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
Phone: (202) 698-3819 Facsimile: (202) 698-3825

2009 JAN 13 AM 9:39

In Re the Matter of :	
Parent on behalf of Student,[1]	
Petitioner,	
	Date of Complaint: November 10, 2008
	Date of Hearing: December 11, 2008
v.	
	Student Case Number:
The District of Columbia Public Schools **825 North Capitol Street, N.W.** **Washington, D.C. 20002** **(DCPS" or "District")**	*** Amendment**
Respondent.	

REVISED
HEARING OFFICERS' DECISION

Hearing Officer: Attorney Ramona M. Justice

Counsel for Parent: Attorney Domiento C.R. Hill
The Law Offices of James E. Brown and Associates
1220 L Street, N.W., Suite 700
Washington, D.C. 20005

Counsel for DCPS: Attorney Tiffany Puckett, Assistant Attorney General, Office of the Attorney General
825 North Capitol St., N.E., 9th Floor
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. * Please note that this decision is amended *only* to correct a typographical error; and does not represent a substantive change, or change in the outcome of this decision. Please note that the date of September 4, 2009, is changed to accurately reflect September 4, 2008, on page 2, paragraph, 3; page 4, paragraph 3; and page 7, paragraph 3, of the December 29, 2008 Hearing Officer's Decision (HOD). The date of amendment is January 13, 2009.

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 Prior to attending the student attended School, also 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); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

On September 4, 2008, a Multidisciplinary Development Team (MDT) meeting convened on behalf of the student. The MDT recommended completion of a Psychiatric Evaluation to determine whether the student is eligible to receive special education services under the disability classification of Other Health Impairment (OHI), identified as Attention Deficit Hyperactivity Disorder (ADHD). According to Petitioner, DCPS failed to complete the evaluation.

On November 10, 2008, Counsel, on behalf of student, initiated a due process complaint alleging that the District of Columbia Public Schools, hereinafter referred to as DCPS, denied the student a Free Appropriate Public Education ("FAPE"), by failing to: (1) complete the Psychiatric Evaluation, in violation of 34 C.F.R. §300.304(c)(4) and 30 DCMR §3005.9(g); (2) reconvene the student's MDT meeting to review the findings and recommendations of the Psychiatric Evaluation; and (3) whether the student is entitled to compensatory education services.

The due process hearing convened on December 11, 2008, at 9:00 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

(1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to complete the Psychiatric Evaluation, in accordance with 34 C.F.R. §300.304(c)(4) and 30 D.C. Municipal Regulations §3005.9(g)?

(2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to reconvene the MDT to review the student's Psychiatric Evaluation?

(3) Whether the student is entitled to compensatory education services?

(Note: Prior to proceeding with a hearing on the merits, Petitioner withdrew Issue 2 of the complaint. The Hearing Officer consolidates Issues 1 and 3 of the complaint)

V. RELIEF REQUESTED

(1) DCPS, in the event the student's Psychiatric Evaluation has been completed, shall provide a copy of the parent's evaluation within two (2) school days.

(2) DCPS, in the event the Psychiatric Evaluation is completed, shall fund the parent's independent Psychiatric Evaluation.

(3) DCPS, shall within five (5) school days of receipt or production of the last of the reevaluations or a reasonable time as determined by the Hearing Officer, agrees to reconvene the student's MDT/IEP meeting to review the findings of the Psychiatric Evaluation and Psychological Addendum, develop an appropriate IEP for the student, and issue a Prior Notice of Placement to an appropriate special education program.

(4) The IEP Team, at the student's MDT meeting shall discuss and determine the appropriate amount of compensatory education services the student is owed, and develop a plan.

(5) DCPS shall schedule all meetings through the parent's counsel, Domiento C.R. Hill, Esquire, in writing, via facsimile at (202) 742—2098.

VI. PROCEDURAL POSTURE

On November 10, 2008, Counsel, on behalf of parent, filed a due process complaint. On November 13, 2008, the Hearing Officer issued a Pre-hearing Conference Notice scheduling the Pre-hearing Conference for November 26, 2008, at 4:00 p.m. The parties failed to appear for the hearing; and on November 29, 2008, the Hearing Officer issued a Pre-hearing Conference Order confirming the due process hearing for December 11, 2008, at 9:00 a.m.. The due process hearing convened on December 11, 2008 at 9:00 a.m., as scheduled.

VII. PRELIMINARY MATTERS

As a preliminary matter, Petitioner's Counsel withdrew Issue 2 of the complaint, representing that since filing of the complaint, DCPS convened an MDT meeting to review the student's Psychiatric Evaluation. The parties presented no additional preliminary matters.

