lacked organizing skills, could follow cues for redirection and would comply with redirection. It was noted by the school social worker that Student made progress in developing social emotional goals for the 2007-2008 school year in that Student reduced from ongoing confrontations with peers, and could articulate learned coping skills as well as verbalize feelings. Petitioner noted that there was no confusion in the classroom. The participating psychologist at the MDT meeting recommended continued special education services, school based counseling, and a family psychologist to address family issues; and noted that a 08/20/07 neuropsychological evaluation indicated that Student gets distracted and functions in the low average range on test results on Attention/Executive Function Domain Evaluation. At the MDT meeting on 10/23/07, the MDT felt that Student did not require a self-contained classroom, but Petitioner did not agree. The MDT proposed a combination setting on a trial basis with a reduction of specialized instruction to 20 hours/week, and Petitioner reluctantly agreed verbally, but did not sign the IEP indicating agreement to the contents of the IEP or consent to implementation of services contained in the IEP. A general education teacher was not present at the 10/23/07 MDT/IEP meeting where Student's curriculum was reduced to a combination setting, i.e., regular education plus special education. (*Petitioner's Exhibit #12, IEP dated 10/23/07; DCPS' Exhibit #5, MDT Meeting Notes dated 10/23/07*).

#7. A 10/05/06 psycho-educational evaluation revealed that Student's cognitive ability was in the Low Average range, but Student's academic achievement testing indicated standard scores in the Average Range in all areas tested. However, Student's processing speed scores fell within the severe cognitive deficiency range, which gave rise to the conclusion that Student experiences extreme difficulty when first presented with new learning materials; however, once Student incorporates the new material, the testing suggests that Student can adequately store the information into memory and apply it to a variety of visual-perceptual and verbal experiences. The testing also revealed that Student presented issues of insecurity and need for support, inadequacy, tendencies toward impulsivity, low self-assurance and aggression, all of which can significantly impede functioning within a classroom setting; and Student needed special education services in the areas of new information input, mathematics, and social/psychological supports within the school setting. As far back as 1st grade, although Student received average grades, Student's behavior problems resulted in placement in a full time special education class. (*Petitioner's Exhibit #6, Psychoeducational Evaluation administered on 09/23/06 and dated 10/05/06*).

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#8. A neuropsychological evaluation dated 08/20/07 indicated that Student was performing well below expectation in comparison to same-age peers in the areas of Attention/Executive Function Core Domain, Sensorimotor Core Domain, as well as Memory and Learning Core Domain. Test results indicated significant difficulties with comprehension, memory for complex instructions, and attention, and as a result, Student would require frequent monitoring and frequent rephrasing, as well as demonstration of tasks. The inadequate comprehension suggested that Student was likely to have problems completing complex tasks at home and in school. The neuropsychological evaluation recommended that Student would benefit from extra time to allow for the completion of assignments, and should have directions repeated in order to ensure that Student comprehends the directions prior to starting a task. (*Neuropsychological Evaluation dated 08/20/07*).

#9. An educational evaluation dated 12/04/07 revealed that Student's academic skills and fluency with academic tasks were both within the average range when compared to others at Student's grade level. Student's performance was average in broad reading, mathematics, and math calculation skills when compared to others at Student's grade level. (*Petitioner's Exhibit #13, Educational Evaluation dated 12/04/07*).

#10. A psychological evaluation dated 05/05/08 indicated that Student's general cognitive ability was within the Average range on intellectual functioning; Student's verbal and nonverbal reasoning abilities were in the Average range; Student's ability to sustain attention, concentrate, and exert mental control was within the Average range; and Student's ability in processing simple or routine visual material without making errors was in the Low Average range when compared to peers. Processing visual material quickly was an area that Student performed poorly as compared to nonverbal reasoning ability. Processing speed is an indication of the rapidity with which Student can mentally process simple or routine information without making errors. Because learning often involves a combination of routine information processing (such as reading) and complex information processing (such as reasoning), a weakness in the speed of processing routine information may make the task of comprehending novel information more time-consuming and difficult for Student. Regarding social-emotional functioning, Student demonstrated the ability to maintain adequate self-control and comply with school rules; Student was able to establish and maintain appropriate relationships with both peers and adults; Student did not appear to be exhibiting behavior or emotional problems that negatively influence academic progress; and Student did not demonstrate characteristics of an emotional disability. (*Petitioner's Exhibit #15, Psychological Evaluation dated 05/05/08*).

