

**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

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In Re the Matter of : )  
 )  
Parent on behalf of Student,<sup>1</sup> )  
 )  
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: February 17, 2009  
Date of Pre-hearing: March 6, 2009  
Dates of Hearing: March 19, 2009  
April 13, 2009

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STUDENT HEARING OFFICE  
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**HEARING OFFICERS' DECISION**

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

**Counsel for Petitioner:** Attorney Fatmata Barrie  
10 R Street, N.W.  
Washington, D.C. 20002

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

<sup>1</sup> Personally identifiable information is provided in the "Index" which is located on the last page of this Order and must be removed prior to public distribution.

**INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004  
(IDEIA), (Public Law 108-446)  
DISTRICT OF COLUMBIA PUBLIC SCHOOLS  
IMPARTIAL DUE PROCESS HEARING**

**I. INTRODUCTION**

The student is \_\_\_\_\_ years of age, and attends the \_\_\_\_\_ School, \_\_\_\_\_ Campus, a public school located within in the District of Columbia. Prior to attending the \_\_\_\_\_ School, the student attended \_\_\_\_\_ School.

The student is a resident of the District of Columbia, and identified as disabled and eligible to receive special education and related services, pursuant to “The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)”. The student’s disability classification is learning disabled (LD).

On February 17, 2009, Counsel, on behalf of Petitioner, initiated a due process complaint alleging that the District of Columbia Public Schools, hereinafter referred to as “DCPS”, denied the student a Free Appropriate Public Education (“FAPE”), by failing to: (1) conduct a Functional Behavioral Assessment, and implement a Behavioral Intervention Plan; (2) provide the student an appropriate Individualized Education Program (IEP); (3) provide the student an appropriate placement; and (4) provide the student appropriate special education and related services.

The due process hearing initially convened on March 19, 2009, at 11:00 a.m., and reconvened on April 3, 2009, at 1:00 p.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**

Petitioners’ Counsel waived a formal reading of parent’s due process rights.

#### IV. ISSUES

The following issues are identified in the *February 17, 2009* due process complaint:

- (1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to conduct a Functional Behavioral Assessment (FBA); and implement a Behavioral Intervention Plan (IBP), for the 2007-08 SY and 2008-09 school years?
- (2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate IEP for the 2007-08 and 2008-09 school years?
- (3) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement?
- (4) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student appropriate special education and related services?

#### V. RELIEF REQUESTED

**Relief Requested:**

- (1) DCPS to fund an independent Functional Behavioral Assessment and convene an MDT meeting within 10 days of receipt of this assessment to review the evaluation, develop an appropriate IEP, develop a behavioral intervention plan, discuss compensatory education, and develop an appropriate compensatory education plan.
- (2) DCPS to issue a prior notice of placement to a placement of parent's choice, inter alia, etc. as the appropriate placement for the 2008/09 school year.
- (3) DCPS to pay reasonable attorney's fees.

#### VI. PROCEDURAL POSTURE

On February 17, 2009, Counsel, on behalf of Petitioner, filed a due process complaint; and on February 27, 2009, the Hearing Officer issued a Pre-hearing Conference Notice scheduling the Pre-hearing Conference for March 3, 2009 at 3:00 p.m..

On February 27, 2009, DCPS filed "District of Columbia Public School's Response to Parent's Administrative Due Process Complaint Notice". The pre-hearing conference convened on March 6, 2009 at 3:00 p.m., and on March 6, 2009, the Hearing Officer issued a Pre-hearing Conference Order, confirming the due process hearing for March 19, 2009, at 11:00 a.m.

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*Note: Issues 2 and 3 of the complaint are consolidated.*

On March 13, 2009, Petitioner and Respondent submitted disclosures and witness lists dated March 13, 2009. On March 19, 2009, the due process hearing convened, as scheduled, however, the hearing required more time than originally requested. Pursuant to a joint motion of continuance, the due process hearing was continued to March 31, 2009, at 9:00 a.m.. On March 31, 2009, Petitioner's counsel requested a continuance to provide parent an opportunity to testify at the hearing. Receiving no objections from DCPS, the due process hearing was continued to April 3, 2009, at 1:00 p.m.. The due process reconvened on April 3, 2009, as scheduled.

The amount of time requested for the hearing was insufficient, precluding the parties from providing closing arguments at the hearing. Therefore, the court granted the parties until close of business on April 8, 2009, to present written closing statements. The parties submitted written closing arguments on April 8, 2009, in a timely manner.

## **VII. PRELIMINARY MATTERS**

At the hearing, there were no preliminary matters introduced by the parties. The Hearing Officer proceeded with a hearing on the merits.

## **IX. DISCLOSURES**

The Hearing Officer inquired of the parties whether all disclosures were submitted by the parties; and whether there were any objections to the disclosures. DCPS objected to Petitioner's introduction of a student Progress Report submitted beyond the five (5) day disclosure period, representing that the disclosure was untimely, and if admitted would prejudice Respondent. The parties discussed the relevance of the document, and its prejudicial effect. The Hearing Officer disallowed the disclosure, as untimely.

### **DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF PETITIONER**

- Petitioner's Exhibits 01 through Petitioner's Exhibit 26; and a witness list dated March 12, 2009.

### **DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT**

- Respondent's Exhibits 01 through Respondent's Exhibit 06; and a witness list dated March 12, 2009.

## **IX. STATEMENT OF CASE**

1. The student is \_\_\_\_\_ years of age, and attends the \_\_\_\_\_ School, \_\_\_\_\_ Campus, a public school located within in the District of Columbia. Prior to attending \_\_\_\_\_ School, the student attended \_\_\_\_\_ School.

2. The student is a resident of the District of Columbia, and is identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)". The student's disability classification is learning disabled (LD).

3. On May 11, 2007, a Multidisciplinary Development Team (MDT) meeting convened, pursuant to parent's request. A Student Evaluation Plan (SEP) was developed for the student; and the MDT recommended a Psycho-educational and Social History Evaluation, to address concerns regarding the student's behavior and education.

4. On June 11, 2007, DCPS completed a "Social Work Evaluation Report". The evaluator determined that some of the student's behavioral characteristics consist of being uncooperative, mood changes, difficulties with math/concentration difficulties, enjoying music, drawing, being outgoing, and the tendency to be tardy when attending school. The evaluator also determined that the student was traumatized due to the loss of her father.

5. On July 30, 2007, DCPS completed a "Comprehensive Psychological Evaluation Confidential Report". At the time of the evaluation, the student was \_\_\_\_\_ years and nine months of age, and enrolled at \_\_\_\_\_ School. The report represents that the student is \_\_\_\_\_ years of age, and a \_\_\_\_\_ grade student, enrolled at \_\_\_\_\_ School. The report also represents that the student's history is unremarkable for any academic, behavior, or school attendance difficulties. The report also provides that while the student's classroom teacher reports no significant behavior problems, the student's mother is concerned regarding her short attention span, and difficulty following directions.

The evaluator determined that the student's perceptual-visual-motor integration ability is within normal limits; and in terms of academic achievement, the student achieved a standard score measuring within the low average to average range, and grade equivalent scores ranging from the late 3<sup>rd</sup> grade to the early 5<sup>th</sup> grade level. The evaluator also determined that projective drawings revealed no indication of a significant emotional issue that would impact her current academic functioning; however continued psychological counseling was recommended in order to address the noted behavioral concerns.

The evaluator concluded that the student continues to meet the DCPS criteria for special education with a disability classification of Learning Disabled; and recommended a Functional Behavioral Assessment (FBA); development and implementation of an Intervention Behavior Plan (IBP); psychological counseling; and specialized instruction in the form of reading, mathematics, and written language.

6. On September 26, 2007, DCPS, \_\_\_\_\_ School completed a fourth advisory "Report to Parents on Student Progress". The report reflects that the student has a possibility of failing, does not complete class assignments, and does not complete homework, in pre-algebra; requires more study in English; and has excessive absences in World History and Geography.