IIX. 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 to the disclosures submitted, the following disclosures were admitted into the record as evidence:

DISCLOSURES SUBMITTED BY PETITIONER

- Petitioner's Exhibits 01 through Petitioner's Exhibit 36; and a witness list dated December 4, 2008.

DISCLOSURES SUBMITTED BY RESPONDENT

- Respondent's Exhibits 01 through Respondent's Exhibit 02; and a witness list dated December 4, 2008.

IX. STATEMENT OF CASE

1. The student is years of age, and attends Prior to attending the student attended also located in the District of Columbia.

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); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

3. On September 4, 2008, a Multidisciplinary Development Team (MDT) meeting convened on behalf of the student. Parent and the Education Advocate requested that DCPS conduct a Clinical Psychiatric Evaluation; to rule out Attention Deficit Hyperactivity Disorder (ADHD. DCPS agreed to complete the evaluation and review the results within 15 days of the report being written. The MDT also determined that review of the evaluation would not be held at however, would be made at an independent PCS, where the student was enrolled and attending school.

A Student Evaluation Plan was completed on September 4, 2008, wherein the MDT recommended completion of a Psychiatric Evaluation; and parent signed a "Consent for Evaluation-Initial or Reevaluation" form, authorizing DCPS to complete a Psychiatric Evaluation.

4. On November 10, 2008, Counsel, on behalf of student, initiated a due process complaint alleging that the District of Columbia Public Schools, hereinafter referred to as DCPS, denied the student a Free Appropriate Public Education ("FAPE"), by failing to: (1) complete the Psychiatric Evaluation, in violation of 34 C.F.R. §300.304(c)(4) and 30 DCMR §3005.9(g); (2) reconvene the student's MDT meeting to review the findings and recommendations of the Psychiatric Evaluation; and (3) whether the student is entitled to compensatory education services. Petitioner withdrew Issue 2 of the due process complaint.

WITNESSES

Witnesses for Petitioner

Parent
Education Advocate

Witnesses for Respondent

No witnesses were introduced by Respondent.

X. DISCUSSION AND CONCLUSIONS OF LAW

ISSUE

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to complete the Psychiatric Evaluation, in accordance with 34 C.F.R. §300.304(c)(4) and 30 D.C. Municipal Regulations §3005.9(g)?

Petitioner represents that pursuant to 34 C.F.R. §300.304(c)(4) and (6), DCPS shall ensure that "the child is assessed in all areas of suspected disability…[and] in evaluating each child with a disability…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."

Petitioner further represents that pursuant to 34 C.F.R.§300.303(a)(2), DCPS shall ensure "a reevaluation of each child with a disability is conducted…if the child's parent or teacher requests a reevaluation. [emphasis added]"

Petitioner concludes that the IEP team, at the student's MDT meeting of September 4, 2008, recommended that the student be evaluated with a Psychiatric Evaluation to determine whether or not the student suffers from attention deficit hyperactivity disorder (ADHD); and as of this date, DCPS, to the best of the parent's knowledge and belief, has yet to conduct the Psychiatric Evaluation.

Petitioner also concludes that DCPS failed to issue a Notice of Intent to Evaluate the student, notifying parent of the dates and times scheduled for the evaluation; DCPS failed to evaluate the student within a reasonable period of time.

DCPS represents that reasonable efforts were initiated to complete the Psychiatric Evaluation; however, was precluded from completing the evaluation because student failed to attend school on the dates scheduled for the evaluation. DCPS represents that parent failed to contact the Psychiatrist to schedule the evaluation.

DCPS further represents that there is no denial of a FAPE, where DCPS has exercised reasonable efforts to evaluate the student.

Initial Evaluations

The Hearing Officer finds that there is no evidence that a Psychiatric Evaluation was previously completed for the student, therefore, the Psychiatric Evaluation referenced herein represents an initial evaluation, and Petitioner's reference to 34 C.F.R. §300.303 (a)(2) which applies to completion of reevaluations is misplaced; and will not apply.

According to ***34 C.F.R. §300.304(c) (4) and (6)*** DCPS shall ensure that a child is assessed in all areas related to the suspected disability; and in evaluating each child with a disability that the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified."

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

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

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

IDEA, §300.301(c)(1)(i) provides that the initial evaluation must be conducted ***within 60 days of receiving parental consent*** for the evaluation; ***or*** if the State establishes a timeframe within which the evaluation must be conducted. The 60 day timeframe established by IDEA in completing initial evaluations, only applies if the State fails to establish a timeframe within which an initial evaluation must be conducted.