#11. An occupational therapy evaluation dated 05/12/08 indicated that Student had been receiving occupational therapy services for the past three years to address fine motor, handwriting deficits, and visual motor integration deficits. At the time of the 05/12/08 occupational therapy evaluation, Student demonstrated average visual motor integration, visual motor and fine motor coordination, and good handwriting skill. Occupational therapy goals on Student's current IEP had been mastered, and it was recommended that occupational therapy intervention be discontinued.

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(Petitioner's Exhibit #17, Occupational Therapy Evaluation dated 05/12/08).

#12. On 03/05/08, the MDT at _____ met, and the general education teacher reported that Student was able to keep up with reading. There was no indication in the MDT notes that Student was floundering behaviorally or academically in the combination general education and special education environment. Student's school adjustment was such that the MDT determined that Student should be re-evaluated to determine whether special education services were still warranted. *(DCPS' Exhibit #6, MDT Meeting Notes dated 03/05/08).*

#13. On 05/30/08, the MDT determined that Student's cognitive abilities were in the Average range, Student's verbal reasoning and perceptual reasoning were in the Average range, Student's social-emotional functioning had improved significantly during the past two years, Student related well to peers and school staff, Student followed school rules and demonstrated the ability to remain on-task until an assignment was completed, Student's academic skills were in the Average range, Student did not exhibit any emotional deficits which negatively affected Student's academic achievement, Student had met Student's occupational therapy goals, and despite Petitioner's concerns about Student being exited from special education, the MDT determined that Student no longer qualified for special education services under IDEA. Petitioner did not agree and felt that Student needed additional support to transition Student to a full general education curriculum. *(DCPS' Exhibit #6, MDT Meeting Notes dated 05/30/08; Testimony of Petitioner).*

#14. Petitioner enrolled Student at _____ at the beginning of the 2008-2009 school year and Student participated in the general education curriculum until December 2008, at which time Petitioner withdrew Student from school. While at _____ Student performed poorly in school and couldn't keep up with the class, could not stay focused in class, could not do homework correctly, was failing with grades of "F's" and one "D," was suspended for fighting with other children, showed outbursts of anger and violence, and was anxious, depressed and confused about the prospect of repeating the 6th grade. Emotionally, Student was regressing. *(Testimony of Petitioner).*

#15. In August 2008, Petitioner was informed by _____ that Student's academic records had been received. In October 2008, Petitioner contacted _____ expressing concern about Student's inability to keep up with the class and informed the school that Student previously had been in special education. *(Testimony of Petitioner).*

#16. In December 2008, Petitioner withdrew Student from _____ because Petitioner felt that Student was psychologically and physically endangered (by bullies). *(Testimony of Petitioner).* Since January 5, 2009, Student has been attending _____ where Student has been provided with 1:1 tutoring from 9:00 a.m. to 2:30 p.m. until spring break, and then group tutoring from 3:00 p.m. – 6:00 p.m., for one hour each day in the areas of math, reading and writing remediation.

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(*Testimony of Petitioner; Testimony of* _____ *Director of* _____ *Students*
 placed at SOT are funded by DCPS when placed there pursuant to HODs, Settlement
 Agreements, and compensatory education plans. (*Testimony of* _____ *Director*
of _____)

#17. On 03/17/09, the MDT convened for an eligibility determination meeting and Parent was present with Parent's advocate. Student's evaluations were reviewed and Student was determined to be eligible for special education with a disability classification of Multiple Disabilities ("MD"), i.e., Other Health Impaired ("OHI") and Emotionally Disturbed ("ED"). (*Stipulation #2*). On 04/14/09, an IEP was developed that prescribed 20 hours/week of specialized instruction and 1 hour/week of psychological counseling, with services to be provided in a combination general education and resource classroom. (*DCPS' Exhibit #21, IEP dated 04/14/09*).