7. On November 24, 2007, Parent's counsel forwarded a letter to the Principal at School, requesting a copy of the student's educational records, to address parent's concerns regarding the student's negative social emotional behavior and below average academic performance at School. The letter also included a request that Lincoln reevaluate the student for specialized instruction and related services, by completing a comprehensive psychological (clinical and psycho-educational), speech and language, psychiatric, occupational therapy, and social history evaluations.

8. On November 30, 2007, DCPS forwarded to parent a "Notice Confirming Administrative Conference", informing parent of the student's misconduct and the need for an administrative conference. The notice invited parent to attend a meeting on November 30, 2007, at 4:00 p.m., to discuss the student's disruptive behavior, specifically, harassing another student.

9. On April 2, 2008, DCPS issued a Suspension Level 1, "Notice of Student Disciplinary Action" notifying parent of the student's five (5) day suspension; and discipline for causing disruption or being otherwise disorderly; repeated failure to comply with school orders or directions; assault of another student.

10. On April 21, 2008, DCPS completed an Educational Evaluation, including the Woodcock Johnson Tests of academic Achievement. The evaluator summarized that the student's fluency with academic tests is within the very superior range of others at her age level; her academic skills are average; and when compared to others at her age level, her performance is very superior in written language and written expression; superior in broad reading; and average in math calculation skills.

The results of the Woodcock Johnson III Tests of Achievement reflect scores of 13.0 in broad reading, 15.6 in broad reading language, 7.9 in math calculation skills, >18.0 in written expression, 5.2 in academic skills, >18.0 in academic fluency, 5.6 in letter word identification, >18.0 in reading fluency, 4.9 in calculation, 17.2 in math fluency, 5.0 in spelling, >18.0 in writing fluency, 3.7 in passage comprehension, and >18.0 in writing samples. At the time of the evaluation the student was in the 7<sup>th</sup> grade, and 12 years, 7 months of age.

11. On April 28, 2008, DCPS convened a Multidisciplinary Development Team (MDT) meeting, to review current documentation and educational evaluation as part of her triennial evaluation and develop a revised IEP for the upcoming school year. The student's teacher reported, among others, that the student's weakness area in math is in division as she is unable to divide whole numbers as well as solving problems with fractions; and at times makes mistakes because she rushes.

The teacher also reported that the student has a problem exercising self control; can be adversarial and defiant, refuses to follow school rules and its regulations, however, her behavior had improved since the beginning of the school year when she would not obey anyone. The teacher recommended the student work in improving her understanding in following school regulations/rules. The parent reported that she fail to receive telephone calls from the school regarding issues of fighting or problems at school.

The MDT determined that the student continued to meet DCPS' criteria for special education services as a student with a learning disability; specialized instruction in the areas of reading, writing, and math would be provided; and a total of 10 hours per week in special or the general education setting or as determined by the special education teacher.

The MDT also determined that in the area of related services, psycho-social services the student would receive a total of 30 minutes per week. According to the MDT meeting notes, the IEP could be implemented at \_\_\_\_\_ which is the neighborhood school for the student; and parent agreed with the proposed accommodations and services in the IEP.

The MDT developed an IEP for the student recommending 7 hours of specialized instruction; and 30 minutes of psychological services, per week. The IEP also recommends a combination general education and resource classroom setting for the student.

12. On April 28, 2008, the MDT issued a "Letter of Invitation" inviting parent to attend a MDT meeting to develop/review the student's IEP, review evaluation or reevaluation information, review records to support the completion of services, discuss personal health information, compensatory education, and consider transition services needs. The letter proposed April 28, 2008, at 2:00 p.m. for the meeting.

13. On May 22, 2008, DCPS forwarded to parent a "Notice Confirming Administrative Conference", informing parent of the student's misconduct and the need for an administrative conference. The notice invited parent to attend a meeting on May 23, 2008, at 11:00 a.m., to discuss the student's disruptive behavior, use of profanity, disrespect toward staff, and disobedience.

14. On December 8, 2008, DCPS completed a second advisory "Report to Parents on Student Progress". The report indicates that the student lacks initiative, and requires more study in English; has excellent initiative, and excessive absences in Pre-Algebra; poor behavior, and fail to bring materials to class, in Health and Physical Education; does not complete assignments, request conference with parents, and poor behavior in Art; poor behavior, and fail to bring materials to class, in her advisory class; poor behavior in Spanish; poor behavior, fail to participate, and possibility of failing, in Music; is failing, does not complete class assignments, and request for parent conference in Science.

15. On February 3, 2009, DCPS completed an incident report, documenting the student's discipline for fighting at school. The IEP team determined that the student's behavior was not a manifestation of her disability.

16. On February 4, 2009, Petitioner's counsel forwarded a letter to \_\_\_\_\_ requesting the student's most recent MDT/IEP and any documentation related to her special education for the 2008/09 school years; all records pertaining to the student's behavior and/or disciplinary file; and that the records be provided by February 6, 2009. The letter references an attached consent for the release of documents.

17. On February 17, 2009, Counsel, on behalf of Petitioner, initiated a due process complaint alleging that the District of Columbia Public Schools, hereinafter referred to as "DCPS", denied the student a Free Appropriate Public Education ("FAPE"), by failing to: (1) conduct a Functional Behavioral Assessment, and implement a Behavioral Intervention Plan; (2) provide the student an appropriate Individualized Education Program (IEP); (3) provide the student an appropriate placement; and (4) provide the student appropriate special education and related services.

## **X. WITNESSES**

### **Witnesses for Petitioner**

Parent  
Student  
Psychology Associate  
Admissions Director,                      School

### **Witnesses for Respondent**

Special Education Coordinator,                      Campus

## **Witness Testimony**

### **Petitioner's Witnesses**

**Admissions Director,                      Academy**

The Director testified that                      School offers a full-time special education day program for learning disabled students, in a therapeutic environment. The Director also testified that the special education teachers at the school are certified in special education; the school has on staff licensed clinical social workers, occupational therapists, and speech and language therapists.

The Director testified that the average class size consists of 8-10 coed students; the school offers a 3 to 1 student to teacher ratio; and a behavior modification program; and approximately 54 students are in the program. The Director also testified that a student's success rate in a mainstream environment is that student's can transition back into the mainstream.

The Director also testified that he is familiar with the student, reviewed her April 28, 2008 IEP, Educational Evaluation dated April 24, 2008, Comprehensive Psychological Evaluation dated July 30, 2007, Social Work Report dated June 11, 2007, Psycho-Educational Evaluation dated March 18, 2004, and a Social Work Report dated June 11, 2007.

The Director testified that based on the student's educational records, the student "fits" the profile of other students; the student can receive educational benefit by attending Academy; and the school will accept the student into the program.

The Director testified that he is aware that the student's IEP is not provide for full-time placement in a therapeutic environment; and requires 30 minutes of psychological services. During cross-examination the Director testified that he accepted the student into the school, although he has not met or observed the student in a classroom setting, or communicated with any of the student's teachers, he based his decision on the student's records.

The Director also testified that all students attending School are 100% disabled, and often a stigma is attached to special needs students, causing them to regress; although there can be a benefit to receiving special education services. The Director testified that he is also aware that 7.0 hours of specialized instruction is recommended on the student's IEP, and is not aware of any evaluations recommended a full-time special education program for the student. The Director also testified that should the student attend the school, during the 30 day review the school would update the student's IEP to reflect that the student would receive full-time specialized instruction.

During redirect, the Director testified that evaluations completed for the student fail to indicate that the student does not require a full-time special education program or that the student only requires 7.0 hours of specialized instruction. The Director testified that it can be a detriment and a benefit for a student to be around non-disabled students, because of the stigma associated with special education students, and harassment experienced by the students.

## **Student**

The student testified that she attends the Campus; and visited with a special education teacher twice, since attending the school; and receives no special education services, although she received services while attending School.

The student testified that there are approximately 20+ students in the majority of her classes, and there is one teacher assigned to each class. The student also testified that although she is scheduled to visit with the counselor every Thursday for psychological services, she fail to receive the services on a consistent basis, because of the unavailability of the counselor. The student testified that she receives counseling services twice a month, although scheduled for four times per month; and receives no other services.