In the District of Columbia, the District of Columbia Code, Chapter 25, §38-2501, entitled "Special Education and Assessment", established a 120 day timeframe within which initial evaluations and assessments must be completed for students who may have a disability and may require special education services; applicable to student in public or non-public schools. However, §38-2501 was recently repealed, and not replaced.

District of Columbia Code, Chapter 25B, §38-2561.02, entitled "Placement of Students with Disabilities in *Nonpublic* Schools", includes the same language in §38-2561.02 requiring completion of initial evaluations and assessments within 120 days after the date the student is referred for evaluation or assessment, however, this Chapter only applies to students in non-public schools. The student in this matter is not in a non-public school, therefore, the 120 day time frame is inapplicable.

The Hearing Officer finds that the District of Columbia repealed D.C. Code, §38-2501, and failed to replace the section with another section establishing a timeframe for completing initial evaluations/assessments for students in public schools. Therefore, absent the District of Columbia establishing a timeframe within which the evaluation must be conducted; IDEA §34. C.F.R. §300.301(c)(1)(i) must apply.

The record reflects that on September 4, 2008, a Multidisciplinary Development Team (MDT) meeting convened on behalf of the student. Parent and the Education Advocate requested that DCPS conduct a Clinical Psychiatric Evaluation; to rule out Attention Deficit Hyperactivity Disorder (ADHD; and DCPS agreed to complete the evaluation and review the results within 15 days of the report being written at where the student is enrolled.

According to the IDEA it is clear that either the parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child with a disability. The Hearing Officer finds that parent's September 4, 2008 request for the Clinical Psychiatric Evaluation constitutes a referral of the student for evaluation, and consent for the evaluation; and the 60 day time limit for DCPS to complete the evaluation began on that date.

Therefore, to comply with IDEA, §300.301(c)(1)(i) DCPS was required to complete the Clinical Psychiatric Evaluation no later than November 4, 2008, within ***60 days*** after September 4, 2008, the date that the student was referred and parent provided consent for the evaluation. As of the date of hearing, DCPS failed to complete the initial Clinical Psychiatric.

Based on the aforementioned, it is the Hearing Officer decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS failed to complete the initial Clinical Psychiatric Evaluation, within sixty (60) days of receiving parental consent for the evaluation, representing a procedural violation of IDEA, **34 *C.F.R. Section 300.300 (c)(1)(i).***

Free Appropriate Public Education (FAPE)

The FAPE requirement under IDEA, is applicable to substantive and procedural violations, which may result in a denial of a FAPE. In alleging substantive violations under IDEA, a party challenges the ***substantive*** content of the educational services the disabled student is entitled to receive under the IDEA.

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

procedural violation of the IDEA, is not a per se denial of a FAPE. The courts have held that even if we find that DCPS failed to comply with the procedural requirements of IDEA, such a finding does not necessarily mean that the Petitioners are entitled to relief; nor does it end our analysis. Rather, we must inquire as to whether the procedural violations result in a denial of FAPE, causing substantive harm to the student, or his parents.

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

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

According to DCPS reasonable efforts were made by the Psychiatrist to complete the Clinical Psychiatric Evaluation at PCS, however, the student's absence precluded completion of the evaluation on several occasions. The Communication Log" reflects that on October 28, 2008, the school returned the Psychiatrist's telephone call regarding testing the student on October 31, 2008 from 9 to 9:30 a.m.. The communication log also reflects that the school contacted parent by telephone and parent advised the school that she had no knowledge of the DCPS Psychiatrist or efforts to complete the testing at the school; therefore, she had not arranged for the student's availability at the school, to ensure completion of the evaluation.

On October 30, 2008, the school notified the Education Advocate of a one day in school suspension of the student, to occur on October 31, 2008. On October 31, 2008, the DCPS Psychiatrist visited the school to complete the evaluation; and although the student was on in school suspension on that date, the student was absent from school; and the evaluation failed to occur. The communication log indicates that the Psychiatrist rescheduled the evaluation for November 7, 2008, between 9-10:00 a.m..

On November 3, 2008, the school contacted the Education Advocate to discuss the necessity of the Psychiatrist completing the evaluation. On November 7, 2008, the school contacted parent in reference to the evaluation. On November 7, 2008, the school also contacted the Psychiatrist regarding the student's unavailability for the evaluation on that date, because of a scheduled fieldtrip on that date. The Psychiatrist rescheduled the evaluation for November 14, 2008. On November 13, 2008, the school telephoned parent to confirm the student's absences from school on November 12, 2008, and November 13, 2008; and completion of the Psychiatric Evaluation on November 14, 2008.

