

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 5th St., S.E., Washington, D.C. 20003
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STUDENT HEARING OFFICE
2009 SEP 21 AM 8:49

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

Date of Complaint: July 13, 2009
Date of Pre-hearing: August 13, 2009
Date of Hearing: September 16, 2009
Student Case Number:

HEARING OFFICERS' DECISION (HOD)

Student Hearing Officer: Attorney Ramona M. Justice

Attorney for Petitioner: Attorney Chessey Robinson
4401 Connecticut Avenue, N.W., #190
Washington, D.C. 20008

Attorney for Respondent: Attorney Blair Matsumoto, Assistant Attorney
General, Office of the Attorney General
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Washington, D.C. 20002

1 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 a _____ grade student at _____ a public school located in the District of Columbia, providing educational services to students, in a full inclusion academic setting. Prior to attending _____ the student attended _____ also a public school located in the District of Columbia.

The student resides in the District of Columbia, with his maternal grandfather and legal guardian; and is identified as eligible to receive special education services, pursuant to "The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)". The student's disability classification is Emotionally Disturbed (ED).

On July 13, 2009, Petitioner, through his Attorney, initiated a due process complaint on behalf of the student, alleging that D.C. Public Schools, hereinafter referred to as "DCPS" or "Respondent", denied the student a free appropriate public education (FAPE); by failing to: (1) issue a Prior Notice, in response to parent's request for a change in the student's placement; (2) provide and implement an appropriate Individualized Education Program (IEP), for the student, during the 2008/09 school year; and (3) provide the student an appropriate placement, during the 2008/09 school year; in violation of "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")".

The due process hearing convened on September 16, 2009, at 11:00 a.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

II. JURISDICTION

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

III. DUE PROCESS RIGHTS

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

IV. ISSUES

The following issues are before the court for hearing:

- (1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to issue a Prior Notice, in response to parent's request for a change in the student's placement?
- (2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide and implement an appropriate Individualized Education Program (IEP), for the student, during the 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 for the 2008/09 school years?

V. RELIEF REQUESTED

- (1) Immediate placement at a setting of the parent/guardian's choosing
and
- (2) Transportation services between all academic programs and Plaintiff's residence; and
- (3) Compensatory education for the period that the student was denied a FAPE.

VI. PROCEDURAL POSTURE

On July 13, 2009, Petitioner, through his Attorney, initiated a due process complaint on behalf of the student, alleging that D.C. Public Schools, hereinafter referred to as "DCPS" or "Respondent", denied the student a free appropriate public education (FAPE); by failing to: (1) issue a Prior Notice, in response to parent's request for a change in the student's placement; (2) provide the student an appropriate Individualized Education Program (IEP), during the 2008/09 school year; and (3) provide the student an appropriate placement, for the 2008/09 school year; in violation of "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA").

On July 17, 2009, the Hearing Officer issued a Pre-hearing Notice scheduling the pre-hearing conference for August 13, 2009, at 4:30 p.m... On July 24, 2009, Respondent filed "District of Columbia Public School's Response to Petitioner's Due Process Complaint"; and "District of Columbia Public School's Notice of Insufficiency to Parent's Due Process Complaint". The pre-hearing conference was held on August 13, 2009, at 4:40 p.m., and a Pre-hearing Conference Order issued by the Hearing Officer confirming the due process hearing for September 16, 2009, at 11:00 a.m..

On September 1, 2009, the Hearing Officer issued an Order denying Respondent's Motion to Dismiss the due process complaint. The due process hearing convened on September 16, 2009, at 11:00 a.m., as scheduled.

VII. PRELIMINARY MATTERS

There were no preliminary matters presented by the parties, or introduced by the court; and the Hearing Officer proceeded with the due process hearing.

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. Receiving no objections from the parties, the following disclosures were admitted into the record as evidence:

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF PETITIONER

- Petitioner's Exhibits 01 through Petitioner's Exhibits 10; and a witness list dated September 9, 2009.

