

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Review and Compliance  
State Enforcement and Investigation Division  
Student Hearing Office  
Van Ness Elementary School  
1150 5<sup>th</sup> St., S.E., Washington, D.C. 20003  
Phone: (202) 698-3819      Facsimile: (202) 442-5556

**OSSE**  
**STUDENT HEARING OFFICE**  
**2009 AUG 19 AM 10:14**

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

**Date of Complaint:** June 3, 2009  
**Date of Pre-hearing:** July 7, 2009  
**Date of Hearing:** August 10, 2009  
  
**Student Case Number:**  
**Student Identification Number:**

**HEARING OFFICERS' DECISION (HOD)**

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

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

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

1 Personally identifiable information is provided in the "Record of Proceeding" which is located on the last page of this Order and must be removed for public distribution.

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

**I. INTRODUCTION**

The student is \_\_\_\_\_ years of age, and attends \_\_\_\_\_ School, a charter school located in the District of Columbia. The District of Columbia serves as the Local Education Agency (LEA), on behalf of the charter school. Prior to attending \_\_\_\_\_, the student attended \_\_\_\_\_ also located in the District of Columbia.

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

On June 3, 2009, Petitioner’s Attorney initiated an “Administrative Due Process Complaint” with the D.C. Public Schools, hereinafter referred to as “DCPS” or “Respondent”, Student Hearing Office (SHO), on behalf of the parent and student. The due process complaint alleged that DCPS denied the student a free appropriate public education (FAPE), by failing to:

- (1) implement the student’s Individualized Education Program (IEP);
- (2) comprehensively evaluate the student; and
- (3) provide an appropriate placement, during the 2008/09 school year.

The due process hearing convened on August 10, 2009, at 11:00 a.m.; at Van Ness Elementary School, located at 1150 5<sup>th</sup> Street, S.E., Washington, D.C. 20003.

**II. JURISDICTION**

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

**III. DUE PROCESS RIGHTS**

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

#### **IV. ISSUES**

The following issues are identified in the *June 3, 2009* due process complaint, and accepted by the court:

- (1) Whether D.C. Public Schools failed to implement the student's 2008/09 Individualized Education Program (IEP), and/or failed to provide the student the related and/or instructional services, in accordance with the IEP?
- (2) Whether D.C. Public Schools failed to comprehensively evaluate the student, by failing to conduct a Clinical or Occupational Therapy Evaluation and/or reevaluate the student, pursuant to parent's request?
- (3) Whether D.C. Public Schools failed to provide the student an appropriate placement for the 2008/09 school years?

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

- (1) A finding that DCPS denied the student a free appropriate public education;
- (2) DCPS shall provide an appropriate placement and/or, at parent's request, fund the private placement of the student with transportation if a suitable placement has not been located by the date of the hearing;
- (3) That DCPS/Charter School shall conduct or fund a Psycho-educational evaluation, Clinical Evaluation, Occupational Therapy Evaluation, for the student;
- (4) That DCPS shall convene a meeting to review evaluation results and revise the student's IEP;
- (5) The student shall be entitled to compensatory education services for the denials of FAPE, that have occurred and DCPS shall fund a Linda Mood Bell diagnostic assessment and reconvene an MDT to address the student's need for the program;
- (6) DCPS/Charter School shall also fund one on one tutoring, as well as, provision of independent related services to make up for services that were denied this school year;
- (7) That DCPS agrees to pay counsel for the parent's reasonable attorney's fees and related costs incurred in this matter;
- (8) All meetings shall be scheduled through counsel for the parent, Roberta L. Gambale, Esquire, in writing, via facsimile, at 202-742-2096 or 202-742-2098;

#### **VI. DISCLOSURES**

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

#### **DISCLOSURES ADMITTED INTO EVIDENCE ON PETITIONER'S BEHALF**

Petitioner's Exhibits 01 through Petitioner's Exhibits 35; and a witness list dated July 29, 2009.

## **DOCUMENTS ADMITTED INTO EVIDENCE ON RESPONDENT'S BEHALF**

Respondent's Exhibits 01 through Respondent's Exhibits 18; and witness lists July 1, 2009, and August 3, 2009.

### **VII. PROCEDURAL POSTURE**

On June 3, 2009, Petitioner filed the due process complaint; and Respondent filed "DCPS' Resolution Session Waiver", agreeing to waive the resolution meeting and requested that the complaint proceed to a due process hearing. The due process hearing was initially scheduled for July 9, 2009, however, during the pre-hearing conference the court determined that the two (2) hours initially allotted for the hearing was insufficient; and rescheduled the hearing for July 24, 2009, at 9:00 a.m..

The DCPS waiver resulted in advancement of the hearing date to July 9, 2009, however, due to the parties' unavailability on July 9, 2009, and the need for four (4) hours for the hearing, the hearing was continued to August 10, 2009.

The due process hearing convened on August 10, 2009, at 11:00 a.m., as scheduled. Although opposed by Petitioner, the court granted Respondent's request to submit written closing arguments. The record remained open until 5:00 p.m. on August 14, 2009, to provide the parties the opportunity to submit written closing arguments. Respondent submitted written closing arguments at 12:31 p.m., on August 14, 2009. Petitioner failed to submit written closing arguments.

### **IIX. PRELIMINARY ISSUES**

There were no preliminary matters presented by the parties at the hearing. The Hearing Officer proceeded with the due process hearing, as scheduled.

### **IX. STATEMENT OF CASE**

1. The student is \_\_\_\_\_ years of age, and attends \_\_\_\_\_ a charter school located in the District of Columbia. The District of Columbia serves as the Local Education Agency (LEA), on behalf of the charter school.

Prior to attending the \_\_\_\_\_ and \_\_\_\_\_ the student attended \_\_\_\_\_

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

3. On December 14, 2007, \_\_\_\_\_ completed a Speech and Language reevaluation, to indicate present levels of language functioning and determine if Speech and Language services are warranted. Test results indicate that the student demonstrates a severe speech and language impairment in the areas of semantics and syntax. The same was indicated for expressive and receptive vocabulary. The evaluator surmised that the speech and language impairment would negatively impact the student's academic performance.

The evaluator recommended continuation of speech and language services for 1 hour weekly, improving expressive and receptive language skills in the areas of recalling sentences, formulating sentences, vocabulary, semantic relationships, auditory and written sequences and complex thinking skills such as inference, verbal reasoning and interpreting figurative language.

4. On December 19, 2007, RehabFocus, L.L.C. completed an Occupational Therapy Evaluation Report. The student was referred for evaluation to determine if services were indicated. Test results indicate that the student scored very low when compared to peers of her age; and the student required extra time and worked diligently to complete all tasks presented to her.

The evaluator concluded that the student would continue to benefit from direct school-based occupational therapy services for 1 hour a week in conjunction with her daily educational program to improve her visual motor integration, visual perception, fine motor coordination and handwriting skills. The evaluation also included several general recommendations, and classroom recommendations.