The Education Advocate testified that DCPS failed to notify parent or its representative of the dates and times the DCPS Psychiatrist was scheduled to visit the school to complete the evaluation; provide a schedule identifying dates for the evaluation; or a request for assistance in identifying a mutually agreeable date, time, and location for the evaluation; and scheduling the-

evaluation. Petitioner represents that DCPS failed to issue a Notice of Intent to Evaluate, notifying the parent of the dates, times, location of the evaluations; or the individual conducting the evaluation.

According to IDEA, at **34 C.F.R. Section 300.300 (a)(1)(i):**

"The public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under Section 300.8 ***must, after providing notice consistent with Sections 300.503 and 300.504***, must obtain informed consent, consistent with Section 300.9, from the parent of the child ***before*** conducting the evaluation. Although DCPS received parent's informed consent to evaluate the student on September 4, 2008, DCPS failed to provide parent or her representative notice of its intent to evaluate the student, prior to initiating efforts to conduct the evaluation; in violation of §§300.503 and 300.504. Specifically, DCPS failed to issue a Notice of Intent to Evaluate, notifying parent or her representative of the identity of the evaluator, dates, times, and location of the evaluation, to ensure the student's availability.

The Hearing Officer finds that although DCPS exercised efforts to complete the evaluation, the efforts were not reasonable. The record is clear that the DCPS Psychiatrist communicated directly with the school in scheduling the evaluation; and there was limited to no communication from the Psychiatrist with the parent to facilitate scheduling of the evaluation, or the student's participation in the evaluation. In addition, there is no evidence that the school or the Psychiatrist included parent in any of the decisions regarding scheduling and completion of the evaluation; or that additional efforts have been made to complete the evaluation.

The courts have held that procedural violations that ***deprive an eligible student of an individualized education program*** or result in the loss of educational opportunity will also constitute denial of a FAPE under the IDEA. *See, Babb v. Knox County Sch. Sys., 965 F.2d 104, 109 (6th Cir. 1992); W.G., 960 F.2d at 1484.* The Hearing Officer finds that although the DCPS determined that the student is eligible for special education and related services, it failed to comprehensively evaluate the student in all areas of suspected disability, including completion of a Clinical Psychiatric Evaluation, prior to the initial provision of special education and related services. As a result, the student has an IEP that was developed without the benefit of comprehensive evaluations; may not be specifically designed to address the student's unique-special education and related service needs; or reasonably calculated to provide the student educational benefit; resulting in denial of a FAPE.

The courts have also held that substantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process. The record reflects that DCPS failed to include parent in all decisions regarding the student education and the provision of a FAPE, specifically completion of the Clinical Psychiatric Evaluation. The Hearing Officer finds that DCPS' delay and failure to complete the Psychiatric Evaluation, seriously infringes upon the parent's opportunity to participate in the IEP process; resulting in denial of a FAPE.

The Hearing Officer finds that although it appears that the approximately one month and a half delay in completing the evaluation has had no more than a de minimis impact upon the student or his parents, the record reflects that the impact is more than de minimis. The student has a history and continues to exhibit such behavior, having an adverse impact upon his learning; and DCPS failed to comprehensively evaluate the student in all areas of suspected disability, prior to the initial provision of services. As a result, the court must consider the significant period of time which has lapsed since the student was initially evaluated, and determined eligible for special education and related services; and has had an IEP that may not be reasonably calculated to provide educational benefit.

The Hearing Officer concludes that the procedural violations in question impedes the child's right to a free and appropriate public education; significantly impedes the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; and causes a deprivation of educational benefit to the student; resulting in denial of a FAPE; and entitling the student to compensatory education services.

XI. ORDER

Based on the aforementioned, it is hereby:

(1) **ORDERED**, that DCPS shall fund an independent Clinical Psychiatric Evaluation; and it is further

(2) **ORDERED,** that DCPS shall within ten (10) school days of receipt of the independent Clinical Evaluation, reconvene the student's MDT/IEP meeting to review the findings of all evaluations, develop an appropriate IEP for the student, and issue a Prior Notice of Placement to an appropriate special education program, as appropriate; and it is further

(3) **ORDERED**, that at the MDT/IEP Team meeting, DCPS shall discuss and determine the appropriate amount of compensatory education services the student is entitled, and develop a Compensatory Education Plan; and it is further

(4) **ORDERED**, that DCPS shall schedule all meetings through the parent's counsel, Domiento C.R. Hill, Esquire, in writing, via facsimile at (202) 742-2098.

(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 , 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 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 /s/

Attorney Ramona M. Justice
Hearing Officer

Date Filed: *1-13-09*

cc: Attorney Tiffany Puckett, Office of the Attorney General
Attorney Domiento C.R. Hill: Fax: 202-742-2098