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT

- Respondent's Exhibits 01 through Respondent's Exhibits 15; and a witness list dated September 9, 2009.

IX. STATEMENT OF CASE

1. The student is _____ years of age, and attends _____ a public school located in the District of Columbia, providing educational services to students, in a full inclusion academic setting. Prior to attending _____ the student attended _____ also a public school located in the District of Columbia. While attending _____ the student was provided an Individualized Education Program (IEP), providing for 27.5 hours of specialized instruction and related services.

2. The student resides in the District of Columbia, with his maternal grandfather and legal guardian; and is identified as eligible to receive special education services, pursuant to "The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)". The student's disability classification is Emotionally Disturbed (ED).

3. On February 6, 2007, while the student attended _____ an IEP was developed providing for 27.5 hours of specialized instruction and related services, with the student expending 85% of his time not in a general education setting; and on January 31, 2009 and March 31, 2009, while attending _____ an IEP was developed for the student providing for 27.5 hours of specialized instruction and related services, with the student expending 85% of his time not in a general education setting.

4. On January 31, 2008, an IEP was developed for the student providing for 26 hours of specialized instruction, and 1.5 hours of psychological services, for a total of 27.5 hours of services, weekly. The IEP provides that the student will expend 85 percent of his time, NOT in a general education setting; and the least restrictive environment (LRE) provision of the IEP provides that curricular modification, accommodation and/or supplemental aids and services cannot be used for a LRE setting in general education. This provision of the IEP also provides that the student requires behavior intervention and modifications that cannot be met within the general education classroom; and the student was accepted for an out of general education classroom.

5. On March 12, 2008, the Government of the District of Columbia, Department of Mental Health completed a "Psycho-educational Evaluation", to assess the student's current level of cognitive and academic functioning. The evaluator determined that the student's overall cognitive functioning was within the Deficient range; the efficiency of his overall cognitive functioning was significantly decreased as a result of his working memory and verbal comprehension limitations; and his impaired verbal capabilities likely played a significant role in his reduced overall cognitive aptitude.

The evaluator opined that in comparison to the finding of his prior cognitive testing, on the current cognitive testing, almost all of the student's overall cognitive capabilities were less efficient. The evaluator concluded that based on the cognitive and academic testing, the student has limited skills to efficiently and proficiently complete most reading or writing tasks; and is experiencing global verbal processing limitations.

The evaluator recommended consideration of maintaining the student within a special education academic environment that can provide him with consistent and highly focused academic and therapeutic services; tutoring services; and recommendations in assisting the student with academic tasks containing a language component. The evaluator also recommended a vision examination to determine if the student requires corrective eyewear; and a Psychiatric Reevaluation screening.

5. On November 21, 2008, a MDT meeting was held in which the team determined that the student requires a full-time placement; and the student's special education teacher commented that the student's progress is based on his current level of functioning, not grade level; and that there is too much transitioning between classes, for the student; and he would progress in a self contained program. The student's teacher stated that the student's behavior impacts his academic progress; and the team agreed that the student requires a more restrictive environment, and 1.2 hours of counseling, weekly. The team discussed alternative placements for the student; and DCPS informed parent and his Attorney that many of the programs (appropriate) for the student, have closed; and it is unknown which programs remain operational.

The team also agreed that parent, parent's Attorney and DCPS will investigate alternative placements for the student; and the team would reconvene the second week of January, 2009.

6. On March 31, 2009, DCPS convened a reevaluation meeting for the student. According to the MDT meeting notes, parent expressed concern regarding the student's progress; the student's special education teacher advised the MDT that the student's writing skills are poor, he is more comfortable with math than with reading, and has difficulty decoding words, while noting some improvement in the student's behavior this year. The teacher also advised the team that the student's reading ability is at low 2nd grade, math level is between 3rd and 4th grade.