5. On January 11, 2008, a Psychosocial History/Social Work Assessment was completed. The student was referred for the assessment because the student had had little to no academic growth, during the school year. The assessor opined that the student was experiencing difficulty in academics, possibly due to her extended absenteeism, thus not obtaining the basis for learning. It was suggested that a Psycho-educational Evaluation be completed to establish the student's level of functioning.

The assessor also indicated that due to the student's possible level of cognitive functioning, it was also suggested that the student should be considered for an educational setting that would meet all of her needs both academically and socially. The assessor recommended that the educational setting include students that are functioning at the same cognitive level as the student and the student teacher ratio is approximately 6 students to one teacher.

6. On February 15, 2008 and February 27, 2008, \_\_\_\_\_ completed a Psycho-Educational Reevaluation of the student; to determine the most appropriate academic environment for the student. The evaluator determined that in light of the fact that earlier nonverbal cognitive test demonstrate low average cognitive functioning, current test results would suggest that the student continues to deal with a severe language based learning disability which has depressed her overall functioning. The evaluator concluded that the severity of the learning disability in addition to missed instructional time would support the need for increased special education services.

The evaluator opined that the optimal educational environment would include a full time setting with a low teacher student ratio (6 students to 1 teacher), to provide the student the opportunity to receive the required related services (e.g. speech, OT/PT, counseling). The evaluator recommended that the MDT review and discuss findings from other evaluations; and indicated that the student would benefit from special education intervention in the following areas:

- Ongoing assistance in the area of self-management (e.g. self management of academic behaviors, self-regulation, time management)
- Student should be reinforced with the SQ4R (survey, question, read, recite, write and review) checklist when reading textbook assignments.
- While in the individual/group counseling sessions the student should attempt to develop coping skills and issues with stress within the family.
- Exercises in reading comprehension.
- Counseling goals focused on assisting the student in advocating for herself in a classroom setting, problem solving, and coping strategies.

7. On May 8, 2008, an IEP was developed for the student, providing for 5 hours of specialized instruction in the general education setting; 15 hours of specialized instruction in the special education setting, 1 hour of occupational therapy, and 1 hour of communication therapy, weekly.

The IEP reflects that the student spends 71% of her time not in a regular education setting; the general education and combination general education with Resource Classroom setting is rejected; and the out of general education setting is accepted.

In the Least Restrictive Environment portion of the IEP, it indicates that curricular modification, accommodation and/or supplemental aids and services can be used for a Least Restrictive Environment (LRE) setting in regular education. In the modifications/accommodations portion of the IEP, it indicates that "Student will engage in non-academic courses with non-disabled peers and have provisions for parallel instruction". In the "Current Setting Considerations" section of the IEP, it reflects "combination general education and resource classroom" as the student's current setting consideration.

The team also completed a "Special Education Goal and Objective for ESY", indicating that the student's placement for ESY shall consist of a separate class with students with similar deficits, receiving 2.5 hours per day in reading, and 2.5 hours per day in math; for a period for four weeks. The document also indicates continuous failure in the general education environment; and that the student has difficulty even with accommodations and modifications. The team also approved transportation services for the student, to participate in the ESY program.

8. On November 4, 2008, an Individualized Education Program (IEP) was developed for the student, providing for 20 hours of specialized instruction, 1 hour of speech and language therapy, 1 hour of occupational therapy, and 1 hour of social emotional counseling services,-

weekly. According to page 4 of the IEP, a general education and combination general education setting with Resource Classroom was rejected; and an out of general education setting for the student, was accepted.

In the Least Restrictive Environment portion of the IEP, it indicates that curricular modification, accommodation and/or supplemental aids and services can be used for a Least Restrictive Environment (LRE) setting in regular education. In the modifications/accommodations portion of the IEP, it indicates that "Student will engage in non-academic courses with non-disabled peers and have provisions for parallel instruction".

The team authorized extended school year (ESY) services for the student, which was included in the IEP Special Education Goal and Objective for ESY, in Reading, and Mathematics, for 2.5 hours each, per day, for a period of four weeks. The educational setting for the ESY is described as a separate class with students with similar deficits. The document also indicates continuous failure in the general education environment; and that the student has difficulty even with accommodations and modifications.

The team also developed an IEP Addendum for ESY Services; indicating that due to the student's severe deficits in math, reading, and written language, the student would benefit from ESY. The addendum also indicated that ESY was warranted because the student was not in school for an extended period of time, which has also negatively impacted her ability to learn and retain information. The team also approved transportation services for the student, to ensure daily attendance and safety.

The MDT note reflects that the mother advised the team that the student was not evaluated properly; and the prior school failed to complete the evaluation process.

10. On February 25, 2009, D.C. Public Schools prepared "Health Encounter Tracking Form", Progress Notes, for February 4, 2009, February 11, 2009, February 18, 2009, and February 25, 2009. The progress notes indicate that the student's goals and objectives remained the same as February 4, 2009; and she continued to respond to treatment.

11. On February 25, 2009, D.C. Public Schools prepared a Health Encounter Tracking Form reflecting the following regarding the provision of *occupational therapy* services for the student, during the month of February, 2009:

2/4/09	1 hour regular and .5 hours of makeup time
2/11/09	1 hour regular and .25 minutes of makeup time
2/18/09	1 hour regular and 1 hour make up time
2/25/09	1 hour regular and .75 hours of makeup time
Total:	4 hours regular time and 2.5 hours of makeup time

On March 28, 2009, D.C. Public Schools prepared a Health Encounter Tracking Form reflecting the following regarding the provision of *occupational therapy* services for the student, during the month of March, 2009:

3/11/09 1 hour regular time and .50 hours of makeup time  
3/18/09 1 hour regular time and .25 hours of makeup time  
3/25/09 School Closed

Total: 2 hours of regular time and .75 hours of makeup time

An additional Health Encounter Tracking Form reflects the following regarding the provision of occupational therapy services for the student, during the month of April, 2009:

4/1/09 1 hour regular time and .50 hours of makeup time  
4/8/09 1 hour of regular time and .75 hours of makeup time  
4/15/09 1 hour regular time  
4/20/09 .5 hours of makeup time  
4/29/09 1 hour of regular time and .25 hours of makeup time

Total: 4.5 hours of regular time and 1.5 hours of makeup time

The student's IEP recommends 1 hour per week of occupational therapy services. There were 42 calendar weeks of school during the 2008/09 school year, beginning August 25, 2008. The student received a total of 15.25 hours of occupational therapy services. Therefore, the student failed to receive 26.75 hours of occupational therapy services.

12. On March 28, 2009, D.C. Public Schools prepared "Health Encounter Tracking Form", Progress Notes, for March 4, 2009, March 11, 2009, March 18, 2009, March 28, 2009. The progress notes indicate that the student's goals and objectives remained the same; and she continued to respond to treatment

13. On March 19, 2009, Petitioner's Attorney forwarded a Request for Records and General Authorization, to the Acting Principal at requesting a copy of the student's educational records.