#18. On 04/14/09, a Prior Notice was issued by DCPS for Student's placement in an inclusion classroom at _____ (*DCPS' Exhibit #22, Prior Notice dated 04/14/09*). There are three special education classrooms at Johnson MS; one where students were in their seats and engaged in the learning process, one where students were moderately disengaged from the learning process, and one where students were very disengaged from the learning process. (*Testimony of Petitioner*).

#19. _____ School is a full time, non-public special education school for Students with disability classifications of ED, LD and Autism Spectrum. No general education is provided at _____ School. (*Testimony of* _____ *Clinical Coordinator at* _____ *School*).

#20. On 11/07/08, Petitioner's representative sent a letter to DCPS requesting that Student be re-evaluated in all areas of disability. (*DCPS' Exhibit #14, Correspondence from Karen Plowden dated 11/07/08*).

#21. On 12/17/08, Petitioner's Attorney sent a letter to DCPS indicating Petitioner's immediate intent to place Student in a private program because continued placement at _____ would result in serious emotional harm to Student. (*DCPS' Exhibit #19, Correspondence from Carolyn Houck, Esq. dated 12/17/08*).

#22. On 01/05/09, DCPS sent Petitioner a Letter of Invitation for a meeting on 01/12/09 or 01/15/09 regarding reinstatement of special education services, development of an IEP, and development of a student evaluation plan. (*DCPS' Exhibit #16, Letter of Invitation dated 01/05/09*).

DISCUSSION AND CONCLUSIONS OF LAW

"The burden of proof shall be the responsibility of the party seeking relief. Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or

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adequate to provide the student with a FAPE.” 5 D.C.M.R. 3030.3. “The burden of proof in an administrative hearing...is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 44 IDELR 150 (2005).

Issue #1 - Whether DCPS failed to evaluate Student in all areas of suspected disability, thereby denying Student a FAPE? Petitioner alleges that although a September 2006 independent psycho-educational evaluation does not recommend a speech and language evaluation or an auditory processing evaluation, Petitioner contends that these two evaluations are warranted because the psycho-educational evaluation indicates processing deficiencies more than 2 standard deviations below the mean, in the extremely low range. More specifically, Petitioner alleges that DCPS failed to conduct a speech and language assessment and an auditory processing evaluation, thereby denying Student a FAPE?

34 C.F.R. 300.507(a)(2) states that the due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint.

In this case, the evidence showed that the 10/05/06 psycho-educational evaluation that formed the foundation of Petitioner’s allegation was forwarded to DCPS on 11/28/06. (*Finding of Fact #1*). The letter forwarding the psycho-educational evaluation to DCPS requested that DCPS conduct three evaluations recommended in the psycho-educational evaluation, but the letter did not request an auditory evaluation or a speech and language evaluation. In fact, the psycho-educational evaluation indicated that Student’s scores were in the average to above average range on the 10/05/06 evaluation and in a previous speech and language evaluation. (*Finding of Fact #7*). Substantively, there was no reason to conduct a speech and language evaluation or an auditory evaluation based on a review of the 10/05/06 psycho-educational evaluation, and in this regard Petitioner failed to meet its burden of proof that these evaluations were warranted and necessary.

Also, in this case, Petitioner fails on this claim because this claim falls outside of the statute of limitations set by 34 C.F.R. 300.507(a)(2). DCPS was on notice as of 11/28/06 that Student had processing deficiencies when it received a copy of the psycho-educational evaluation. The processing deficiencies delineated in the 10/05/06 psycho-educational evaluation formed the basis of Petitioner’s allegation in this Complaint. The statute of limitations for this claim expired on or about 11/28/08, and since the Complaint was filed on 01/22/09 (*Finding of Fact #2*), Petitioner’s claim falls outside of the statute of limitations.