The student also testified that she is unable to control her temper, has an attitude problem, she shuts down, and requires assistance controlling her temper. The student testified that she attends school every day; does not avoid attending class; was suspended for 10 days for fighting; and would like to "do better" in school.

During cross-examination the student testified that she has had an altercation with the same student on approximately five (5) occasions; and has had no altercations with any other students. The student testified that while attending her prior school, she was pulled out of class and was not pleased with the "pull out" method of teaching; and at her current school she receives the same class work as other students.

The student testified that approximately three months after the beginning of the 2008/09 school year she engaged in a conversation with the Special Education Coordinator (SEC) at the school, regarding exiting the special education program. The student testified that the SEC inquired of the student whether she wished to exit the program, and the student responded in the affirmative. The student also testified that although she recognizes that special education services are necessary, she prefers placement in a regular class; although the work becomes more difficult for her.

The student concluded by testifying that she would not resist placement with general education students, and would prefer placement in a combination setting. The student concluded by testifying that she receives counseling on an inconsistent basis, and does not receive specialized instruction.

#### **Parent**

Parent testified that that the student has attended \_\_\_\_\_ Campus since the 2007/08 school year; and previously attended \_\_\_\_\_ School. Parent testified that the student is not performing well at all, is frequently suspended for fighting; last year was suspended; and this year was suspended once for ten (10) days, and once for three (3) days, for a total of thirteen (13) days.

Parent also testified that the student fail to receive special education services, therefore, she filed a due process complaint. Parent testified that the student has shown no improvement this school year; and her report cards fail to include special education classes.

Parent testified that the suspension notices indicate that the student is not in special education; and the student has been suspended for years, due to fighting and problematic behavior at school. Parent testified that when she expressed concerns to DCPS regarding the student's problematic behavior and grades, she was advised that the student is performing well, however, the student's report cards reflect problems.

Parent testified that she attended the April 28, 2008 IEP team meeting and agreed with the IEP because at the time, the student required special education services, however, the student fail to receive the services recommended in her IEP. Parent testified further that the MDT advised her that the student would be evaluated and receive counseling services, which failed to occur. Parent also testified that she failed to receive notice from DCPS that the student refuses to attend counseling sessions, or fail to attend classes.

Parent also testified that she is dissatisfied with the school because the school fails to assist her in ensuring that the student receives the services she requires, and instead continue to advise her that the student is progressing, although she continues to receive telephone calls from the school, regarding the student's behavior.

Parent testified that she attended a manifestation determination meeting after the student's suspension, and DCPS requested that she sign a "Consent to Evaluate" form, authorizing DCPS to complete another Psychological Evaluation, however, she refused to provide consent. Parent testified that the Psychological Evaluation completed by DCPS was defective; and that she was dissatisfied with the report and results; and although she wanted the student reevaluated, she preferred that DCPS not complete the evaluation.

Parent testified that last year the student was suspended quite often, and this year she was suspended for a total of 13 days; and both suspensions were out of school suspensions. Parent testified that DCPS failed to convene a meeting with her before the suspension, and she was contacted by telephone by the school advising of the suspensions, after each incident. Parent testified that the manifestation determination meeting was held the day the student returned to school; and the team determined that the student's behavior was not a manifestation of her disability; and she disagreed with the team's findings.

Parent also testified that the team recommended additional testing, however, she preferred the student not undergo additional testing. Parent testified that the student was evaluated during the 2007/08 school year; and the 2008/09 school year, and according to the results of both tests, within one year the student progressed from performance at a below grade level, to beyond college level; however, she is failing all classes.

### **Psychology Associate**

The Associate testified that she is experienced conducting cognitive, academic, and psychological testing and providing evaluations, including a Functional Behavioral Assessment. The Associate also testified that she was employed as a special education teacher from 2006-2008 in Prince Georges' County; served as an IEP Case Manager; developed IEPs for hundreds of special needs students; and completed classroom observations

The Associate also testified that she received a Bachelor's degree in Psychology in 2002, and a Masters Degree from Bowie State University, in 2005; and is currently employed with Interdynamics, Inc.. The Associate testified that she attended special education workshops, received training in special education as a Special Education Teacher, and attended IEP workshops, dealing with problematic behavior.

The Associate testified that she reviewed the student's records, MDT meeting notes, Progress Reports, Suspension Notices, and evaluations, and has an idea of regarding the services the student should receive. The Associates testified that in several areas the student is functioning below grade level, particularly in math (4<sup>th</sup> GE), reading comprehension (3<sup>rd</sup> GE), and reading basic (5.6 GE). The Associate testified that the goals in the student's IEP require a higher level of functional skills than the student possess.

The Associate testified that because of the student's behavioral problems, and many suspensions, she recommends a small structured environment; based on review of the student's records, progress reports, and suspensions. The Associate testified that on page 4 of the Comprehensive Psychological Evaluation, the last paragraph references a student, other than the student in this matter, and the information is inaccurate; and the method utilized in testing the student's social/emotional skills fail to include rating scales. The Associate also testified that the evaluator relied heavily on projective measures; provided no diagnosis regarding the student's social/emotional functioning and impact on the student's behavior and learning in the classroom; and failed to explain the test results.

The Associate recommended reevaluation of the student and a more comprehensive Psychological Evaluation to include rating scales (BASC- Behavior Assessment Systems for Children). The Associate recommends a Functional Behavioral Assessment to assess the student's behavior in class and assist in managing her behavior; and given the student's prior suspensions and mother's statements regarding the student's behavior, the student requires behavior goals regarding self control, interaction with peers, and practical goals geared towards her behavior.

During cross-examination the Associate testified that she has not met the student or observed her in her current placement; failed to communicate with the student's teachers regarding the student or the assessments; related service providers at regarding the student's evaluations, or the individuals who completed the evaluations. The Associate testified that she communicated with parent for approximately fifteen (15) minutes, prior to the hearing; failed to discuss the manifestation determination meeting, and her failure to sign the consent to evaluate form.

The Associate also testified that she was unaware that the student refused counseling services; had not communicated with anyone regarding the student's IEP, or IEP goals; and is unable to testify regarding the student's behavior.

### **Respondent's Witness**

#### **Special Education Coordinator (SEC),**

#### **Campus**

The SEC testified that the school provides an inclusion program for students' with special needs and the student's IEP is being implemented at the school. The SEC testified that she was the student's Case Manager and Special Education Teacher, and is familiar with the student's IEP. The SEC testified that the student receives 7 hours of specialized instruction, and 30 minutes of psychological services, per week; the student failed to receive services during her suspension; and refused to receive services this week because she was not in the building.

The SEC testified that the student receives services in an inclusion setting; and all class work is accommodated and modified prior to distribution to the student. The SEC also testified that twice a week she meets with the Department Chair to ensure that the student receives the accommodations and modifications, and her IEP is adhered to academically.

The SEC testified that the student is not pulled out of her general education class and placed in a resource room where she receives specialized instruction, therefore, the student and parent may have the impression that the student is not receiving special education services, or modifications in her educational program. The SEC testified that the student's lessons are broken down in segments as opposed to receiving the instruction all at once; therefore, she has extra time to submit the class work. The SEC testified that the student attends class with non-disabled students so that she is not singled out.

The SEC testified that she met the student on August 9, 2008, when she administered an informal assessment with the student, at which time she expressed the need not to be stereotyped as special needs as at other schools attended, and does not want to be labeled as a special needs student. The SEC testified that the student expressed a desire to exit special education.

The SEC also testified that she worked with the student in her English class and on various projects, and in her Spanish and Math class, and the student exhibited no behavior problems, until the February 3, 2009 incident wherein she participated in a staged fight, which was being videotaped. The SEC testified that that the determination was made at the manifestation determination meeting that the student's behavior was not a manifestation of her disability because: the fight was planned; no prior fighting disruptions for the entire year; and the student's behavior throughout the day in question, was not disruptive and the student performed at or above grade level.