14. On March 19, 2009, Petitioner's Attorney forwarded a letter and Parental/Guardian Consent to Evaluate, to the Acting Principal of requesting comprehensive reevaluation of the student, to include, but not limited to: psycho-educational, clinical psychological, speech and language, occupational therapy, social history, formal classroom observation, and vision and hearing screenings. The letter also indicated that the reevaluations requested may also include, if warranted: a neuropsychological, physical therapy, and medical assessment.

The letter also included a request for a vocational assessment, in anticipation of the student reaching the age of 16 and the necessity of addressing transition services at the student's May, 2009, IEP team meeting.

15. On March 24, 2009, prepared an Attendance Detail reflecting that from August 14, 2008 through June 10, 2009, the student has a total of 10 excused absences, and 20 tardy unexcused.

16. On March 27, 2009, the Special Education Advocate forwarded a letter to the Special Education Coordinator at \_\_\_\_\_ of Washington, notifying the school of its intent to conduct a classroom observation of the student, on April 21, 2009 at 1:00 p.m.. The letter also included a request to review the student's report cards, IEP Report Cards, Tracking Forms for services, and classroom schedule.

17. On April 17, 2009, Psychological Assessment Solutions, LLC completed a Speech and Language Evaluation, to assess the student's current speech and language functioning, and determine whether the student continue to qualify for speech and language services. Formal testing revealed the student demonstrates receptive and expressive language skills which are significantly below the average range of ability for her chronological age.

The evaluator recommended continuation of direct speech and language services to provide academic support; enhanced support for language within her classroom setting, as well. Additional recommendations were provided for general and/or special educators, to assist the student in the classroom.

18. On April 28, 2009, Psychological Assessment Solutions, LLC completed a Confidential Vocational Evaluation, to assess the student's occupational interests and assist in her career decision-making process.

19. On April 29, 2009, \_\_\_\_\_ completed the student's Report of Progress, for the 3rd Period. The report indicates that the student is progressing in 29 goals, 6 goals were not introduced, and mastered 3 goals, out of a total of 38 goals.

20. The following "*Speech and Language Related Services Sign-In Sheets*", were completed by the DCPS Speech Pathologist, identifying the dates and times speech and language services were provided to the student:

**Service Dates:**

10/22/08	1 hour 5 minutes
10/29/08	30 minutes
11/5/09	1 hour 15 minutes
11/19/08	-
12/8/08	-
12/17/08	-
2/4/09	1 hour 15 minutes
3/5/09	45 minutes

The following "*Speech and Language Contact Notes*" were *completed* by the DCPS Speech Pathologist, reflecting the dates the student had contact with the Speech and Language Pathologist and/or received speech language services, which failed to indicate the amount of time expended:

10/22/08	(First Session with Student)
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10/29/098  
11/5/08  
2/18/09  
2/25/09  
3/5/09  
3/11/09  
4/8/09

The following *Service Log Detail forms* were completed, identifying additional service dates speech and language services were provided the student:

**Service Dates**

11/26/08	School Closure
12/8/08	Direct Service (1 hour)
12/17/08	Direct Service (1 hour)
1/7/09	Student Absent
1/14/09	Student Unavailable
1/23/09	Student Unavailable
1/29/09	Student Unavailable
2/4/09	Direct Service (1 hour)
3/18/09	Direct Service (1 hour)

21. On May 12, 2009, Respondent issued an Independent Educational Evaluation letter authorizing parent to obtain an independent Assistive Technology Assessment, at its expense. On May 13, 2009, Petitioner's Attorney forwarded to Interdynamics, Inc. a written request for an Assistive Technology Assessment.

22. On May 13, 2009, \_\_\_\_\_ issued to parent a Letter of Invitation/ Notice to a Meeting of the IEP Team, on May 26, 2009 at 9:30 a.m., to develop the initial or revise the student's existing IEP.

23. On May 13, 2009, Respondent issued an Independent Educational Evaluation letter authorizing parent to obtain an independent Adaptive Behavioral Assessment, at its expense. On May 13, 2009, Petitioner's Attorney forwarded to Interdynamics, Inc. a request for conduct of the Assistive Technology Assessment.

24. On May 29, 2009, an Occupational Therapist at Ellis Therapeutic Consultants , completed an "Annual IEP Progress Report". The report indicates that the student received 60 minutes of school-based occupational therapy for the 2008/09 school year; and the Occupational Therapist who authored the report indicated that he began providing the student occupational services in February, 2009. The Occupational Therapist also indicated that additional sessions were provided the student to "make up for missed sessions from October 2008 through January 2009.

The report reflects that within the goal of motor health, the student mastered three (3) objectives in the goals, made limited progress in one objective, was making progress/proofreading skills-visual perception, and not mastered two (2) of the objectives. The Occupational Therapist recommends:

- (1) the continuation of school-based occupational therapy to address visual perceptual skills and fine motor/visual motor integration skills;
- (2) modification of current goals and objectives to reflect her present level of performance and educational need;
- (3) an Assistive Technology Evaluation to determine specific technology that would assist the student in achieving greater education success; and
- (4) a career/vocational assessment for exploration of appropriate careers based upon interest and skill.

25. On May 19, 2009, Petitioner's Attorney forwarded an email to DCPS acknowledging receipt of service logs; and referencing an MDT meeting scheduled for May 26, 2009. Petitioner's Attorney indicated that she was not aware of a meeting scheduled for that date and would be unable to attend; and requested that a meeting is rescheduled through her office.

26. On June 1, 2009, DCPS emailed Petitioner's Attorney expressing interest in reviewing the following evaluations for the student, prior to the end of the school year: Vocational and Speech and Language. The email also proposed June 8<sup>th</sup>, 9<sup>th</sup>, or 10<sup>th</sup> to meet and review the evaluations.

27. On June 2, 2009, Petitioner's Attorney forwarded an email to DCPS inquiring regarding the status of the reevaluations requested in March, 2009; indicated that the student was referred for an independent assistive technology and adaptive assessment; and "preference would be to wait until we have the rest of her re-evaluations especially since her IEP doesn't expire until next November and it addressed her need for ESY."

28. On June 3, 2009, Petitioner's Attorney initiated an "Administrative Due Process Complaint" with the D.C. Public Schools, hereinafter referred to as "DCPS" or "Respondent", Student Hearing Office (SHO), on behalf of the parent and student. The due process complaint alleged that DCPS denied the student a free appropriate public education (FAPE), by failing to:

- (1) implement the student's Individualized Education Program (IEP);
- (2) comprehensively evaluate the student; and
- (3) provide an appropriate placement, during the 2008/09 school year.

29. On June 9, 2009, Petitioner's Attorney forwarded an email to DCPS inquiring regarding the status of the outstanding evaluations; and its failure to respond to a June 2, 2009 status request.