The student's reading and homeroom teacher stated that the student wants to read, however, struggles with reading on his level; and she opines that the student struggles in the inclusion setting and would benefit more in a small group setting; which parent agreed. The teacher also stated that he student had not been able to master the 6th grade reading objectives he tends to have behavior outbursts when he gets frustrated. Parent stated that he recognizes that the student would be able to maximize his potential in a smaller setting; and is considering educational settings outside of _____ that would better address the student's needs.

The team noted that per recommendations of recent evaluations, the student requires a pull out, separate resource environment with low teacher student ratio to address his academic needs; although he receives outside tutoring and has a mentor. The school Psychologist reviewed the Department of Mental Health Psycho-education Evaluation, indicating that the student's overall range is deficient, his academic and cognitive skills are developing, and his reading skills are in the deficient range, at the high first grade/low second grade.

The team indicated that consideration would be given to further assessment to possibly change the student's disability if his behavior does not impact is academics, recommending a Clinical Reevaluation to determine whether the student continue to require services as an ED student.

The team concluded that the student requires remediation for reading, math, and written language; and a full time placement (27.5 hours of specialized instruction and related services); a resource or pull out environment, indicating that the inclusion setting is not appropriate to meet the student's needs; and had not been successful for the student.

The team discussed _____ and _____ as potential placements for the student. Petitioner's Attorney advised the team that the student was accepted at _____, a private school located in _____ however, the Special Education Coordinator and the school Psychologist stated that _____ can provide for the student. DCPS noted that final consideration is contingent upon further testing which may change the student's disability classification.

DCPS concluded that a clinical reevaluation was needed to determine whether the student continues to require services as an ED student; and that the student would remain at _____ until further assessments were completed; agreed to reconvene on April 15, 2009 to review additional assessments and discuss placement. According to the MDT meeting notes, the parent thanked DCPS for its service of the student; however indicated that it was his desire that the student attend _____

The MDT proceeded with development of an IEP for the student, providing for 26 hours per week of specialized instruction; and 1.5 hours per week of behavioral support services, for a total of 27.5 hours of services for the student, outside the general education setting. The student's disability classification is identified as emotionally disabled (ED). The IEP also includes accommodations in the classroom and during standardized tests. The Least Restrictive Environment (LRE) portion of the IEP provides that the student requires specialized instruction for all academic subjects; and 1.5 hours, weekly, for psychological counseling.

7. On June 8, 2009, a Resolution meeting was held at which the student's Special Education Teacher and school Counsel advised the team that the student's behavior had improved, the student is making progress, received all average grades, more significant improvement in reading than in math; and his skills are much stronger in reading. Petitioner's Attorney reminded the team that at the April 29, 2009 meeting, the student's classroom teacher was adamant regarding the student's attitude, outbursts, and frustration; and expressed concern regarding the alleged progress.

The Principal stated that she met with the student's teachers, and requests tangible evidence of the student's progress. The student's special education teacher requested a reduction in the student's hours of specialized instruction because of the student's progress; and Petitioner's Attorney reiterated concern regarding representations that the student has made significant progress in a short period of time; and requests assurance of the progress. The Principal indicated that the student's report card is the true indicator of improvement. The team agreed to reconvene on June 11, 2009, at 9:00 a.m.; and quarterly to discuss the student's progress.

On June 11, 2009, an IEP team meeting was held to revise the student's IEP. The meeting notes indicate that the student's specialized instruction and related service hours would be decreased from 27.5 to 15 hours, weekly. The team indicated that the student would receive specialized instruction for math, reading, and writing; and 1 hour weekly of psycho-social counseling and 1 hour of school counseling, 30 minutes of group and 30 minutes of individual. The team also indicated that there would only be consults with the general education teacher and the special education teacher, to discuss/determine the student's progress and the needs of the student; and quarterly reviews held by the team. The MDT meeting notes indicate that parent agreed with revision of the IEP.

X. ISSUE 1

Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to issue a Prior Notice, in response to parent's request for a change in the student's placement?