The SEC testified that the team requested reevaluation of the student, however, the Attorney advised parent to withhold consent; although the student's triennial evaluations were due to expire and the team wanted to reevaluate the student to determine her current level of functioning. The SEC testified that the student is making progress in her English class, and although she had behavior difficulties at her prior school, such behavior was not evident at her current school, no altercations, not disruptive, and student followed instructions. The SEC testified that the student's grades were posted in January, 2009, reflecting a grade of "C" in English, failed Physical Education because student failed to dress for class; and failed Music because the student failed to complete a major project.

The SEC concluded by testifying that the student's IEP is being implemented, and she is making progress at her current placement; there are no representations by parent that the student's placement is inappropriate, or that an alternative placement is needed. The SEC also concluded that the student is doing well, comprehends the curriculum, and fully participates in the inclusion setting.

During redirect testimony the SEC testified that the team determined a FBA was not warranted because all concerns regarding behavior at prior school, were all primarily related to incidents in the neighborhood, and not at school.

## XI. DISCUSSION AND CONCLUSIONS OF LAW

### ISSUE 1

#### **Whether DCPS denied the student a free appropriate public education (FAPE); by failing to conduct a Functional Behavioral Assessment (FBA); and implement a Behavioral Intervention Plan (IBP), for the 2007-08 SY and 2008-09 school years?**

Petitioner represents that DCPS failed to evaluate the student in all areas of suspected disability; i.e. behavioral issues that manifest because of her learning disability. Petitioner further represents that a July 30, 2007 Comprehensive Psychological evaluation conducted by DCPS recommended a Functional Behavioral Assessment (FBA) and a Behavioral Intervention Plan (BIP) to be developed and implemented for the 07/08 school year; and as of this date DCPS failed to complete the recommended FBA for the student, and implement a BIP for the 2007/08 or 2008/09 school years. Petitioner represents that because DCPS failed to evaluate the student in all areas of her suspected disability, DCPS denied the student a FAPE.

Petitioner concludes that according to the student's report cards she has behavior problems in her classes. Petitioner represents that DCPS has yet to complete the FBA; and testified that they do not believe the FBA should be completed because the student no longer has behavioral problems. "However, according to her teachers' comments, she does have behavior problems. The mother testified that the student's behaviors have continued to be a problem because there are still documented complaints about her inappropriate behaviors."

Petitioner reference 34 CFR 300.530, representing that when a student has been suspended for 10 days or more in a school year, a FBA must be completed. In this case, the mother testified that her daughter was suspended for about 13 days this school year alone and that last school year she was suspended so many days that she lost count. Therefore, for the past two years DCPS has been required to complete a FBA. Petitioner further represents that according to the student she is aware that she is unable to control her temper and as a result acts out; and the Psychology Associate testified that an FBA should be completed to assess her current behavior difficulties in the classroom.

Petitioner represents that the student's social history evaluation demonstrates that the student has had problems with changes in mood, being uncooperative, and difficulties with peers; however, DCPS failed to complete a FBA to address these behavioral concerns. Petitioner further represents that although there was documentation of the student's inappropriate behaviors in the classroom, DCPS did not present any testimony from any of the teachers who wrote those comments.

Petitioner represents that the student was suspended for inappropriate behaviors, including fighting; and according to the student she has been in fights on five different occasions, since attending her current school. Petitioner further represents that according to 34 CFR 300.530 even if the behavior was determined to not be a manifestation of the student's disability, the school system should do a FBA; and in this instance, DCPS failed to conduct a FBA.

According to Petitioner, the Psychology Associate testified that the student needed a more comprehensive psychological evaluation. "The parent through counsel is requesting the evaluation independently because as the parent testified, she does not trust the school system to complete the evaluation. In this case, the parent's concerns are because in less than a year, the DCPS' April 21, 2008 educational evaluation showed the student functioning beyond a high school and college graduate level when on July 30, 2007, she was functioning between the 3<sup>rd</sup> and 5<sup>th</sup> grade level."

DCPS represents that "the MDT collectively determined that the student's behavior improved so much this 2008-2009 school year that a FBA or BIP was not warranted. Petitioner has the Burden of Proof to demonstrate that an FBA and BIP were warranted in this case. The United States Supreme Court has held such in *Schaffer v. Weast*, 546 U.S. .... (2005). It further identified that the "default rule" is that the burden of persuasion belongs to the party seeking relief:

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

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

"The Court further identified its long-standing application of the Petitioner's rightfully bearing this burden as the moving party in various other actions brought under a variety of other state and federal statutes dating back more than thirty years. *Id.* citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (standing); *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806 (1999) (Americans with Disabilities Act); *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999) (equal protection); *Wharf (Holdings) Ltd. V. United Int'l. Holdings Inc.*, 532 U.S. 588, 593 (2001) (securities fraud); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (preliminary injunctions); *Mt. Healthy City Bd. of Ed. V. Doyle*, 4289 U.S. 274, 287 (1977) (First Amendment)."

"Congress has not made any correction or alteration to the Supreme Court's determination that these burdens rest with plaintiffs. In fact, the Court further noted in *Schaffer* that Congress "expressed its approval of the general rule when it chose to apply it to administrative proceedings under the Administrative Procedure Act." citing Administrative Procedure Act, 5 USC §556(d) and *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 271 (1994). "Decisions that place the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding...are extremely rare." emphasis in original, *Schaffer* at .... Without express Congressional intent stating the opposite, the burdens fall upon Plaintiff. *Id.*"

“In this case, Petitioner had the burden of demonstrating how this student incurred educational harm by any purported delay by DCPS in conducting an FBA/BIP. Petitioner has not met this burden. Not only did testimony reflect that the student’s suspensions have decreased over the course of the school year (as compared to last year), but that her behavior in her classrooms has improved.”

“At the last Manifest Determination meeting held for this student in February of 2009 after this student was involved in an altercation, the team determined that the student’s behavior was not a manifestation of her disability. As testimony revealed, this most recent behavioral incident was due to premeditated actions and not because of any impulsive behavior in the classroom. Despite this, the team went ahead and agreed to further testing for the student (DCPS-3); however, Petitioner *declined* DCPS’ offer. Petitioner-parent testified in the hearing that she did not want any testing because she did not trust DCPS. Under IDEA, however, Parents have the right to obtain independent evaluations only if they disagree with the evaluations completed by their school (20 USC §1415(b)(1)).”

“Independent evaluations are at public expense *if it can be shown that evaluations conducted by the school were inappropriate.* (R.L. ex rel Mr. and Mrs. L. v. Plainville Board of Education, 2005) (emphasis added). The IDEA mandates this condition precedent before an LEA is obligated to provide a parent with an independent evaluation. In this case, Petitioner would not even consent for the school to obtain an FBA before disagreeing with the results, nor did Petitioner present any evidence demonstrating that DCPS-testing is categorically inappropriate.”

## ANALYSIS

According to IDEA, each disabled student is entitled to a “free appropriate public education,” or a “FAPE,” which requires that appropriate special education services be “provided at public expense, under public supervision and direction, and without charge.” 20 U.S.C. §1401(9)(A).

IDEA, *34 C.F.R. §300.301(a) (b)* provides in pertinent part:

(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.

In requesting initial evaluations, IDEA, *34 C.F.R. §300.301 (b)* provides that 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* (emphasis supplied) to determine if the child is a child with a disability.

IDEIA, *34 C.F.R. §300.304(c) (4) and (6)* also provides that the public agency shall ensure that a child is assessed in *all* areas related to the *suspected* disability; and 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 June 11, 2007, DCPS completed a "Social Work Evaluation Report", to obtain additional background information regarding the student, to assist with her academic and social emotional needs. The evaluator determined that the student's developmental milestones were within normal limits, except she was delayed in walking; can independently perform all self help skills; has poor study habits; enjoys playing outside with peers; had no preferred vocational interest at that time; and tended to be tardy when attending school. The evaluator also determined that the student presented with the following behavioral characteristics: "uncooperative, gets along with peers (sometimes), experiences changes in her moods; experiences difficulties with peers; experiencing difficulties with math and concentration difficulties."