30. On June 11, 2009, \_\_\_\_\_ issued to parent and forwarded to Petitioner's Attorney a Letter of Invitation/Notice to a Meeting of the IEP Team to develop an initial or revise the existing IEP of the student, on July 22, 2009 at 10:00 a.m..

On June 11, 2009, \_\_\_\_\_ issued to parent and forwarded to Petitioner's Attorney a Letter of Invitation/Notice to a Meeting of the IEP Team to develop an initial or revise the existing IEP of the student, on July 23, 2009 at 10:00 a.m..

On June 11, 2009, \_\_\_\_\_ issued to parent and forwarded to Petitioner's Attorney a Letter of Invitation/Notice to a Meeting of the IEP Team to develop an initial or revise the existing IEP of the student, on July 24, 2009 at 10:00 a.m..

31. The due process hearing convened on August 10, 2009, at 11:00 a.m.; at Van Ness Elementary School, located at 1150 5<sup>th</sup> Street, S.E., Washington, D.C. 20003.

32. On July 2, 2009, Interdynamics, Inc. completed an independent Vineland Adaptive Behavior Evaluation. The purpose of the evaluation was to measure the student's adaptive functioning abilities and assist with educational service planning. On July 12, 2009, Petitioner's Attorney forwarded a copy of the independent Vineland Adaptive Behavior Evaluation to the Acting Principal of \_\_\_\_\_

On July 14, 2009, Petitioner forwarded a copy of the independent Vineland Adaptive Behavior Evaluation to Respondent's Assistant Attorney General, DCPS, Office of the Attorney General.

## **X. DISCUSSION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

### **ISSUE 1**

#### **Whether D.C. Public Schools failed to implement the student's 2008/09 Individualized Education Program (IEP), and/or failed to provide the student the related and/or instructional services, in accordance with the IEP?**

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

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

Petitioner represents that occupational therapy services were initiated in February, 2009, and the student failed to receive 22 weeks of services; the speech therapy logs indicate the student failed to receive 19 therapy sessions; and no counseling services. Petitioner argues that-

in the instant matter, never provided the student with the full amount of instructional services in a resource setting as required by the program to address her learning disabilities; and as a result, she was denied a FAPE.

Petitioner also argues that the student has not been provided a free appropriate public education in that the student's IEP has not been fully implemented since the commencement of the 2008/09 school year in that the student was not provided with related speech and language therapy, occupational therapy and/or counseling services despite her significant deficits.

Petitioner argues that prior to attending the student was in a full-time placement, where she progressed academically, however, since attending the school is unable to implement the student's IEP or provide the level of services the student requires. Petitioner argues further that according to the student's class schedule the student receives 8.75 hours of specialized instruction per week, failed to receive over 45 hours of specialized instruction.

Respondent generally denies the allegation that it denied the student a FAPE; however, acknowledge that the student attended of which DCPS is the local education agency for special education purposes. DCPS asserts that the student's IEP has been implemented as such, denies the student has been denied a FAPE based on this allegation.

Respondent acknowledge a break in the student's services from October, 2008 through January, 2009; the services were ultimately resumed; and the student suffered no harm during the break in services. Respondent represents that although it acknowledge the student experienced a break in occupational therapy services from October, 2008 through January, 2009, the student was not harmed; and according to the Occupational Therapist additional sessions were provided to the student to substitute for the services the student failed to receive during this period. DCPS Exhibit #15.

Respondent also reports that the Occupational Therapist's Report indicates that the student made progress in her occupational therapy goals; and the student mastered three of her objectives and made progress in the other goals. Respondent argues that the student failed to receive speech language services, however, the student was absent for sessions. In addressing the specialized instructions services, Respondent represents that the student's IEP recommends 20 hours of specialized instruction and related services; the IEP includes academic goals, in which the student progressed and mastered. Respondent further represents that according to the student's IEP Report Card, the student progressed academically.

Respondent concludes that Petitioner failed to meet its burden of demonstrating that the student was denied a FAPE; suffered educational harm; or requires a more restrictive setting in a full-time, out of general education, non-public placement. Respondent further concludes that implemented the student's IEP; the student is receiving a FAPE; and made progress during the 2008-09 academic years. Respondent also concludes that the student's November 14, 2008 IEP provides the student with 20 hours of specialized instruction, one hour of speech and language, one hour of occupational therapy, and one hour of social-emotional counseling. DCPS Exhibit #11.

## Discussion

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

To ensure that each eligible student receives a FAPE, the IDEA requires that an Individualized Educational Program (IEP) be developed for children with disabilities; to provide each disabled student with a plan for educational services tailored to that student's unique needs. 20 U.S.C. §1414(d); 34 C.F.R. §300.300(a)(3)(ii). The IEP includes services to ensure that students are able to make functional use of what they learn, in addition to ensuring academic growth.

According to IDEIA, 34 C.F.R. §300.15 evaluations are procedures used in accordance with §§300.304 through 30.311 as a means of determining whether a child has a disability and the nature and extent of the special education and related services the student requires. Upon completion of the administration of assessments and other evaluation measures a group of qualified professionals and the parent of the child must meet to determine whether the child is a child with a disability, as defined in §300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and... *See, IDEA, 34 C.F.R. §300.306(a).*

Once a student is disabled and eligible to receive special education services, the public agency must ensure that—

- (1) A meeting to develop an IEP for a child is conducted within **30 days** of a determination that the child needs special education and related services; and
- (2) *As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. See, IDEA, 34 C.F.R. §300.323 (c)(1).*

Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, ...and training. See, 34 C.F.R. Section 300.34 and 30 DCMR Section 3001.1.

The D.C. Municipal Regulations, Title 5, §3010.2 (2003), also provides that DCPS shall implement an IEP as soon as possible after the meeting where the IEP is developed..."

### **Specialized Instruction:**

According to the student's May 8, 2008 IEP, which expired on May 8, 2009, the student was entitled to receive 5 hours of specialized instruction in the general education setting; 15 hours of specialized instruction in the special education setting; and related services consisting of 1 hour of counseling services, 1 hour of occupational therapy, and 1 hour of speech and language therapy, weekly. The IEP also provides that the student will expend 71% of her time not in a-

regular education setting; however in the placement considerations and justification section of the IEP, the general education and combination general education with Resource Classroom setting is rejected; and the out of general education setting is accepted.

According to the student's November 4, 2008 IEP, the student was entitled to receive 20 hours of specialized instruction, 1 hour of speech and language, 1 hour of occupational therapy, and 1 hour of social emotional counseling services, weekly. The IEP also provides that the student will expend 61-100% of her time in specialized instruction and related services; and in the placement considerations and justification section of the IEP provides that the general education and combination general education with Resource Classroom setting is rejected; and the out of general education setting is accepted. The modification/accommodation section of the IEP provides that the student will engage in non-academic courses with non-disabled peers and have provisions for parallel instruction.