Petitioner represents that Respondent failed to provide notice as is required when they refused to initiate a change in placement requested by the parent; and as required under 20 U.S.C. §1415, as implemented by 34 C.F.R. §300.503(a) (2) resulting in substantive denial of FAPE, as the student remained in an inappropriate placement.

Respondent generally denies the allegation that it denied the student a FAPE, by failing to issue a Prior Notice of its refusal to change the student's placement.

Discussion

According to IDEA, 34 C.F.R. Section 300.503(a) (1) and (b), whenever the public agency proposes to initiate or change, or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; written notice that meets the requirements of paragraph (b) of this section must be given by the public agency to the parents of a child with a disability within a reasonable time before the proposed action.

Paragraph (b) provides that the notice required under paragraph (a) of this section must include—

- (1) A *description of the action proposed or refused* by the agency;
- (2) An explanation of *why the agency proposes or refuses to take the action*;
- (3) A *description of each evaluation procedure, assessment, record, or report the agency used as a basis* for the proposed or refused action;
- (4) A statement that the parents of a child with a disability have protection under the *procedural safeguards* of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (5) *Sources for parents to contact to obtain assistance* in understanding the provisions of this part;
- (6) A *description of other options that the IEP Team considered and the reasons* why those options were rejected; and
- (7) A *description of other factors that is relevant to the agency's proposal or refusal*.

It is clear from the statute, and the legislative intent that Congress by no means, intended to detract from or deny parents the right to meaningfully participate in substantive decisions regarding the student's education, including placement decisions. The courts recognize that states and local agencies are in the better position to develop the content of a student's educational program, while still involving the parent in all decisions regarding the student's education, including changes in the student's placement.

Findings of Fact

1. Student evaluations, student teachers, Attorney, and parent recommend a full-time special education program for the student, in a therapeutic environment.

2. At the March 31, 2009 MDT meeting, after reviewing student evaluations, receiving input from the parent, teacher, parent's Attorney, and school Psychologist; and discussing the student's academic performance, behavior, and placement, the team determined that the student requires a full-time special education program, in a more restrictive environment, with a low teacher student ratio to address his academic needs.
3. At the March 31, 2009 MDT meeting, the team determined that the student requires remediation for reading, math, and written language; pull out, separate resource environment with low teacher student ratio to address his academic needs; and that the inclusion setting at _____ was not appropriate in addressing the student's needs.
4. At the March 31, 2009 MDT meeting, DCPS disregarded information from parent's Attorney regarding the student's acceptance at _____, and _____ as a potential placement for the student; input from the parent, student's teachers, and Attorney regarding the student's academic performance and needs; and parents' expressed desire that the student not remain at _____ and attend _____.
5. At the March 31, 2009 MDT meeting, DCPS concluded that a clinical reevaluation was needed to determine whether the student continues to require services as an ED student; and that the student would remain at _____ until further assessments were completed; indicating that the team would reconvene on April 15, 2009 to review additional assessments and discuss placement.
6. At the March 31, 2009 MDT meeting, parent requested a change in the student's placement from _____ School, to _____.
7. At the March 31, 2009 MDT meeting, DCPS disregarded findings and recommendations in the student evaluations; and input from the student's teachers, parent, and Attorney, for a full-time special education program, in a therapeutic environment, and more restrictive environment for the student; and unilaterally refused to initiate a change in the student's placement.
8. DCPS refused to initiate a change in the educational placement of the child, pursuant to parent's request; and unilaterally decided to maintain the student's placement at _____.

Conclusions of Law

D.C. Public Schools failed to issue a Prior Notice, in response to parent's request for a change in the student's placement, within a reasonable period of time; prior to refusing to change the student's placement from _____ to _____ and its decision to maintain the student's placement at _____ in violation of the notice requirements of the IDEA, at 34 C.F.R. Section 300.503(a) (1) and (b).

Decision

It is the Hearing Officer's Decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that D.C. Public Schools failed to issue a Prior Notice, in response to parent's request for a change in the student's placement; in violation of "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA").