The record reflects that on July 30, 2007, while attending DCPS completed a "Comprehensive Psychological Evaluation Confidential Report". The record reflects that while attending the school, the student had a history of disruptive behavior and suspensions, dating to the 2005/2006 school years; and that such behavior impacted her learning. In the evaluation, the evaluator determined that the student continued to meet the DCPS criteria for special education with a disability classification of Learning Disabled; and recommended a Functional Behavioral Assessment (FBA); development and implementation of an Intervention Behavior Plan (IBP); psychological counseling; and specialized instruction in the form of reading, mathematics, and written language.

The record also reflects that the student began attending the 2007/08 school years; and since attending the school, the student's disruptive behavior and suspensions continue; student progress reports indicate that the student exhibits "poor behavior", and struggles academically. DCPS' acknowledgement of the student's problematic behavior is reflected in the MDT meeting notes. For instance, the April 28, 2008 meeting notes reflect that although the student's behavior had improved since the beginning of the 2008/09 school year, she has a problem exercising self control, can be adversarial and defiant, refuses to follow rules and its regulations; and at times makes mistakes because she tends to rush through without putting much attention to the exercises.

In addition, as recent as February 3, 2009, the student was suspended for fighting at school, however, on February 19, 2009, during a Manifestation Determination Review the team determined that the student's behavior had improved compared to her past history of problematic behavior, and therefore a FBA and BIP were not warranted. The team determined that the student's behavior on February 3, 2009, was not a manifestation of her learning disability. The team also agreed that the social/emotional goals in the student's IEP required modification to address her behavior; and failed to recommend a FBA or IBP, as recommended in the July 30, 2007 Psychological Evaluation.

Additionally, the team requested that parent provide consent authorizing DCPS to conduct triennial reevaluations, however, parent withheld consent for DCPS to reevaluate the student. According to the meeting notes, parent disagreed with the team's determination that the student's behavior was not a manifestation of her disability, the student's suspension, indicating that the student's behavior resulted from the team's failure to complete a FBA and IBP, as recommended in the July 30, 2007 Psychological Evaluation.

In addition, MDT meeting notes over the last two (2) school years reflect that the MDT had knowledge of the student's history of problematic behavior in the classroom, and school suspensions, impacting the student's learning; and that such behavior remained a matter of concern. For instance, on May 11, 2007, the MDT developed a Student Evaluation Plan (SEP) identifying areas of concern to include: behavior and educational. The MDT notes documenting meeting held during the 2007/08 and 2008/09 school years reflect that the team was aware of the student's history of problematic behavior in the classrooms, suspensions, and academic regression, however, DCPS failed to complete a FBA or develop a BIP, to address the student's behavior and academic regression.

At the hearing, the student testified that she is unable to control her temper; requires assistance in controlling her temper; and has a problem with attitude; supporting a finding that the student requires behavioral interventions and supports; and would benefit from a FBA and BIP.

The Hearing Officer finds that DCPS had knowledge of the student's history of problematic behavior in the classroom, suspensions, and the impact upon her learning; and failed to complete a FBA and develop a BIP, to address the behavior. The necessity of a FBA and BIP was confirmed on July 30, 2007 when DCPS completed a Psychological Evaluation, which recommended a FBA and BIP, to address the student's behavior. However, DCPS disregarded all of this information, failed to complete a FBA and develop and BIP; and on February 19, 2008 at a manifestation determination meeting merely recommended completion of triennial evaluations, which failed to include a FBA and BIP; and adjusting the social/emotional goals in the student's IEP, to address her behavior.

At the due process hearing, parent testified that during the 2008/09 school year the student was suspended for a total of thirteen (13) school days, representing a change in placement. According to IDEA, 34 C.F.R. §300.530 (c), for disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not be a manifestation of the child's disability, school personnel may apply the relevant disciplinary procedures, as would apply to a nondisabled student.

In addition, subparagraph (d) provides that a child with a disability who is removed from the child's current placement pursuant to paragraphs (c) or (g) of this section for a period of time exceeding 10 consecutive school days, and pursuant to paragraphs (c), or (g) of this section must—

- (i) Continue to receive educational services;

- (ii) Receive, as appropriate, ***a functional behavioral assessment, and behavior intervention services and modifications***, designed to address the behavior violations so that it does not recur ...

The record reflects that the student was removed from her current placement for more than ten (10) consecutive school days, within the 2008/09 school year, representing a change in placement; and the team determined that the behavior that gave rise to the violation of the school code was not a manifestation of the student's disability.

The Hearing Officer finds that IDEA clearly provides that a child with a disability who is removed from the child's current placement for a period of time exceeding 10 consecutive school days, must receive a FBA, and behavior intervention services and modifications, designed to address the behavior violations, to preclude reoccurrence of the violations, however, DCPS failed in this regard.

According to IDEIA, 34 C.F.R. §300.15 evaluations are procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services the child needs. A full evaluation of a child is an integral part of developing an IEP for a student, which is the reason 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.

According to *Harris v. District of Columbia, Civil Action No. 07-1422 (RCL) (2008)*, "the FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." The court explained that the FBA is performed to determine causes of a child's behavior and the concomitant consequences of that behavior; and the information gleaned from the assessment is central in formulating an IEP tailored to the needs of the individual student.

The Hearing Officer concludes that DCPS failed to evaluate the student in all areas of suspected disability, during the 2007/08 and 2008/09 school years; by ensuring that the completed evaluations were sufficiently comprehensive to identify all of the student's special education and related services needs.

Based on the aforementioned, it is the Hearing Officer decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS failed to evaluate the student in all areas of suspected disability, during the 2007/08 and 2008/09 school years, in violation of IDEA, 34 C.F.R. §300.304 (c)(4)(6).

## ISSUE 2

### **Whether DCPS denied the student a free appropriate public education (FAPE); by failing to develop an appropriate individualized education program (IEP); and provide the student appropriate special education and related services?**

Petitioner represents that the student's most recent IEP dated April 28, 2008, was implemented without the benefit of a behavioral intervention plan (BIP); and during the 2007/08 and 2008/09 school years, the student regressed behaviorally; and was suspended because of problematic behavior. Petitioner further represents that a BIP should have been developed and included in the student's IEP to address her "negative behavior"; and by failing to complete and implement a BIP, the student's IEP has been implemented inappropriately; and her goals and objectives are not geared towards providing her educational benefit.

Petitioner also represents that DCPS failed to provide the student appropriate special education and related services; and although parent requested document verifying services received by the student, DCP failed to provide the information; and as a result there is no evidence that the student received all of the services provided in her IEP. Petitioner represents that because DCPS failed to provide the student the services, and an appropriate IEP, it denied the student a FAPE.

In its closing argument, Petitioner represents that "the law requires that a child with a disability must have an IEP that provides more than a mere "de minimis" benefit; it must instead "be 'likely to produce progress, not regression or trivial advancement.'" Cypress-Fairbanks Ind. School Dist. v. Michael F. by Barry F., 118 F.3d 245, 248 (C.A.5 (Tex.), 1997), quoting Board of Educ. of East Windsor Regional Sch. Dist. v. Diamond, 808 F.2d 987, 991 (3<sup>rd</sup> Cir. 1986). The court in Sharon Hunter, et al. v. District of Columbia, et al Civil Action No. 07-695 (Sept. 17, 2008) found that when determining the appropriateness of an IEP, one must look at the academic progress of the student. The court quotes Roark ex rel. Roark v. District of Columbia, 460 F. Supp.2d at 44 (DC Cir. 2006), when it said 'academic success is an important factor in determining whether an IEP is reasonably calculated to provide educational benefit. In this case, the student regressed as opposed to progress. Therefore, under the above cases, the hearing officer must rule that in fact the student's IEP was not appropriate because it did not provide her with services for her to progress.'

"Hunter also cited to Daniele G. v. N.Y. City Dept. of Educ., 2008 WL 3286579, at 7 (E.D.N.Y. Aug. 7, 2008) which states that 'a school district will fulfill its substantive obligations under the IDEA if the student is likely to make progress, not regress, under his IEP, and if the IEP affords the student with an opportunity "*greater than mere trivial advancement*."