Although Petitioner argues that the student received 8.75 hours of specialized instruction per week; and missed over 45 hours of specialized instruction, there is no evidence supporting this determination. Presentation of the student's 2008/09 school schedule reflects that the student was only assigned to a resource classroom for Math, which is a classroom where students generally receive specialized instruction; and no other classes.

Presentation of the student's class schedule is persuasive, however, absent any other reliable or substantive evidence, the court is unable to render a finding that the student failed to receive the 5 hours of specialized instruction in the general education setting; and 15 hours of specialized instruction in the special education setting, in accordance with the May 8, 2008 IEP; or the 20 hours of specialized instruction per week, in an out of general education setting, as identified in the November 4, 2008 IEP; which were the student's IEPs during the 2008-09 school years.

#### **Speech and Language Services:**

The student's IEP recommends 1 hour per week of speech and language services; and there were 42 calendar weeks of school during the 2008/09 school year, although all weeks were not full weeks, beginning August 25, 2008. Therefore, it appears that the student was entitled to receive approximately 42 hours of speech and language services.

The record reflects several Speech and Language Contact Notes which indicate that the Speech and Language Pathologist engaged in additional contacts with the student, however, the amount of time is not indicated on all of the notes. According to the Speech and Language Contact Notes actually completed by the DCPS Speech Pathologist, the total number of hours of speech and language services provided the student during the 2008/09 school years is 4.83. Therefore, it appears that the student failed to receive approximately 37.17 hours of speech and language services, during the 2008/09 school years.

In addition, the student's Attendance Detail, for the period beginning August 14, 2008 through June 10, 2009, reflects that the student was only absent a total of 10 days during the 2008/09 school years; and tardy a total of 19 days. Therefore, it is not probable that the student's attendance had significant impact on the delivery of services.

Based on the Speech and Language Contact Notes, and the actual number of calendar weeks of school during the 2008/09 school year, speech and language services were not provided during the following weeks:

August: 25<sup>th</sup>  
September: 1<sup>st</sup>, 8<sup>th</sup>, 15<sup>th</sup>, 22<sup>nd</sup>, 29<sup>th</sup>  
October: 1<sup>st</sup>, 6<sup>th</sup>, 13<sup>th</sup>  
November: 10<sup>th</sup>, 17<sup>th</sup>  
December: 1<sup>st</sup>  
January: 5<sup>th</sup>, 12<sup>th</sup>, 19<sup>th</sup>, 26<sup>th</sup>  
February: 9<sup>th</sup>  
March: 30<sup>th</sup>  
April: 1<sup>st</sup>, 13<sup>th</sup>, 20<sup>th</sup>, 27<sup>th</sup>  
May: 1<sup>st</sup>, 4<sup>th</sup>, 11<sup>th</sup>, 18<sup>th</sup>, 25<sup>th</sup>  
June: 1<sup>st</sup>, 8<sup>th</sup>, 15<sup>th</sup>

The complaint indicates that the student missed over 19 sessions of speech and language services, during the 2008/09 school year; however, the Education Advocate testified that the student failed to receive 25 sessions or hours of speech and language services. However, Petitioner failed to present evidence or testimony sufficient for the court to determine the actual amount of speech and language services the student failed to receive, during the 2008/09 school year; the methodology utilized; or time period considered, in arriving at a determination that the student missed 19 or 25 hours of speech and language services. The evidence is insufficient and inconclusive.

#### **Occupational Therapy Services:**

The student's IEP recommends 1 hour per week of occupational therapy services. There were 42 calendar weeks of school during the 2008/09 school year, beginning August 25, 2008. DCPS acknowledge that the student failed to receive occupational therapy services from October, 2008 through January, 2009. Therefore, it appears that the student was entitled to receive approximately 42 hours of occupational therapy services. According to the service logs, the student received a total of 15.25 hours of occupational therapy services. The student failed to receive approximately 26.75 hours of occupational therapy services, as recommended in her May 8, 2008 and November 4, 2008 IEPs.

Additionally, the complaint indicates that the student failed to receive occupational services from the commencement of the school year (August 25, 2009) through February, 2009; Petitioner's Attorney represented at the hearing that the student missed 22 weeks of occupational therapy services; and the Education Advocate testified that the student missed 20 sessions or hours of occupational therapy services.

Petitioner failed to present evidence or testimony sufficient for the court to determine the actual amount of occupational therapy services the student was entitled to receive, however, failed to receive, during the 2008/09 school year; the methodology utilized or time period considered, in arriving at a determination that the student missed 22 weeks of occupational therapy services. Furthermore, the information provided by Petitioner and Petitioner's witness is conflicting, as a result the court is unable to adequately decide this issue.

### **Social/Emotional Counseling Services:**

The student's IEP recommends 1 hour per week of social/emotional counseling services. There were 42 calendar weeks of school during the 2008/09 school year, beginning August 25, 2008. Therefore, it appears that the student was entitled to receive approximately 42 hours of social/emotional counseling services.

Although Petitioner argues that the student failed to receive counseling services during the 2008/09 school year, Petitioner failed to present documentary evidence to support this assertion; or evidence regarding the amount of social emotional counseling the student was entitled, however, failed to receive. The Education Advocate testified that the student failed to receive 34 sessions or hours of social emotional counseling, however, there is no documentation or evidence to support this determination.

Petitioner failed to present evidence or testimony sufficient for the court to determine the actual amount of social/emotional counseling services the student was entitled, however, failed to receive during the 2008/09 school year; or the methodology utilized or time period considered, in arriving at a determination that the student missed 34 hours of occupational therapy services.

### **Student's Academic Progress**

On April 29, 2009, Hospitality PC High School completed the student's Report of Progress, for the 3rd Period. The report indicates that the student is progressing in 29 goals, 6 goals were not introduced, and 3 goals mastered, out of a total of 38 goals.

On May 29, 2009, an Occupational Therapist at Ellis Therapeutic Consultants , completed an "Annual IEP Progress Report". The report reflects that within the goal of motor health, the student mastered three (3) objectives in the goals, made limited progress in one objective, was making progress/proofreading skills-visual perception, and not mastered two (2) of the objectives.

The Special Education Advocate testified that she became familiar with the student in March, 2009; has not met or spoken with the student; failed to conduct a classroom observation of the student; or communicated with the student's related service providers or teachers regarding the student's academic progress. The Special Education Advocate testified that she did communicate with the Special Education Coordinator and student's Special Education Teacher regarding the student's progress, however, failed to testify regarding teacher input regarding the student's academic progress.

The Special Education Advocate also testified that she had not communicated with DCPS or Hospitality PCS regarding concerns that the student failed to receive services identified in her IEP; was unable to recall whether she had requested a meeting with the school to discuss the student's services, however, recall notifying the school regarding the missed services via email.

The Special Education Advocate testified that the Vineland Evaluation failed to indicate that the student is mentally retarded or recommended a "rule out" for mental retardation, while indicating that the purpose of the evaluation was to determine whether the student presents with mental retardation.