ISSUE 2

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide and implement an appropriate Individualized Education Program ("IEP"), for the student, during the 2008/09 school years?

Petitioner represents that DCPS denied the student a FAPE, by failing to provide and implement an appropriate IEP for the student, during the 2008/09 school year; pursuant to 20 U.S.C. §1412 as implemented by 34 C.F.R. §300.101.

Respondent represents that the student's IEP is being implemented at Brightwood ES; is reasonably calculated to provide educational benefit to the student; the student receives specialized instruction and related services at the school; and is making progress under his IEP.

Discussion

"The Individuals with Disabilities Education Improvement Act ("IDEIA") of 2004" requires that all students be provided with a Free Appropriate Public Education ("FAPE"). *See, 20 U.S.C. §1401(9), 34 C.F.R. §300.17, and 30 DCMR §3001.1.* A free appropriate program or FAPE means special education and related services that are provided at public expense, under public supervision, and without charge; meets 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.

Related services includes 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.*

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.

Evaluations are procedures used in accordance with §§300.304 through 300.311 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 at §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); and 34 C.F.R. §300.15.*

In interpreting evaluation data for the purpose of determining if a child is a child with a disability under §300.8, and the educational needs of the child, each public agency must—

- (i) *Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and*
- (ii) *Ensure that information obtained from all of these sources is documented and carefully considered. See, IDEA, §300.306 (c)(1)(i)(ii).*

Once a student is determined 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)(2).*

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..."

In developing a child's IEP, the team *must* consider—

- (i) *Strengths of the child;*
- (ii) *Concerns of the parents for enhancing the education of their child;*
- (iii) *Results of the initial or most recent evaluation of the child; and*
- (iv) *The academic, developmental, and functional needs of the child. See, IDEA, 34 C.F.R. §300.324 (a)(1).*

Subparagraph (a) (2) provides that the IEP team must—

- (i) *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.*

Findings of Fact

1. The student's January 31, 2008, and March 31, 2009 IEPs recommend 26 hours of specialized instruction, and 1.5 hours of psychological services, for a total of 27.5 hours of services, weekly. The IEP provides that the student will expend 85 percent of his time, NOT in a general education setting; and the least restrictive environment (LRE) provision of the IEP provides that curricular modification, accommodation and/or supplemental aids and services cannot be used for a LRE setting in general education.

This provision of the IEP also provides that the student requires behavior intervention and modifications that cannot be met within the general education classroom; and the student was accepted for an out of general education classroom. The IEPs recommends the student's placement in a full-time special education program, and therapeutic environment; while failing to comply with the LRE requirements of the IDEA. is not the LRE for the student.

2. provides educational services to students, in a full inclusion academic setting. acknowledges that the student requires placement in a full-time special education program, and therapeutic environment; and that such a program is unavailable at however, failed to initiate a change in the student's placement.

3. The SEC at testified at the hearing that the student's IEP is appropriate; while also testifying that is unable to implement the student's IEP by providing the student 27.5 hours of specialized instruction and related services, because it offers students a full inclusion program; and not a full-time special education program.

The SEC also testified that at the March 31, 2009 MDT meeting, the student's teacher advised the team that the student was reading below the 2nd grade level; struggles with reading on the 6th grade level; and can maximize his potential in a smaller academic setting.

4. Parent testified that during the 2008/09 school year, he opined that was not qualified or equipped to provide the student the one on one instruction he requires; the class sizes were too large for the teachers to address the student's individual needs; and students were required to rotate between classes, leaving the student confused and frustrated.

Parent also testified that at the end of the 2008/09 school year, it was evident that the student failed to receive the services he required; and the student exhibited significant difficulty with rotating between classes and comprehending the assignments from the various classes.

Parent testified that the student was unable to follow the class work, and feared criticism from other students; and that at the end of the 2008/09 school year, the student received unsatisfactory grades in all classes, except physical education.