Petitioner failed to meet its burden of proof on Issue #1.

Issue #2 - Whether DCPS failed to develop an appropriate IEP, thereby denying Student a FAPE? Petitioner specifically alleges that DCPS took no action regarding the recommendations contained in the September 2006 psycho-educational

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evaluation and the August 2007 neuropsychological in that DCPS received the evaluations, but they were never discussed at an MDT meeting. Alternatively, Petitioner alleges that DCPS met twice since receiving these evaluations, but ignored the reports during the meeting, as if they didn't exist.

Both the 10/05/06 independent psycho-educational evaluation and the 08/20/07 independent neuropsychological evaluation were reviewed by DCPS and determined to be valid and reliable assessments. Both of these evaluations were presented to the MDT by the participating DCPS psychologist at the MDT meeting on 10/23/07. On 10/23/07, the MDT recommended that Student's diagnosis remain the same, and recommended that Student continue to receive special education services, school based counseling and a family psychologist. The MDT, after review of the neuropsychological evaluation, ultimately recommended that Student remain at the same school. (*Finding of Fact #3, #4*).

Petitioner's allegations with respect to this issue do not state with any specificity what action the MDT failed to take based on review of these evaluations, and how those failures would have been a violation of IDEIA. Therefore, the Hearing Officer concludes that the 10/05/06 independent psycho-educational evaluation and the 08/20/07 independent neuropsychological evaluation were reviewed by the MDT on 10/23/07, and the MDT took whatever action it deemed appropriate. Petitioner has not specifically alleged or proven any violation of IDEIA.

Petitioner failed to meet its burden of proof on Issue #2.

Issue #3 - Whether DCPS failed to implement Student's 06/11/07 IEP, thereby denying Student a FAPE? Petitioner specifically alleges that DCPS failed to implement Student's 06/11/07 IEP when it failed to provide the required related services or the full 26 hours of specialized instruction from 06/11/07 until the present time.

Petitioner did not present any evidence on this issue and failed to meet its burden of proof on Issue #3.

Issue #4 - Whether DCPS failed to convene an IEP Team meeting with all necessary members, thereby denying Student a FAPE? Petitioner specifically alleges that at the October 2007 MDT/IEP team meeting, Student was placed in regular education part-time, but that no regular education teacher participated in the meeting when Student's services were reduced, and this resulted in the denial of a FAPE.

A school district is required to "ensure that the IEP team for each child with a disability includes...at least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment)." 34 C.F.R. 300.324(a).

In this case, the evidence was clear that a general education teacher was not present at the MDT/IEP meeting where Student's special education services were reduced from 27.5 hours/week in a self-contained classroom to 20 hours/week with

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participation in a general education curriculum. (*Finding of Fact #5, #6*). Failure to include a regular education teacher constitutes a technical or procedural violation of IDEIA.

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The evidence in this case also was clear that Petitioner did not agree with removing Student from a self-contained ED classroom and integrating Student into a general education curriculum, even on a trial basis. (*Finding of Fact #6*). In *Deal v. Hamilton County Bd. Of Educ.*, 392 F3d 840 (CA 6, 2004), the Court explained that "the rationale for requiring the attendance of a regular education teacher is closely tied to Congress' "least restrictive environment" mandate. The input provided by a regular education teacher is vitally important in considering the extent to which a disabled student may be integrated into a regular education classroom and how the student's individual needs might be met within that classroom." In *Deal*, one of the Deals' main objections to the IEP was that it did not provide for sufficient integration. The Court in *Deal* stated that "the absence of the unique perspective that could have been provided by a regular education teacher therefore had a real impact on the decision-making process," and the court reversed the district court's decision and held that the absence of the general education teacher caused substantive harm to the student and to the student's parents, and thus there was a denial of a FAPE.