The Special Education Advocate testified that she does not recommend a change in the student's educational program; and had not communicated with the student, therefore, she was unaware whether the student had received the services in her IEP. The advocate testified that the student's IEP includes social emotional goals, and the student made progress with four (4) behavioral goals; and mastered several other behavioral goals.

However, the Special Education Advocate also testified that according to the Woodcock Johnson test results, the student performs at a very low academic level, is in the 9<sup>th</sup> grade, however performs at a 2<sup>nd</sup> grade level in math and reading; and the Speech and Language Evaluation indicates that there are significant deficits in expressive and receptive skill areas; which is supported by the December 19, 2007 Speech and Language Evaluation.

Results of the February 27, 2008 Psycho-educational Evaluation reflects that at the time of the evaluation the student was in the 8<sup>th</sup> grade, and according to the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV), the student performed extremely low in every area tested (verbal comprehension, perceptual reading, working memory, processing speed, and full scale IQ). In addition, the Woodcock Johnson test results reflect that the student performed at 2.6 grade equivalent in letter word identification, 2.3 in reading fluency, 2.31 in passage comprehension; and 2.9 in math fluency. In the category of written language the student performed at a grade equivalent of 3.1 in spelling, 2.1 in oral language, 1.5 in story recall, and 2.4 in understanding directions.

The evaluator determined that the student continues to deal with a severe language based learning disability which has depressed her overall functioning. The evaluator also opined that the severity of the learning disability in addition to missed instructional time would support the need for increased special education services; recommending a full-time setting with a low teacher student ratio.

Although the evaluations and witness testimony indicate that the student is below grade level, and the student continue to exhibit significant deficits in learning, receptive, and expressive language skills, Petitioner failed to present evidence that as a result of DCPS' failure to provide the student the speech and language and occupational therapy services identified in the 2008/09 IEP, the student suffered, academically, or otherwise; is denied access to the general curriculum; or educational benefit.

### **Findings of Fact**

1. Petitioner failed to satisfy its burden of proof by presenting witness and/or documentary evidence demonstrating that as soon as possible following development of the student's 2008/09 IEP, DCPS failed to implement the student's IEP, by failing to provide the student the 20 hours of specialized instruction, per week, in an out of general education classroom setting, as recommended in the student's IEP.
2. Petitioner failed to satisfy its burden of proof by presenting evidence that as soon as possible following development of the student's 2008/09 IEP, DCPS failed to implement the student's IEP, by failing to provide the student the 1 hour per week of social emotional counseling services, as recommended in the student's IEP.
3. Petitioner presented evidence that as soon as possible following development of the student's 2008/09 IEP, DCPS failed to implement the student's IEP, by failing to provide the student the 1 hour per week of speech and language services, as recommended in the IEP. However, Petitioner failed to present sufficient evidence regarding the amount of speech and language services the student was entitled, however, failed to receive, during the 2008/09 school year; or the methodology utilized to determine the amount of services the student allegedly failed to receive.
4. Petitioner presented evidence that as soon as possible following development of the student's 2008/09 IEP, DCPS failed to implement the student's IEP, by failing to provide the student the 1 hour per week of occupational therapy services, as recommended in the IEP. However, Petitioner failed to present sufficient evidence regarding the amount of occupational therapy services the student was entitled, however, failed to receive, during the 2008/09 school year; or the methodology utilized to determine the amount of services the student allegedly failed to receive.

### **Conclusion of Law**

It is the Hearing Officer's decision that DCPS failed to implement the student's 2008/09 IEP, as soon as possible following its development, by providing the student the related speech and language, and occupational therapy services, as recommended in the IEP, representing a substantive violation of the IDEA, 34 C.F.R. §300.323 (c) (2), and the D.C. Municipal Regulations, Title 5, §3010.2 (2003).

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

The standard applied in determining whether the student was denied a FAPE as a result of DCPS' failure to implement the student's IEP, is whether the aspects of the IEP not followed were "substantial or significant", or, in other words, whether the deviations from the IEP were material.

Petitioner presented evidence that the DCPS failed to provide the student speech and language and occupational therapy services, as recommended in the student's 2008/09 IEP; however, failed to present sufficient evidence regarding the amount of speech and language and occupational therapy services the student was entitled, however, failed to receive; and the period of time the student failed to receive services. Therefore, the court is unable to determine whether the aspects of the IEP not followed were "substantial or significant", or the deviations from the IEP were material, resulting in substantive harm to the student or parent, and denial of a FAPE to the student.

Petitioner failed to present evidence that DCPS' failure to provide the student the related speech and language and occupational therapy services, as recommended in the student's 2008/09 IEP, resulted in substantive harm to the student and/or his parents, and denial of a FAPE to the student.

## ISSUE 2

### **Whether D.C. Public Schools failed to comprehensively evaluate the student, by failing to conduct a Clinical or Occupational Therapy Evaluation and/or reevaluate the student, pursuant to parent's request?**

Petitioner represents that "The Individuals with Disability Act (IDEA) (P.L. 101-476) reauthorized as the IDEA Improvement Act of 1997 (IDEIA)", (P.L. 105-17) 20 U.S.C. 1400 et. seq. and their current regulations, specifically the Code of Federal Regulations at 34 C.F.R. Part 300, further reauthorized as the IDEA Improvement Act of 2004 (P.L. 108-446) address evaluations to be conducted for students and require that evaluations be sufficiently comprehensive so as to provide "relevant, functional, developmental, and academic information...To assist in developing the content of the child's individualized education program". See 2 U.S.C. 1414(a); 1414(a)(1)(e).

Petitioner further represents that there is an obligation to ensure that a child is "assessed in all areas of suspected disability." See, 20 U.S.C. 1414(b)(1)-(3), 1412(a)(6)(B). Petitioner represents that the public agency has an obligation to reevaluate at least every three years and upon request of the parent and/or the recommendations of teachers or service providers. See, 20 U.S.C. 1414(b)(1)-(3), 1412 (a)(6)(B). Petitioner represents that D.C. Municipal Regulations place the obligation to conduct comprehensive evaluations of the student upon the LEA. (30 DCMR Sec. 3005).

Petitioner references Harris v. District of Columbia, 561 F.Supp.2d 63 (D.D.C. 2008); Herbin v. District of Columbia, Civil Action No. 02-1185 (2005); and Spiegler v. District of Columbia.

Petitioner represents that in the instant matter, the student's FSIQ scores fell within the range of mental retardation however, an adaptive scale to rule out or confirm such a diagnosis was never conducted. Petitioner also represents that despite the need for counseling a clinical evaluation was never conducted to address the student's social emotional needs; testing completed for the student indicates there is a need for testing requested by the parent, however,

DCPS failed to conduct the evaluation. Petitioner concluded that, as a result, the student was denied a FAPE.