5. The Psycho-educational Evaluation completed by the Government of the District of Columbia, Department of Mental Health on March 12, 2008, recommend maintaining the student within a special education academic environment that can provide him with consistent and highly focused academic and therapeutic services.
6. On March 31, 2009, the MDT determined that _____ is not an appropriate placement for the student, and the student requires a more structured, therapeutic environment, and the school is unable to implement the student's IEP. However, DCPS failed to carefully consider this information, and unilaterally decided to maintain the student's placement at _____ or initiate a change in the student's placement.
7. The student's January 31, 2008, and March 31, 2009 IEPs are not specifically designed to address the unique educational needs of the student, because the IEP recommends the student's placement at _____ although aware that the school is unable to implement the IEP. Therefore, the student's 2008/09 IEPs are not reasonably calculated to provide the student educational benefit.
8. DCPS failed to ensure that as soon as possible following development of the student's January 31, 2008 and March 31, 2009 IEPs, the student's IEPs were implemented, by ensuring that the student received the 27.5 hours of specialized instruction and related services, weekly, in a full-time special education program, and therapeutic environment, as recommended in the student's IEPs.
9. On June 11, 2009, DCPS initiated a change in the student's educational program and the provision of a FAPE, by decreasing the student's specialized instruction and related service hours from 27.5 to 15 hours, weekly; without issuing parent a Prior Notice of its intent to initiate the change, within a reasonable period of time prior to initiating a change in the student's educational program, and decrease in the student's services.

Conclusions of Law

1. DCPS failed to comply with the procedural and substantive requirements of the IDEA, 34 C.F.R. Sections 300.320 through 300.324 (a)(1) and (2), in developing, reviewing, and revising the student's 2008/09 IEP; and implementing the student's .
2. The IEP team failed to comply with the *Least Restrictive Environment (LRE)* provisions of the IDEA, including Sections 300.114 through 300.118; in developing the student's IEP; and identifying a LRE for the student.

Specifically, the team failed to consider the following:

- Strengths of the child;
 - Concerns of the parents for enhancing the education of their child;
 - Results of the initial or most recent evaluation of the child; and
 - The academic, developmental, and functional needs of the child; or
 - The use of positive behavioral interventions and supports, and other strategies, to address that behavior; in violation of IDEA, 34 C.F.R. §300.324 (a)(1) and (2).
3. DCPS failed to carefully consider the information obtained from the various sources, (Government of the District of Columbia, Department of Mental Health Psycho-educational Evaluation, input from parent, and the student's teachers); and failed to ensure that the information obtained from all of these sources was documented and carefully considered, in violation of IDEA, §300.306 (c)(1)(i)(ii).
4. DCPS failed to issue a Prior Notice of its intent to initiate the change in the student's educational program, in accordance with; and in violation of the notice requirements of IDEA, 34 C.F.R. §300.503(a) and (1)(b), which requires issuance of a notice that includes:
- (1) *A description of the action proposed or refused* by the agency;
 - (2) An explanation of *why the agency proposes or refuses to take the action*;
 - (3) *A description of each evaluation procedure, assessment, record, or report the agency used as a basis* for the proposed or refused action;
 - (4) A statement that the parents of a child with a disability have protection under the *procedural safeguards* of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
 - (5) *Sources for parents to contact to obtain assistance* in understanding the provisions of this part;
 - (6) *A description of other options that the IEP Team considered and the reasons* why those options were rejected; and
 - (7) *A description of other factors that is relevant to the agency's proposal* or refusal.
5. DCPS failed to implement the student's IEP during the 2008/09 school years, by ensuring that as soon as possible following development of the student's IEP, special education and related services were made available to the child in accordance with the child's IEP, in violation of IDEA, 34 C.F.R. §300.323 (c)(2); and the D.C. Municipal Regulations, Title 5, §3010.2 (2003).

Decision

It is the Hearing Officer's Decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS failed to develop; and implement an

appropriate Individualized Education Program (“IEP”), for the student, during the 2008/09-school years; in violation of “The Individuals with Disabilities Education Act (“IDEA””, Public Law 101-476, reauthorized as “The Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”).