The requirement of having a general education teacher participate in the IEP meeting when the meeting addresses the least restrictive environment ("LRE") with the possibility of placement in general education when the LRE setting was of prime concern to the parents, was driven home in *Allen Park Public Schools*, 5 ECLPR 53 (2007). Here too, the Court reversed the district court's decision and held that the procedural violation was sufficient to find a denial of a FAPE.

Of particular note in this case was the fact that Petitioner never agreed with placing Student in a general education curriculum (*Finding of Fact #13*) and when during the 2008-2009 school year, Student was placed 100% in a general education curriculum and woefully failed, the reason for the opposition to the reduction and elimination of special education services became clear. Student, familiar with the teachers and program at _____ was able to adjust to the reduction in special education services while at _____ but when Student went to the new school environment _____ for the 2008-2009 school year with no special education support services intact, Student performed miserably. (*Finding of Fact #14*).

Despite the fact that there was no evidence that Student suffered, regressed or was educationally harmed by the reduction of services from 10/23/07 until the next IEP was

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developed on 05/30/08 (*Finding of Fact #7, #9, #10, #11, #12, #13*), the Hearing Officer concludes that Student was denied a FAPE because the failure to include the general education teacher in the IEP meeting significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student when the Student's curriculum was being changed to include participation in general education, and Petitioner opposed this change in services.

Petitioner met its burden of proof on Issue #4.

Issue #5 - Whether DCPS wrongfully exited Student from special education, thereby denying Student a FAPE? On 05/30/08, the IEP Team at determined that Student was ineligible for special education services. (*Finding of Fact #13*). Petitioner alleges that this determination of ineligibility was wrong in that the IEP Team did not consider the evaluations in Student's file that indicated that Student was eligible for special education; and Guardian objected to the determination of ineligibility. More specifically, Petitioner alleges that the IEP Team didn't consider the following evaluations: (1) a February 2005 independent psychiatric evaluation, (2) a September 2006 independent psycho-educational evaluation, (3) a March 2007 independent occupational therapy evaluation, (4) an August 2007 independent neuropsychological evaluation, (5) a December 2007 DCPS educational evaluation, (6) a May 2008 DCPS psychological evaluation, and (7) a May 2008 DCPS occupational therapy evaluation.

Student transitioned from 26.5 hours/week of specialized instruction to 20 hours/week of specialized instruction without incident or regression over a four months period of time while Student attended (*Finding of Fact #5, #6, #7, #9, #10, #11, #12, #13*). Due to this successful adjustment, the MDT completed two evaluations to determine whether Student should be exited from special education (*Finding of Fact #10, #11, #12*), i.e., a psycho-educational evaluation and an occupational therapy evaluation, both of which indicated that Student was functioning in an Average range when compared to peers. Based on these two evaluations, the MDT, over the objection of Petitioner, determined that Student no longer required special education services for success in the academic environment. Petitioner expressed concern about support services to transition Student into a full general education environment. (*Finding of Fact #13*).

34 C.F.R. 305(e)(1) requires that the public agency evaluate a child with a disability before determining that the child is no longer a child with a disability. DCPS followed this procedure when it conducted a psycho-educational evaluation and an occupational therapy evaluation. The specific components of Student's special education services, i.e., specialized instruction, psychological counseling and occupational therapy, were addressed in the psychological evaluation dated 05/05/08 and the occupational therapy evaluation dated 05/12/08. These evaluations indicated that Student's academic skills were average and that occupational therapy was no longer necessary. Based on these evaluations, DCPS terminated special education services, over the objection of Petitioner. (*Finding of Fact #13*).