Respondent represents that the student has current and comprehensive evaluations that includes a Vocational Assessment dated April 30, 2009, Psycho-Educational Reevaluation dated February 27, 2008, Psycho-Social History dated January 11, 2008, Occupational Therapy Evaluation dated December 19, 2007, Speech and Language Evaluation dated December 17, 2007, Speech and Language Evaluation dated May 8, 2009, Occupational Therapy Report dated May 29, 2009, and a Vineland Assessment dated July 2, 2009.

Respondent further represents that on May 13, 2009, it authorized Petitioner to obtain an independent adaptive behavior assessment, at its expense; and since May 13, 2009, it has attempted to convene an MDT meeting to review the student's evaluations, however, Petitioner's Attorney refused its requests for a meeting. Respondent further represents that Petitioner's Attorney insisted that the team not convene until receipt of the Vineland Assessment. DCPS Exhibit17-4.

Respondent also represents that it remained diligent and proactive in attempting to schedule meetings and as such, asserts that Petitioner has been provided with meaningful opportunity to participate in the educational decision-making for the child. Respondent represents that Petitioner has failed to provide any basis for any additional assessments or demonstrate that they are warranted; failed to contest the findings of any of the completed evaluations; or articulate concerns warranting additional evaluations of the student.

Respondent represents that there was a concern that the student may present as mentally retarded; and to address this concern, a Vineland Assessment was completed. Respondent concludes that the student has been provided a FAPE; and Petitioner failed to meet her burden to show that the student was denied a FAPE.

### Discussion

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

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

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

IDEA is replete with provisions emphasizing the necessity of monitoring the IEP for revision purposes. E.g., 20 U.S.C. §1414 (stating reevaluations *shall* occur at the *request of*

*parents provided they do not total more than one per year*). The Supreme Court forcefully-declared that continual evaluations are necessary, and parents must have the ability to seek redress for a school's failure to sufficiently monitor a child's progress under the IEP.

Additionally, IDEA, 34 C.F.R. §300.304(c)(4) provides that DCPS shall ensure that a child is assessed in *all areas related to the suspected disability*, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. Subparagraph (6) provides that in evaluating each child with a disability that the evaluation is *sufficiently comprehensive* to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

The record reflects that on March 19, 2009, Petitioner's Attorney forwarded a letter and Parental/Guardian Consent to Evaluate, to the Acting Principal of Hospitality Public Charter School, requesting comprehensive reevaluation of the student, to include, but not limited to: psycho-educational, clinical psychological, speech and language, occupational therapy, social history, formal classroom observation, and vision and hearing screening. The letter also indicated that the reevaluations requested may also include, if warranted: a neuropsychological, physical therapy, and medical assessment; and included a request for a vocational assessment, in anticipation of the student reaching the age of 16 and the necessity of addressing transition services at the student's May, 2009, IEP team meeting.

Although the record reflects a current Psycho-Educational Reevaluation dated February 27, 2008, Psycho-Social History dated January 11, 2008, Occupational Therapy Evaluation dated December 19, 2007, and a Speech and Language Evaluation dated December 17, 2007; there is no evidence that parent's request for a Psycho-Educational Evaluation, Clinical Psychological Evaluation, Occupational Therapy Evaluation, Social History Assessment, Classroom Observation, Vision and Hearing Screening, or Vocational Assessment, totaled more than one per year. Therefore, according to IDEA, DCPS was required to reevaluate the student pursuant to parent's request.

IDEA fail to establish a time period in which an LEA is required to reevaluate a student, therefore, the court applies the "reasonableness" standard, that is, whether DCPS reevaluated the student within a reasonable period of time, of receiving parent's request for reevaluation.

The record reflects that pursuant to parent's March 19, 2009 request for reevaluations, a Vocational Assessment was completed on April 30, 2009, a Vineland Assessment dated July 2, 2009, Speech and Language Evaluation dated May 8, 2009; and an Occupational Therapy IEP Progress Report dated May 29, 2009. In addition, on May 12, 2009 DCPS authorized parent to obtain an independent Assistive Technology Assessment; and on May 13, 2009, an independent Adaptive Behavioral Assessment.

The record reflects that more than four (4) months have elapsed since parent requested reevaluation of the student and provided consent for the evaluations, and as of the date of this decision, DCPS failed to complete a Psycho-educational, clinical psychological, occupational therapy, social history, formal classroom observation, vision and hearing screening.

### **Findings of Fact**

1. There is no evidence that the student was evaluated more than once in a given year, or that parent's request for reevaluation, totaled more than one per year. Therefore, according to IDEA, 34 C.F.R. 300.303 (b)(1)(2), DCPS *must* reevaluate the student, if the *child's parent* requests reevaluations, within a reasonable period of time , of parent's request and consent for reevaluation.
2. On March 19, 2009, Petitioner requested reevaluation of the student. More than four (4) months have elapsed since parent initiated the request for reevaluations, and provided written authorization and consent to reevaluate the student; which is more than a reasonable period of time to reevaluate the student.
3. DCPS failed to conduct a Psycho-educational, clinical psychological, occupational therapy, social history, formal classroom observation, vision and hearing screening, within a reasonable period of time of parent's request, and consent for reevaluation.

### **Conclusion of Law**

It is the Hearing Officers' decision that Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to comprehensively evaluate the student in all areas of suspected disability, and/or reevaluate the student pursuant to parent's request; representing a procedural and substantive violation of the IDEA, 34 C.F.R. §300.303 (a)(1)(2), and subparagraph (b)(1)(2); and 34 C.F.R. §300.304(c)(4) and (6).

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

Petitioner failed to present evidence that DCPS' failure to comprehensively evaluate and/or reevaluate the student, pursuant to parent's request; and within a reasonable period of time, resulted in substantive harm to the student and/or his parents, and denial of a FAPE to the student.

### **ISSUE 3**

#### **Whether D.C. Public Schools failed to provide the student an appropriate placement for the 2008/09 school years?**

Petitioner represents that placement program for each disabled student must be reasonably calculated to confer educational benefit. See Board of Education of the Hendrick Hudson Central School District Westchester County et al. v. Rowley, 458 U.S. 276, 102 S.Ct. 3034 (1982). Petitioner further represents that the placement must be based on the child's IEP, the parent's contention that the IEP was not sufficient, would render any placement decision based upon that IEP invalid. Petitioner references 34 C.F.R. §300.116.

Petitioner represents that where the public agency has failed to identify a suitable and appropriate placement that can address and/or provide for this student's unique needs the funding of a private placement would be an appropriate remedy. See, *Burlington v. Dept. of Educ.* 472 U.S. 359, 105 S.Ct. 1996. *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct.361; *Roca v. District of Columbia*, 43 IDELR 58 (March 14, 2005).

Petitioner concludes that in this matter, the current placement of the student is unable to implement the IEP and/or provide the type of setting required by the student to address this student's social emotional and academic needs. Petitioner concludes further that the student has significant deficit that need to be addressed; evaluations recommend a small structured placement and one-on-one assistance that the current school cannot provide; and as a result the student has been denied a FAPE.