"In this case, Ms. Reynolds, the psychology associate testified that she was a special education teacher as well as a psychology associate. She testified that she wrote IEPs for hundreds of students and was the case manager for the students. She testified that the goals and objectives in the student's IEP were too advanced for someone with her level of academic functioning. Ms. Reynolds testified that the goals are those that she would write for someone in middle school but not for someone who is functioning in the 3<sup>rd</sup> to 5<sup>th</sup> grade level. Ms. Reynolds further testified that NA needed an increase in psychological services and that her goals should-

be geared towards appropriate peer interactions due to her fighting. DCPS' witness on the other hand did not provide any testimony as to whether the student can or has met her goals as written. As a result, DCPS has not put on any testimony or evidence to show that the student's IEP is designed to provide her with an "opportunity greater than mere trivial advancement. Id."

Petitioner represents that according to the student's testimony she is not receiving any special education services; and she receives the same assignments as nondisabled students. Petitioner also represents that the student also testified that she only saw the special education coordinator once when the coordinator pulled her aside and asked her if she wanted to be in special education. Petitioner represents that the special education coordinator testified that she is also the special education teacher and that works "behind the scenes"; she is not in the classroom; and does not provide pull-out services. "However, according to the student's IEP, she is to receive resource services and as such DCPS has not provided her with all of her special education services as enumerated on her IEP."

Petitioner also represents that the student testified that she does not see her counselor on a regular basis, although she is scheduled to receive counseling services every Thursday; and that she has seen her only once. Petitioner represents that DCPS failed to have the SEC testify regarding services the counseling services provided the student; therefore, failing to rebut the student's testimony. "Therefore, DCPS has not provided her with all her related services."

DCPS represents that Petitioner argues that the student's IEP is inappropriate because it fail to include a Behavioral Intervention Plan; and that the team at her current placement failed to determine that a BIP was warranted for the student. DCPS also represents that there was a behavior incident on February 3, 2009, and the school determined that his incident stemmed from a community problem and was not a manifestation of her disability; and the IEP is appropriate and fully implemented.

DCPS also represents that the student has received all services; and Petitioner failed to meet its burden of proof for this issue. DCPS represents that the student revealed through testimony that receive counseling services; on a few occasions, the counselor was not available; however, she could not remember the number of occasions or when the sessions occurred, and Petitioner could not corroborate this through any other evidence. DCPS represents that in fact according to the SEC and encounter tracking forms and communication with the counselor, the only days the student failed to receive counseling services was during suspension.

DCPS also represents that the student's IEP only recommends 7 hours of specialized instruction in a combination setting; and the student is in an inclusion, which may account for the student and parent's impression that the student fails to receive specialized instruction. DCPS also represents that the SEC testified that the student's coursework is modified "behind the scenes" with all of her teachers, in order to mitigate the student's feeling of being "stigmatized" as a special education student at school; and the student's IEP is being fully implemented at her current placement.

## ANALYSIS

The FAPE requirement under IDEA, addresses substantive and procedural violations, which may result in denial of a FAPE. When there is a challenge regarding the appropriateness of a program or placement offered to a disabled child by a school district under the IDEA, a reviewing court must undertake a two-fold inquiry: (1) procedural compliance (Procedural FAPE); and (2) conferral of some educational benefit (Substantive FAPE).

### **Procedural FAPE (Compliance with Procedural Requirements of IDEA)**

The *procedural* prong of the FAPE analysis, and the *first* prong of *Rowley*, assesses whether DCPS complied with the procedural requirements of the IDEA, including the creation of an IEP that conforms to the requirements of the Act. *See, The Board of Education of the Hendrick Hudson Sch. Dist. v. Rowley*, 459 U.S. 176 (1982), and *Doe*, 915 F.2d at 658.

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

According to *The Board of Education of the Hendrick Hudson Sch. Dist. v. Rowley*, 459 U.S. 176 (1982), and *Doe*, 915 F.2d at 658; an IEP need not maximize the potential of a disabled student, it must provide "meaningful" access to education, and confer "some educational benefit" upon the child for whom it is designed. However, in its interpretation of *Rowley*, the District Court held that an appropriate IEP must result in more than de minimis benefits to satisfy *Rowley's* "some educational benefit" standard.

For the benefit to be sufficiently meaningful, the IDEA was enacted to assure that all children with disabilities have available to them a (FAPE), which emphasizes special education and related services designed to meet their unique needs, supported by such services, as are necessary to permit the child to benefit from the instruction. The court also held that a plan for a disabled student will satisfy the IDEA only if it is "likely to produce progress, not regression or trivial educational advancement."

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

In this matter, Petitioner fail to allege any procedural violations in the complaint, however, alleges substantive violations of IDEA, challenging the substantive content of the student's IEP. Therefore, the Hearing Officer proceeds with discussion of the *substantive* prong of the FAPE analysis, and the *second* prong of Rowley, assessing whether the individualized education program ("IEP"), offered by the LEA, is reasonably calculated to enable the child to receive some educational benefit.

*First*, the student's April 28, 2008 IEP recommends the student receive 7 hours of specialized instruction, and .5 hours of psychological services, per week; in a combination general education and resource classroom. The student testified that she fails to receive special education services, and receives the same instruction as her non-disabled peers. The student also testified that although her IEP recommends .5 hours of psychological counseling every Thursday of each week, she fail to receive psychological services every Thursday as provided in her IEP, due to the unavailability of the school counselor. DCPS failed to present evidence refuting the student's testimony.

*Second*, the SEC testified that the student receives specialized instruction services in an inclusion setting; and all class work is accommodated and modified prior to distribution to the student. The SEC testified that the student's lessons are broken down in segments as opposed to receiving the instruction all at once, therefore, she has extra time to submit the class work. The SEC testified that the student attends class with non-disabled students so that she is not singled out. The SEC also testified that twice a week she meets with the Department Chair to ensure that the student receives the accommodations and modifications, and her IEP is adhered to academically.

The SEC testified that the student is not pulled out in a resource environment to receive specialized instruction, as provided in her IEP; which may account for the student and parent's impression that the student fail to receive specialized instruction as provided in her IEP. The SEC also testified that according to the encounter tracking forms, the student received counseling services, and the only days the student failed to receive services was during suspension; however, DCPS presented no evidence supporting the SEC's testimony.

The Hearing Officer finds that the student failed to receive 7.0 hours of specialized instruction each week, in a resource classroom; and .5 hours of psychological counseling services, as provided in her IEP.

**Third**, the student's April 28, 2008 IEP recommends 7 hours per week of specialized instruction and .5 hours of psychological counseling services, *in a combination general education resource room*, however, according to the testimony of the SEC, and the student, the student fail to receive specialized instruction in a Resource room as recommended in her IEP. Witness testimony indicates that the student receives instruction in a general education classroom, with non-disabled peers. Therefore, the student's IEP is not fully implemented, as represented by DCPS; and the student's access to the general curriculum is compromised.

Placement of the student in a general education setting may not be conducive for a student with a learning disability; which is evidenced by the student's continued academic and behavioral difficulties; failure to complete homework assignments, poor attendance, poor behavior, etc.. In addition, the student's placement in her current setting has proven to offer de minimis academic and behavioral benefit, because the student fail to demonstrate progress in either area.

Finally, DCPS failed to consider the potential harmful effects of placing the student in a general education setting, instead of a combination general education resource room setting, prior to completing a FBA , developing a BIP, and ensuring that the student received ***behavior intervention services and modifications***, designed to address her social emotional behavior deficits.

**Fourth**, IDEA, 34 C.F.R. §300.320 (a)(1) provides that the student's IEP must include a statement of the child's present levels of academic achievement and functional performance including how the child's disability affects the child's involvement in the general education curriculum; a statement of measurable annual goals, including academic and functional goals; and a description of the child's progress toward meeting the annual goals.

For purposes of comparison only, the Hearing Officer refers to the student's December 11, 2006 IEP which identifies the following levels of student performance: 3.0 in math calculations, **3.0** in math reasoning, 2.0 in reading comprehension, 3.0 in reading basic, and 3.0 in written expression. At the time that the IEP was developed, the student was 11 years of age and in the 6<sup>th</sup> grade.

