

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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2009 JUN 27 PM 12:18
STUDENT HEARING OFFICE
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In Re the Matter of :)
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)
Parent on behalf of Student,)
)
Petitioner,)
)
)
v.)
)
The District of Columbia Public Schools,)
825 North Capitol Street, N.W.)
Washington, D.C. 20002)
)
Respondent.)
_____)

Date of Complaint: June 4, 2009
Date of Pre-hearing: July 7, 2009
Date of Hearing: July 23, 2009

HEARING OFFICERS' DECISION (HOD)

Hearing Officer: Attorney Ramona M. Justice

Attorney for Petitioner: Attorney Charles Moran
601 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004

Attorney for Respondent: Attorney Nia Fripp, Assistant Attorney
General, D.C. 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.

**THE 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 private school located in the District of Columbia; providing full time permanent and interim special education services to students ages 5-22 with a variety of disabilities. Prior to attending _____ the student attended _____ School, a full inclusion general education public school, 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); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)". The student's disability classification is Specific Learning Disability (SLD).

On June 4, 2009, Petitioner, through her Attorney, initiated a due process complaint alleging that the District of Columbia Public Schools, hereinafter referred to as "Respondent" or "DCPS", denied the student a Free Appropriate Public Education ("FAPE"), by failing to: (1) provide special education instruction as provided in the student's IEP; and (2) provide the student an appropriate placement, in violation of "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

Petitioner also alleged that the student is entitled to compensatory education services, as a result of DCPS' alleged failure to provide the student special education instruction and an appropriate placement.

The due process hearing convened on July 23, 2009, at 11:00 a.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

II. JURISDICTION

The due process complaint was initiated pursuant to the rights and guidelines 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 were identified in the *June 4, 2009* due process complaint:

- (1) Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to provide special education instruction, in accordance with the student's Individualized Education Program (IEP)?
- (2) Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement?
- (3) Whether the student is entitled to compensatory education services, because of DCPS' alleged failure to provide the student specialized instruction, and an appropriate placement?

V. RELIEF REQUESTED

- (1) Immediate funding from the beginning of the placement of the parent's choice, and transportation.
- (2) Compensatory education services for the 2007/08 school year, in the amount of 250 hours of specialized instruction, 100 hours of Occupational Therapy and 100 hours of speech/language services.
- (3) Reasonable Attorneys fees and costs.

VI. PROCEDURAL POSTURE

On June 4, 2009, Petitioner, through her Attorney, initiated a due process complaint. The Student Hearing Office issued a "Due Process Hearing Notice", tentatively scheduling the prehearing conference for July 6, 2009, and the due process hearing for August 6, 2009. However, on June 5, 2009, Respondent filed "DCPS Resolution Session Waiver"; requiring rescheduling of the prehearing conference and hearing, to comply with the 45 day time limit governing these proceedings.

On June 11, 2009, the Hearing Officer issued a "Prehearing Conference Notice", scheduling the prehearing conference for July 7, 2009, at 3:00 p.m.. Due to the parties' unavailability, an "Interim Order of Continuance Motion" was issued, continuing the due process hearing to July 23, 2009 at 11:00 a.m..

On June 16, 2009, Respondent filed "District of Columbia Public School's Response to Parent's Administrative Due Process Complaint Notice". The prehearing conference convened on July 7, 2009, at 4:30 p.m.; and the Hearing Officer issued a "Prehearing Conference Order", confirming the due process hearing for July 23, 2009, at 11:00 a.m.; and requiring the parties to submit disclosures and motions by 5:00 p.m., on July 16, 2009.

On July 15, 2009, Petitioner filed disclosures; and on July 1, 2009, Respondent filed disclosures. On July 17, 2009, Respondent filed supplemental disclosures. The due process hearing convened on July 23, 2009, at 11:00 a.m., as scheduled.

VII. PRELIMINARY MATTERS

As a preliminary matter, DCPS advised the court of its intent to rest on the record with regard to Issus 2 and 3 of the complaint; and acknowledged that there is no dispute regarding the following issues:

- (1) Whether D.C. Public Schools failed to provide the student special education instruction?
- (2) Whether D.C. Public Schools failed to provide the student an appropriate placement?
- (3) Whether the student is entitled to compensatory education services?

The remaining issues before the court, are as follows:

- (1) Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to provide the student special education instruction, in accordance with the student's December 17, 2007; and January 26, 2009 Individualized Education Programs (IEPs)?
- (2) Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement, during the 2007/08 and 2008/09 school years?

Additionally, Petitioner revised its request for relief in the complaint, as it pertains to compensatory education services, withdrawing its request that the court award the student 250 hours of specialized instruction, 200 hours of Occupational Therapy and 100 hours of speech/language services, to compensate the student for the two (2) years she failed to receive services. Petitioner requests that the court merely determine whether the student's is entitled to compensatory education services, which the court need not decide because DCPS does not dispute the student's entitlement to compensatory education services.

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, 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 Exhibit 22; and a witness list dated July 2, 2009.

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT

- Respondent's Exhibits 01 through Respondent's Exhibits 04; and witness lists dated July 1, 2009, and July 16, 2009.

IX. STATEMENT OF CASE

1. The student is _____ years of age, and a _____ grade student at _____ a private school located in the District of Columbia; providing full time permanent and interim special education services to students ages 5-22 with a variety of disabilities. Prior to attending _____ the student attended _____ a general education D.C. public school.

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)". The student's disability classification is Specific Learning Disability (SLD).