Respondent denies the allegation and asserts that Petitioner's sole allegation for contesting the location of services for the 2008/09 academic year is based on her allegation that the student's IEP was not implemented. Respondent represents that as it has already denied this allegation, it asserts that the student's location of services at Hospitality PCS for the 2008/09 school year was appropriate; the school provided the student a FAPE by implementing the IEP; and the student's has progressed academically and behaviorally as evidenced in the IEP progress reports.

Respondent further represents that understanding the student may have some additional needs, it has attempted on numerous occasions to reconvene an MDT meeting to discuss the student's progress, evaluations and discuss and determine an appropriate location of services for the 2009/2010 academic year, to which it received no response indicating a willingness to meet. Respondent concludes by denying the student was denied a FAPE.

Respondent also concludes that Petitioner failed to meet its burden of showing the inappropriateness of Hospitality PCS; presented no witnesses other than the educational advocate who never met the student, observed the student in the classroom, or communicated with any of the student's related services providers. Respondent challenges the credibility of the testimony of the Education Advocate, indicating that Petitioner's ability to prove these claims could have been so easily verified by testimony of the student or parent, if true.

Respondent also represents that Petitioner failed to present evidence of any more placements it deems appropriate; failed to demonstrate how the student's educational programming should be any different; or the services the student required to be provided a FAPE, however, failed to receive.

Respondent concludes that in light of the dearth of evidence—either through testimony or documents-Petitioner cannot be found to have met her burden to show the student was denied a FAPE; the student made academic progress during the 2008/09 school year; and requests dismissal of the complaint with prejudice.

## Discussion

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).*

According to the student's May 8, 2008 IEP, which expired on May 8, 2009, the student would expend 71% of her time not in a regular education setting; however in the placement considerations and justification section of the IEP, the general education and combination general education with Resource Classroom setting is rejected; and the out of general education setting is accepted.

In the Least Restrictive Environment portion of the IEP, it indicates that curricular modification, accommodation and/or supplemental aids and services can be used for a Least Restrictive Environment (LRE) setting in regular education. In the modifications/accommodations portion of the IEP, it indicates that "Student will engage in non-academic courses with non-disabled peers and have provisions for parallel instruction". In the "Current Setting Considerations" section of the IEP, it reflects "combination general education and resource classroom" as the student's current setting consideration.

According to the student's November 4, 2008 IEP, the student would expend 61-100% of her time in specialized instruction and related services; and in the placement considerations and justification section of the IEP provides that the general education and combination general education with Resource Classroom settings are rejected; and the out of general education setting is accepted. The modification/accommodation section of the IEP provides that the student will engage in non-academic courses with non-disabled peers and have provisions for parallel instruction.

On January 11, 2008, a Psychosocial History/Social Work Assessment was completed. The assessor indicated that due to the student's possible level of cognitive functioning, it was also suggested that the student should be considered for an educational setting that would meet all of her needs both academically and socially. The assessor recommended that the educational setting include students that are functioning at the same cognitive level as the student and the student teacher ratio is approximately 6 students to one teacher.

On February 15, 2008 and February 27, 2008, Barbara Jordan Public Charter School completed a Psycho-Educational Reevaluation of the student; to determine the most appropriate academic environment for the student. The evaluator opined that the optimal educational environment would include a full time setting with a low teacher student ratio (6 students to 1 teacher), to provide the student the opportunity to receive the required related services (e.g. speech, OT/PT, counseling).

### **Findings of Fact**

1. Recent evaluations, and the student's IEP support a finding that the nature and severity of the student's disabilities, are such that education in a general education classroom even with the use of supplementary aids and services cannot be achieved satisfactorily; and that the student requires placement in a less integrated, small, structured, therapeutic environment, where she can have access to the general curriculum, receive one-on-one instruction; and educational benefit.

2. Petitioner failed to present evidence that the student's placement at Hospitality PCS is inappropriate; or propose an alternate placement for the student which it deems appropriate.
3. Petitioner failed to present evidence regarding the educational program at Hospitality PCS, or the basis for its assertion that the school is inappropriate. Petitioner failed to present information regarding the school composition, the number of student at the school, disability status of the students, the student's classrooms and student composition, class sizes, accommodations/modifications, or whether the student receives specialized instruction in a full-time special education program, as recommended in her IEP.
4. Petitioner failed to present evidence that the student's placement at Hospitality PCS, is a placement where the student continue to struggle academically and behaviorally, is maintaining the student's placement at Hospitality PCS will likely result in continued academic regression, and not progression.
5. Petitioner represents that Hospitality PCS is unable to implement the student's IEP, however, it failed to present evidence that the student's placement at Hospitality PCS is inappropriate; denies the student access to the general curriculum; denies the student educational benefit; or that the school is not a full-time special education school, unable to implement the student's IEP by providing the student a full-time special education program, in a therapeutic environment.
6. Petitioner failed to demonstrate that the student's 2008/09 IEP is inappropriate, and therefore, the student's IEP which is based in part on the IEP, is also inappropriate. Furthermore, absent comprehensive evaluations, any determination regarding the appropriateness of the student's placement is premature.

#### **Conclusion of Law**

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

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

Petitioner failed to present evidence that DCPS failed to provide the student an appropriate placement, or that the student was denied a free appropriate public education.

## XI. ORDER

Based on the aforementioned, it is hereby:

- (1) **ORDERED**, that Respondent's Motion to Dismiss with prejudice is **DENIED**; and it is further
- (2) **ORDERED**, that the relief requested by Petitioner in this matter is **DENIED**; and it is further
- (3) **ORDERED**, that within fifteen (15) calendar days of the date of this decision Petitioner's Attorney shall arrange an agreeable date and time, and meet with DCPS and Hospitality PCS to review any outstanding evaluations; discuss and determine the student's progress and placement; and review and revise the student's IEP, as appropriate; and it is further
- (4) **ORDERED**, that at the MDT/IEP team meeting referenced herein, DCPS shall secure the participation of all necessary IEP team members to include but not limited to the appropriate personnel required to review assessments and develop an appropriate IEP, discuss compensatory education services, and placement; and it is further.
- (5) **ORDERED**, that in the event of DCPS' failure to comply with the terms of this Order, Petitioner's Counsel will contact the Special Education Coordinator at Hospitality PCS; 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
- (6) **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
- (7) **ORDERED**, that all meetings shall be scheduled through counsel or the parent, Roberta L. Gambale, Esquire, in writing, via facsimile, at 202-742-2097 or 202-742-2098; and it is further
- (8) **ORDERED**, that this decision and order are effective immediately.

## XII. APPEAL RIGHTS

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

*Ramona M. Justice*

8-18-09

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

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

cc: Assistant Attorney General, Daniel Kim  
Attorney Roberta Gambale (202) 742-2098  
Ms. Ladwan Garris: 620 Brandywine Street, S.E., Washington, D.C. 20032