The student's April 28, 2008 IEP reflects the following levels of performance, based upon results of the April 21, 2008 Woodcock Johnson II achievement test results: a grade equivalency of 4.9 in math calculations, **17.2** in math reasoning, 3.7 in reading comprehension, 5.6 in reading basic, and 3.7 in written expression. There is a significant disparity in the scores received by the student in math reasoning in 2006 compared to scores received in this area in 2008. According to the student's IEPs, in 2006 she was at a 3.0 grade level in math reasoning, and in 2008 she scored beyond college level in math reasoning, with all other scores remaining consistent; which is not probable. Therefore, the validity of the data in the student's April 28, 2008 IEP, and the evaluation upon which the data is based, is questionable.

**Fifth**, the social/emotional goals and objectives in the student's IEP are not reasonably calculated to enable the student to receive more than de minimis educational benefit, failing to satisfy *Rowley's* "some educational benefit" standard. If the student receives any value from the education afforded by DCPS, it is trivial and not sufficient; and she is likely to continue to produce regression, and not progression, academically and behaviorally.

The services fail to provide the student "meaningful" access to education, and confer "some educational benefit", because the IEP fail to appropriately address the student's social/emotional behavior and its overall impact upon her learning, in all subject areas. The IEP also fail to address the student's lack of progress towards achieving the goals in her IEP; reflect the level of services the student requires to address her social/emotional needs; and are necessary to ensure that she receives "meaningful" educational benefit. The manifestation determination review team acknowledged that although the student's social emotional goals in her IEP appear adequate, the goals as provided in her IEP are inadequate, and require modification to address her behavior.

Assuming arguendo the student's April 28, 2009 IEP is in fact appropriate, there would be more than trivial evidence of educational and behavioral advancement, as reflected in recent test scores; there would be evidence of marked improvement in the student's behavior and academics. Instead, the student remains below grade level, continue to exhibit problematic behavior in the classroom, and is suspended from school because of her behavior.

**Sixth**, a purpose of the MDT/IEP team meetings is to review and revise the student's IEP, as appropriate, and consistent with 34 C.F.R. §300.324(b). IDEA, 34 C.F.R. §300.324 (a) provides that in developing each child's IEP the IEP Team must consider—

- (i) The strengths of the child;
- (ii) The concerns of the parents 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.

The Hearing Officer finds that on April 28, 2008, the IEP team failed to consider a the results of the July 30, 2007 Comprehensive Psychological Evaluation, completed by DCPS, and recommendations for a FBA and BIP; or the student's academic, developmental, and functional needs, in developing the student's IEP.

**Seven**, DCPS developed the student's April 28, 2008 IEP, without the benefit of the results of a Functional Behavioral Assessment, and development of a BIP.

**Eighth**, according to IDEA, 34 C.F.R. §300.324, in development of the student's IEP, in the case of a child whose behavior impedes the child's learning or that of others, the IEP team must consider special factors, such as the use of positive behavioral interventions and supports, and other strategies, to address that behavior; which failed to occur in this matter.

*Ninth*, the “Report to Parents on Student Progress”, dated September 26, 2007, and December 2, 2008, includes teacher comments which indicate that the student required more study; had the possibility of failing; failed to complete class assignments and homework, excessive absences; lacked initiative; poor behavior; failed to participate; is failing, etc.. This information was also available to the team, in developing, reviewing, and revising the student’s IEP.

*Tenth*, the SEC testified that the student receives accommodations and modifications in the educational program within the classroom, however, the April 28, 2008 IEP only recommends modifications and/or accommodations during testing; and fails to include accommodations and modifications in the educational program; and fail to describe the supplementary aids and services, the student requires in the classroom.

The Hearing Officer finds that the MDT/IEP teams reviewed and developed the student’s IEP; however, failed to revise the student’s IEP, as appropriate, to address the student’s lack of progress towards achieving the goals in her IEP; and that are necessary to ensure that the student receives “meaningful” educational benefit. The student requires a special education program specifically designed to address her special education and related service needs. DCPS failed to comply with the substantive requirements of IDEA, in developing, reviewing, and revising the student’s IEP.

It is the Hearing Officer’s decision that Petitioner satisfied its burden of proof, by presenting evidence that DCPS failed to provide the student an appropriate IEP for the 2007/08 and 2008/09 school years; representing a substantive violation of IDEA.

It is also the Hearing Officer’s decision that Petitioner satisfied its burden of proof, by presenting evidence that DCPS failed to provide the student the special education and related services, recommended in her April 28, 2008 IEP; representing a substantive violation of IDEA.

### ISSUE 3

#### **Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement?**

Petitioner represents that according to the *Bd. of Educ. of Hendrick Hudson Central Sch. Dist., v. Rowley*, 458 U.S. 176; 102 S. Ct. 3034, Free Appropriate Public Education (FAPE) must provide the child with meaningful access to educational process and the education must be reasonably calculated to confer some educational benefit. Petitioner further represents that in this case, the student has not made academic progress because she has not been in an appropriate placement; and that in *Reusch v. Fountain*, 872 F. Supp. 1421, 1425 (D. Md. 1994) the benefit conferred to the student has to amount to more than just a trivial progress.” “In this case the student’s 03/18/04 psycho-educational evaluation and 07/30/07 comprehensive psychological evaluation shows the fact that the student has not made academic progress based on her grade equivalences. At the time the 2004 psycho-educational was completed, she was in the 3<sup>rd</sup> grade. However when the 2007 psychological was completed she was in the 7<sup>th</sup>. The below chart will show the differences.”

**03/18/2004 Psycho-educational**

**07/30/07 Comprehensive Psychological**

<b>Word Reading:</b>	<b>1:5 Grade Level</b>	<b>5.0 Grade Level</b>
<b>Numerical Operations</b>	<b>2:2 Grade Level</b>	<b>4.6 Grade Level</b>
<b>Spelling</b>	<b>1:6 Grade Level</b>	<b>3.8 Grade Level</b>

The Petitioner also represents that when the student was in the 3<sup>rd</sup> grade, she was 1.7 years behind in reading however, in the 7<sup>th</sup> grade, she was 2-3 grades behind; in numerical operations she was approximately 10 months behind in the 3<sup>rd</sup> grade but in the 7<sup>th</sup> grade, she was 2.6 – 3 grades behind; in spelling she was 1.6 grade levels behind in the 3<sup>rd</sup> grade but in the 7<sup>th</sup> grade she was about 4 grade levels behind. “Obviously this is not a student who has progressed but rather has regressed. Therefore, she has not received the appropriate services as she has not been in the appropriate-placement as the placement has not resulted in academic progress. Under *Reusch*, this shows that her placement has not provided her with educational benefit.”

Petitioner represents that the student testified that “the work in the general education class is hard and that in a special education school everyone is in special education. She testified that she wants to do better in school and that she needs help in controlling her temper.” Petitioner also represents that the Admissions Director at \_\_\_\_\_ school testified that the school can provide the student educational benefit and can meet the student’s special education needs.

“According to *M.C. on Behalf of J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (C.A.3. (N.J.), 1996) “a child’s entitlement to special education should not depend upon the vigilance of the parents.....rather, it is the responsibility of the child’s teachers, therapists, and administrators – and of the multi-disciplinary team that annually evaluates the student’s progress – to ascertain the child’s educational needs, respond to deficiencies, and place him or her accordingly.” However, in this case, although the student is obviously functioning below level, DCPS has failed to provide her with the program that can meet her needs. The mother testified that she has tried for several years to tell DCPS that her daughter is not making academic progress and that she is dissatisfied with the education the DCPS is providing to her daughter but to no avail.”

“According to *Florence County School District Four, et al. v. Shannon Carter*, 510 U.S. 7, ‘when a public school system had defaulted on its obligations under the Act, a private school placement is “proper under the Act” if the education provided by the private school is “reasonably calculated to enable the child to receive educational benefits.”’ Tuition reimbursement for a denial of FAPE is appropriate if the parent’s choice of school can meet the child’s needs. *Sch. Comm. Of Burlington v. Dep’t of Ed.*, 471 U.S. 359, 368, 105 S. Ct. 85 L. Ed. 2d 385 (1985) DCPS’ only witness testified that the student was making academic and behavioral progress. However, the student’s records state otherwise.”