ISSUE 3

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement for the 2008/09 school years?

Petitioner represents that DCPS failed to provide the student an appropriate placement, in violation of 20 U.S.C. §§1411-1412 as implemented by 34 C.F.R. §§300.101 and 300.323; and that the student’s 2005 and 2008 evaluations recommend a full-time special education program for the student, in a therapeutic environment; and in February 2009, parent requested a change in the student’s placement from _____ to _____

Respondent represents that the student’s placement at _____ is appropriate, and provides the student the least restrictive academic environment; and the educational environment at _____ fail to satisfy the LRE requirements of the IDEA, and is too restrictive.

Respondent also represents that “placement” and location of services are two different legal terms that have been conflated in this jurisdiction. “Placement” is the amount and type of special education provide to the student as provided in his or her IEP; the site or location for the placement is an administrative matter within the discretion of the LEA. *White v. Ascension Parish Sch. Bd.* 343, F.3d 373 (5th Cir. 2003); *AK v. Alexandria Sch. Bd.*, 484 F.3d 672 (4th Cir. 2-0-7)(distinguished educational placement from location); *AW v. Fairfax County Sch Bd.* 373 F.3d 674, 681-83, (4th Cir. 2004) (“...location refers to something geographical in nature: a place or locale”); see also *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 663 (4th Cir. 1998).

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 300.114 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.3rd 315, 330 (4th Cir. 2004).

Findings of Fact

1. In addition, to these findings, the findings of fact identified in Issue 2 of the complaint, are adopted herein.
2. The placement decision was not made by a group of persons, *including the parents*, and other persons *knowledgeable about* the child, the meaning of the evaluation data, and the *placement options*; however, was unilaterally made by DCPS.

Parent was denied the opportunity to provide "meaningful" input in the placement decision.

3. In identifying a LRE for the student, DCPS failed to consider any potential harmful effects on the child or on the quality of the services he requires; and failed to identify an appropriate placement based on the child's needs; and as recommended in his 2008/09 IEP.

4. The student's IEPs reflect that the nature and severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; the student requires specialized instruction for all academic subjects.

5. _____ provides an educational setting that fosters academic, emotional and character growth; which in turn promotes the personal and social development of the students. This is accomplished through:
 - A full-time special education therapeutic day program.
 - Language based classes, multisensory approach to teaching, information disseminated to students in small segments.
 - Student in a classroom of his peers, with similar academic deficits, age, and disabilities.
 - A student teacher classroom ratio, providing the student one on one instruction.
 - The creation of a safe and therapeutic environment that allows for learning to transpire without unnecessary distractions, embarrassment, and criticism from other students.
 - The implementation of related services, (speech and language therapy, occupational therapy, physical therapy, psychological counseling, behavior management, reading remediation) as required in the student's IEP.
 - Offering a range of cultural, social and athletic opportunities so that students may develop other strengths and experience models of cooperation.

_____ can provide the student a full-time special education program, in a highly structured therapeutic environment, with an instructional learning environment utilizing multiple presentation formats to include visual, auditory, kinesthetic and tactile modalities. The school offers a behavioral management program, and crisis intervention, therapeutic interventions and supports.

_____ is an appropriate placement for the student; can implement the student's IEP; and provide the student educational benefit.

Conclusion of Law

DCPS failed to comply with the *Least Restrictive Environment (LRE)* requirements of the IDEA, 34 C.F.R. §300.116, in determining the educational placement of the student.

Decision

It is the Hearing Officer's Decision that Petitioner satisfied 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 year, in violation of "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")", 34 C.F.R. §300.116.

Free Appropriate Public Education (FAPE)

Petitioner alleges that DCPS' failure to provide the student special education instruction and an appropriate placement, during the 2008/09 school years, represents not only a procedural violation, but also a substantive violation of the IDEA; resulting in denial of a FAPE to the student.

Respondent represents that the student's IEP and placement are appropriate, and denies allegations that the student was denied a FAPE.