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The record showed that Student had been in a full time special education program from the 1st grade until 10/23/07. (*Finding of Facts #6, #7*). Student's 08/20/07 neuropsychological evaluation, available to the MDT on 05/30/08, should have been scrutinized more carefully. It was documented that Student's academic skills and cognitive level were average, but that Student performed well below expectation in the areas of Attention/Executive Function Core Domain, Sensorimotor Core Domain, as well as Memory and Learning Core Domain. Low functioning in these areas indicated significant difficulties with comprehension, memory for complex instructions, and attention, and as a result, Student would require frequent monitoring and frequent rephrasing, as well as demonstration of tasks. (*Finding of Fact #8*). Student's low processing speed was also documented in the 05/05/08 psychological evaluation that the MDT used in determining that Student should be exited from special education. The 05/05/08 psychological evaluation indicated that although Student's general cognitive ability, verbal and nonverbal reasoning abilities, ability to sustain attention, concentrate, and exert mental control was within the Average range, Student's ability in processing simple or routine visual material without making errors was in the Low Average range, and processing visual material quickly was an area that Student performed poorly in. And, because learning often involves a combination of routine information processing (such as reading) and complex information processing (such as reasoning), a weakness in the speed of processing routine information may make the task of comprehending novel information more time-consuming and difficult for Student. (*Finding of Fact #10*).

The Hearing Officer concludes that while at _____ Student was able to perform well academically with a reduction in special education services because the environment was familiar to Student, and because the 20 hours/week of specialized instruction and 1.0 hour/week of psychological services enabled Student to perform on par with non-disabled peers. When Student moved to _____ at the beginning of the 2008-2009 school year, Student's adjustment was disastrous because it was a new school environment with the introduction of new educational materials, and because Student had low processing speed and without special education support services, Student could not process the educational material at all.

The Hearing Officer concludes that the MDT erred when it terminated special education services for Student on 05/30/08. The MDT should have been aware that Student would require extra time and extra help in processing information and allowed for either the same level of services or a trial reduction of services, but to jump from 20 hours/week to zero hours/week was a mistake, and as a result, Student was denied a FAPE. This was readily apparent by Student's complete failure to succeed in the general education curriculum at _____ (*Finding of Fact #14*).

The Hearing Officer also concludes that (1) Student's low executive functioning was the primary reason Student did not experience success in a new school environment where there were no supplementary supports to assist Student with the comprehension of new educational material, and (2) Student's neuropsychological profile of low executive functioning will always make it impossible for Student to succeed in a full time general

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education environment. This should have been evident to the MDT, particularly the participating psychologist.

Petitioner met its burden of proof on Issue #5.

Issue #6 - Whether DCPS failed to provide Student with an appropriate education during the 2008-2009 school year, thereby denying Student a FAPE?

Petitioner alleges that since September 2008, Petitioner has requested that Cesar Chavez PCS develop an IEP for Student because Student's behavior and poor grades indicated that Student needed special education services. Petitioner also alleges that since November 2008, the school had promised to convene an MDT meeting, but had not done so as of the date of the filing of the Complaint.

The conclusion reached by the Hearing Officer on Issue #5, that DCPS wrongfully exited Student from special education on 05/30/08 necessarily means that DCPS failed to provide Student with an appropriate education for the 2008-2009 school year. Student was sent to as a general education student without an IEP, and that proved to be academically fatal for Student who failed to thrive, regressed emotionally, and failed nearly all classes. The general education curriculum at for the 2008-2008 school year was an inappropriate educational program for Student, and despite the fact that Petitioner expressed concerns to the school regarding the inappropriateness of Student's educational program, DCPS made no effort to evaluate Student until 01/05/09. (*Finding of Fact #15#20, #21, #22*).

Petitioner met its burden of proof on Issue #6.