“According to the student’s report cards, she is failing most of her classes and majority of her teachers indicated that she was having behavioral problems in the class. On cross-examination, the DCPS Special Education Coordinator could not explain why the report cards state something different from what she was testifying to. Therefore, DCPS has not presented any evidence that they have met their obligation to provide the student with an appropriate placement. Since \_\_\_\_\_ testified that they can provide her with educational benefit, the parent, through counsel implores this

hearing officer to find in favor of the student and the parent and place the student at school so she can have a chance to gain educational benefit.”

DCPS represents that “Petitioner failed to meet her burden on this issue; and failed to demonstrate that the student’s current placement was inappropriate. Petitioner’s suggested alternative placement--a full-time, therapeutic, private school which serves only disabled students--is a completely inappropriate placement for this student and violates the IDEA prescription of the least restrictive environment (LRE) for disabled students.”

“The IDEA permits educators to place children with disabilities in special classes and/or separate facilities or institute other removals from the general education environment only when the nature or severity of the students’ disabilities is such that instruction in general education classes cannot be achieved satisfactorily.” DCPS represents that this has not been demonstrated by Petitioner; the student only receives 7.5 hours on her IEP and no one has ever suggested in any MDT meeting or otherwise, that the student requires more hours on her IEP or that any type of alternative placement is warranted.

DCPS also represents that the student’s current placement at the Center is completely appropriate; and the student is making academic and behavioral progress.

### ANALYSIS

According to 34 C.F.R. Section 300.116, in determining the *educational placement* of a child with a disability, including preschool child with a disability, each public agency must ensure that—

- (a) The placement decision—
  - (1) Is made by a group of persons, *including the parents*, and other persons *knowledgeable about* the child, the meaning of the evaluation data, and the *placement options*; and
  - (2) Is made in conformity with the *Least Restrictive Environment (LRE)* provisions of this subpart, including Sections 300.14 through 300.118;
- (b) The child’s placement—
  - (1) Is determined at least annually;
  - (2) Is *based on the child’s IEP*; and
  - (3) Is as close as possible to the child’s home;
- (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if non-disabled;

- (d) In selecting the LRE, consideration is given to any ***potential harmful effect on the child*** or on the ***quality of services that he or she needs***;... *Individuals with Disabilities Education Improvement Act of 2004, 34 C.F.R. Section 300.116.*

The LRE requirement also reflects the IDEA's preference that "[to] the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled", and special classes, separate schooling, or other removal of children with disabilities from the regular educational-environment occurs only when ***the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.*** *See also, 34 C.F.R. Section 300.114(a)(2); 34 C.F.R. Section 300.116(a)(2); and D.C. Municipal Regulations Title 5, Section 3011.*

However, IDEA's preference for "mainstreaming" disabled students is not absolute; Section 1412(a)(5) ***permits the delivery of educational services to disabled students in less integrated settings as necessitated by the student's disability.*** *A. B. ex rel. D.B. v. Lawson, 354 F.3<sup>rd</sup> 315, 330 (4<sup>th</sup> Cir. 2004).* IDEA also provides that in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs. *See, 34 C.F.R. §300.116.*

The Hearing Officer finds that Petitioner presented evidence that the student's placement in a general education classroom, and not in a combination general education resource classroom setting is inappropriate, and inconsistent with the student's IEP. However, Petitioner failed to present evidence that the student's placement at \_\_\_\_\_ is inappropriate; that the school is unable to implement a properly developed and appropriate IEP; provide the student specialized instruction, in a combination general education resource room setting; or provide the student educational benefit.

Clearly, DCPS failed to consider the potential harmful effects on the student, or on the quality of the services she requires, by maintaining the student's placement in her current classroom, and failing to provide the student the specialized instruction recommended in her IEP, in a resource room setting. However, more definitive evidence is required to find that the student's current placement is inappropriate.

Petitioner also failed to present evidence that the nature and severity of the student's disability, is such that education in a combination general education and resource classroom setting, with the use of supplementary aids and services cannot be achieved satisfactorily; or that the student requires placement in a full-time special education program, and therapeutic environment, to have access to the general curriculum; and receive educational benefit.

In addition, according to IDEA, the student's placement is based in part, upon the IEP. In this matter, the Hearing Officer determined that DCPS failed to develop an appropriate IEP for the student. The Hearing Officer finds that absent an appropriate IEP, any determination regarding the appropriateness of the student's current placement, or an alternative placement, would be premature.

It is the Hearing Officers' decision that Petitioner failed to satisfy its burden by presenting evidence sufficient for a finding that DCPS failed to provide the student an appropriate placement during the 2007/08 and 2008/09 school years; in violation of IDEA, 34 C.F.R. §300.116.

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

According to *Harris v. District of Columbia, Civil Action No. 07-1422 (RCL) (2008)*, "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." See, *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. The IDEA further recognizes that the quality of a child's education is inextricably linked to that child's behavior, and hence an effective educational evaluation must identify behavioral problems: "the IEP team must, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. §300.324 (a)(2)(i).

The courts also held in *Harris*, that "the FBA is essential to addressing a child's behavioral difficulties, and, as such, it plays an integral role in the development of an IEP." The court explained that the FBA is performed to determine causes of a child's behavior and the concomitant consequences of that behavior; and the information gleaned from the assessment is central in formulating an IEP tailored to the needs of the individual student.

Additionally, "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*. Prior to passage of the IDEA, Congress contended that disabled children's needs were not being met because they "did not receive appropriate educational services," and undiagnosed disabilities prevented the children from having a successful educational experience."

The failure of DCPS to evaluate the student in all areas of suspected disability; complete a FBA; and develop a BIP, has certainly compromised the effectiveness of IDEA, as applied to this student. The student's academic and behavioral history, "Student Report of Progress", and DCPS Psychological Evaluation completed on July 30, 2007, supports a finding that the student requires academic and behavioral intervention and support; and would benefit from a FBA and BIP.

In addition, it is evident that the student is not progressing under her current educational program, or in her current classroom setting, therefore, the program is not specifically designed to address the student's special education and related service needs; and the student fail to receive the educational benefit as contemplated by *Rowley*. The MDT notes are replete with information that the student's behavior and academics remain areas of concern; however, DCPS failed to develop an appropriate IEP that meets the student's academic, developmental, and functional needs of the student, to ensure that she receives educational benefit.

The Hearing Officer finds that DCPS' failure to evaluate the student in all areas of suspected disability, by completing a FBA and BIP, as recommended in the July 30, 2007 Comprehensive Psychological Evaluation, and as necessitated by the student's special education and related services needs, seriously infringes upon the parent's opportunity to participate in the IEP process; and development of an IEP specifically designed to address the student's unique special education and related service needs, resulting in loss of educational opportunity to the student.

It is the Hearing Officers' Decision that DCPS' failure to evaluate the student in all areas of suspected disability, represents a substantive 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")"; denial of a FAPE; and entitlement to compensatory education services.

## XII. ORDER

Based on the aforementioned, it is hereby:

- (1) **ORDERED**, that DCPS shall fund an independent Functional Behavioral Assessment (FBA); and convene an MDT meeting within ten (10) calendar days of Receipt of the FBA, to review the assessment and develop a Behavioral Intervention Plan (BIP); review and revise the student's IEP, as appropriate; discuss and determination compensatory education services; and it is further
- (2) **ORDERED**, that DCPS shall schedule all meetings through parent's counsel, Fatmata Barrie, in writing, via facsimile at (202) 626-0048.
- (3) **ORDERED**, that in the event of DCPS' failure to comply with the terms of this decision and order, Petitioner's Counsel will contact the Special Education Coordinator \_\_\_\_\_ Campus, 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
- (4) **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
- (5) **ORDERED**, that this decision and order are effective immediately.

**XIII. APPEAL RIGHTS**

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

*Ramona M. Justice*

*4-13-09*

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

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

cc: Attorney Harsharen Bhuller, Office of the Attorney General  
Attorney Fatmata Barrie: Fax: 202-626-0048