Discussion

IDEA, at 34 C.F.R. §300.101 provides that a "free appropriate public education" ("FAPE") must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in §300.530(d). 20 U.S.C. §1412(1).

A free appropriate public education "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Bd. Of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102 S.Ct.3034 (1982).

The FAPE requirement under IDEA, is applicable to procedural and substantive violations, which may result in a denial of a FAPE. The 2004 amendments to IDEA, at Section 615(f)(ii) specifically limit the jurisdiction of administrative hearing officers to make findings that a child did not receive FAPE due to procedural violations, if the inadequacies:

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

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

In *Board of Education v. Rowley*, 458 U.S. 176, 206-07 (1982), a child is deprived of a free and appropriate public education:

- (1) If the LEA violated the IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the child's right to a free and appropriate public education (FAPE), or
- (2) If the IEP is not reasonably calculated to enable a child to receive educational benefits.

According to *Rowley*, the benefit cannot be trivial. For the benefit to be sufficient to be 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.

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

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

For an entire school year, DCPS failed to develop and implement an appropriate IEP for the student; and failed to provide the student an appropriate placement. As a result, the student was denied access to the general curriculum, and educational benefit.

The evidence reflects, and teachers' reports indicate that although the student exercised significant effort, receives private tutoring and has a mentor, he remains at a 1st and 2nd grade level in most areas, although he is in the 7th grade; and continue to require special education services in all areas.

At the June 11, 2009 IEP team meeting, DCPS represented to the team that the student made academic progress during the 2008/09 school year; warranting a decrease in his specialized instruction and related services from 27.5 to 15 hours, however, failed to present evidence of the student's academic progress.

Finally, on March 31, 2009, the MDT agreed that _____ was an inappropriate placement for the student, and the student requires placement in a full-time special education program, and therapeutic setting. However, as of the date of hearing, DCPS failed to identify a full-time special education program, in a therapeutic environment; or issued a Notice of Placement identifying an alternate appropriate placement for the student.

Conclusions of Law

The procedural violation not only represents a procedural violation of the IDEIA and the DCMR, but it also affects the student's substantive rights under the IDEIA, which is the right to a free appropriate public education (FAPE); and is to such an extent that it is serious and detrimentally affects the student's substantive rights, that is, the right to a free and appropriate public education (FAPE).

The procedural violation impeded the child's right to a free and appropriate public education; significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the student; and caused a deprivation of educational benefit to the student.

The procedural violation deprived an eligible student of an individualized education program, reasonably calculated to provide educational benefit; resulting in the loss of educational opportunity, constituting 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.

Decision

The student was denied a FAPE, in violation of "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")"; entitling the student to compensatory education services, for the 2008/09 school year.

XI. ORDER

Based on the aforementioned, it is hereby:

1. **ORDERED**, that no later than 5:00 p.m. on October 2, 2009, DCPS shall issue parent/guardian a Prior Notice of Placement, authorizing and funding the student's placement and transportation, for the student to attend _____ and it is further _____
2. **ORDERED**, that within thirty (30) days of the student's placement at _____, DCPS shall convene an MDT/IEP team meeting with _____ staff to review and revise the student's IEP, to include the student's placement at _____ and at a minimum, extended school year (ESY) services;-

remediation services for reading, math, and written language; tutoring services; a behavioral modification program; and interventions to assist the student with academic tasks containing a language component; and it is further

3. **ORDERED**, that DCPS fund an independent vision examination to determine if the student requires corrective eyewear; and a Psychiatric Reevaluation screening; and it is further
4. **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, or its comparable, at _____ 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
5. **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
6. **ORDERED**, that DCPS shall schedule all meetings through counsel for the student and parent, Chessey Robinson, Esquire, in writing, via facsimile at (202) 380-9296; and it is further
7. **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

9-20-09

Date Filed: _____

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Blair Matsumoto, Office of the Attorney General
Attorney Chessey Robinson: Fax: 202-380-9296