CONCLUSION

Petitioner met its burden of proof on Issues #4, #5, and #6, and the Hearing Officer concludes that there was a denial of a FAPE on each of these issues. Student has a current IEP that prescribes a combination general education and special education setting with 20 hours/week of specialized instruction and 1 hour/week of psychological services. (*Finding of Fact #17*), and therefore the request for relief for DCPS to develop an IEP is moot. Placement at School, the relief requested by Petitioner, is inappropriate because School cannot implement Student's IEP and is not the least restrictive environment. (*Finding of Fact #19*). A Prior Notice of placement to suggests that Student's IEP can be implemented at and has three special education classes that will potentially meet Student's needs (*Finding of Fact #18*). Therefore, the Hearing Officer concludes that is an appropriate placement for Student. There was no evidence in the record that the special education program at was an inappropriate placement. Student was successful at when Student had 20 hours/week of specialized instruction and 1 hour/week of psychological counseling in a combination setting, and the MDT correctly surmised that 21 hours/week of special education in a combination setting again would be adequate and appropriate for Student.

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Regarding Petitioner's request for relief for DCPS to reimburse/fund Student's placement at _____ from the time of enrollment until Student is enrolled in an appropriate education program, there is no doubt that Student was denied a FAPE while attending _____ and that DCPS should have taken steps to evaluate Student for special education services. Petitioner testified credibly regarding Student's psychological and emotional decline as a result of Student's unsuccessful adjustment at _____ (*Finding of Fact #14*). _____ was either slow or non-responsive in addressing the educational needs of Student, despite Petitioner's concerns and despite letters from Petitioner's representatives. (*Finding of Fact #15, #20, #21*). DCPS did not offer an invitation to meet to develop an IEP until 01/05/09 (*Finding of Fact #22*), the same day that Student began attending SOT (*Finding of Fact #16*). If Petitioner had met with DCPS on 01/12/09 or 01/15/09, the dates proposed in DCPS' Letter of Invitation dated 01/05/09, an IEP could have been developed and an appropriate school placement could have been made available to Student. Instead, Petitioner chose not to meet with DCPS and to keep Student at SOT at Petitioner's own risk, not to mention keeping Student out of school entirely.

Pursuant to 34 C.F.R. 300.148(c), "if the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the State Education Agency and the Local Education Agency."

Petitioner amply demonstrated the need for a different placement, and DCPS' non-responsiveness to Student's academic needs. However, *District of Columbia v. Abramson*, 493 F. Supp 2d 80 (D.D.C. 2007) (48 IDELR 96) provides that parents who place their children in private schools without the consent of local school officials are entitled to reimbursement only if a federal court finds that the public agency violated IDEA, that the private school placement was an appropriate placement, and that the cost of the private education was reasonable. Likewise, in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), the court held that a court may order reimbursement for a parent who unilaterally withdraws his or her child from a public school that provides an inappropriate education under the Act and enrolls the child in a private school that provides an education that is otherwise proper under the Act, but does not meet the State standards that apply to education provided by the SEA and LEAs. The Court noted that these standards apply only to public agencies' own programs for educating children with disabilities and to public agency placements of children with disabilities in private schools for the purpose of providing a program of special education and related services.

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The purpose of IDEIA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1

In this case, Petitioner alleged and proved that Student was not receiving special education services at _____ and because of Petitioner's concerns about Student's emotional stability at _____, Petitioner withdrew Student from school and then enrolled Student at SOT. However, there was no evidence in the record that _____ provided any special education or related services to Student, nor was there any evidence in the record that _____ was a school. The sum total of Student's activities at _____ was 1 hour each day of math, reading and writing remediation. Without evidence that these activities were special education services, it would be impossible to reimburse Petitioner, because for all intents and purposes, Student was receiving the same general education services at _____ that Student was receiving at _____. Therefore, the Hearing Officer concludes that _____ was not an appropriate placement for which reimbursement could occur under the guidelines of IDEIA. The Hearing Officer also concludes that Petitioner's failure to meet with DCPS in early January 2009 to develop an IEP effectively bars Petitioner from prevailing on the relief of reimbursement for Student's placement at SOT for these past four months on the basis that DCPS would not provide an appropriate placement for Student.

ORDER

WHEREFORE, it is

ORDERED that,

(1) Petitioner shall enroll Student at _____ immediately.

IT IS SO ORDERED.

This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).

Virginia A. Dietrich /s/

Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

05/02/09

Date

Issued: May 2, 2009