3. On March 2, 2007, while attending _____ School, the student's 2nd grade Teacher completed a Student Support Team (SST) Request Form, Teacher Version, indicating that the student was below basic level in reading and math; however, can work better in a small group; and has short term memory deficits. The Teacher also identified the following student strengths: exhibited a positive attitude, worked well in groups, respected authority, motivated, cooperative, transitions easily handles conflict well, takes pride in appearance

In addition, the Teacher identified the following academic concerns: slow rate of work, incomplete assignments, low rate of retention, failed to work well independently; and instructional accommodations included one on one instruction, and small group instruction for a period of 3-4 months. The Teacher concluded that the problems occur in the classroom and at the student's home.

4. On March 20, 2007, in response to the Student Support Team (SST) Request Form, Teacher Version, completed by the student's 2nd grade Teacher, a Student Support Team (SST) meeting convened with the parent, and the student's Teacher, among others. Parent advised the team that the student is identified as developmentally delayed (DD), and had an impending appointment at Children's Hospital. The team agreed that parent would on that date, provide the school copies of medical evaluations completed for the student last year; and that it may be necessary to refer the student to the Multidisciplinary Development Team (MDT).

5. On October 8, 2007, an "Individualized Intervention Program" was developed to address the student's academic deficits, indicating that the student fail to perform assignments independently; does not perform academically at her ability level; has difficulty with short-term or long-term memory; does not comprehend what she reads; and requires repeated drill and practice to learn what other student's master easily.

6. On October 10, 2007, the student's 3rd grade Teacher completed a Student Support Team (SST) Request Form, Teacher Version, indicating that the student had a positive attitude towards learning, and was a hard worker, however, experienced difficulty in reading and math. The Teacher also indicated that the student was below grade level in reading and math.

In Reading, the Teacher indicated that the student had difficulty decoding words with long or short vowels and blends; begins to have difficulty identifying basic sight words on the 1st grade level; did not identify two syllable words; does not read some below level stories independently; exhibited low retention of information; failed to complete assignments (not all of them); and had difficulty with simple rhyming words. In Math, the Teacher indicated that the student failed to comprehend abstract addition and subtraction problems, and was unable to complete math problems independently, in the classroom.

Specific academic concerns included: grades declining, slow rate of work, incomplete assignments, does not follow directions, low rate of retention, poor writing skills, poor reading skills, and poor math skills, does not work well independently. Behavioral concerns include: shy sometimes.

Instructional accommodations included: small group in reading and math, indicating that the student works well in a small group; modified curriculum/demands, noting slight improvement; providing the student some below grade level materials, noting slight progress.

7. On November 8, 2007, D.C. Public Schools, Office of Special Education, and RehabPlus Staffing Group, Inc. completed an Occupational Therapy Evaluation of the student, to determine whether occupational therapy intervention was warranted to assist in meeting her educational goals.

8. On November 8, 2007, D.C. Public Schools, Office of Special Education, and RehabPlus Staffing Group, Inc. completed an Occupational Therapy Screening, in the student's classroom setting to screen for possible need of occupational therapy services in the educational setting.

The screening indicated that parent reports that the student exhibits possible attention deficit disorder (ADD) or attention deficit hyperactivity disorder (ADHD) symptoms; and included a clinical observation and teacher interview.

9. On December 17, 2007, DCPS issued a "Confirmation of Meeting Notice" to parent, requesting to convene a MDT meeting on December 17, 2007 at 10:00 a.m., to develop/review the student's IEP; review evaluation or reevaluation information; discuss placement; discuss eligibility; and discuss Personal Health Information (PHI).

After review of the assessments, the MDT determined that the student was eligible for special education and related services; and the team developed an IEP for the student, for the 2007/08 school years.

The December 17, 2007 IEP identifies the student's disability classification as learning disabled (LD); and recommends 10 hours of specialized instruction, and 1 hour of occupational therapy, weekly. The IEP indicates that the percent of time in specialized instruction and related services is 69% of the time; and 31% of the time NOT in a general education setting. Areas requiring specialized instruction and related services include: math, reading, and language arts/English.

The IEP also indicates that curricular modification, accommodation and/or supplemental aids and services can be used for a LRE setting in general education. Accommodations/modifications included: extended time, extra breaks during tests, read directions/test to student, preferential seating, and use of computer/calculator/slantboard.

The student's academic setting is identified as combination general education and resource classroom; consisting of a combination of general educators, special educators, and related service providers, 21% to 60% of service time. The student's level of need is identified as "moderate".

The Education Advocate prepared MDT meeting notes indicating among others, that academically, the student struggles in all areas and displays many behavioral problems; and has some problems with peer relationships. According to the student's teacher the student improved in math, however not in language; and is in a class of 25 students. The advocate's notes indicate that the student was diagnosed with ADHD, Disorder of written expression, reading disorder, math disorder, and provisional mood disorder; and a neuropsychological was recommended.

10. On May 6, 2008, the student's 3rd grade Teacher completed a "Deficiency Report", identifying the following student deficiencies: poor class test scores, lack of basic reading/math/writing skills; inadequate written homework or notes. The report also indicated that a conference with the Teacher was necessary; and proposed May 16, 2008 to meet with parent and discuss the student's academic progress.

11. On June 9, 2008, the student's 3rd grade teacher wrote a letter indicating that she served as the student's teacher for the 2007/08 school year, at _____ and since the beginning of the school year she had major concerns regarding the student's academic progress, particularly in reading and math. The teacher reported that the student began 3rd grade reading below grade level; was exiting 3rd grade reading far below grade level; was reading on 1st grade level; was unable to read independently or recognize 2 or more syllable words; and struggled to sound out words.

The teacher also indicated that while the student was slightly stronger in math than in reading, she continued to have difficulty adding and subtracting 1 digit numbers, which are 1st grade skills; and memorizing multiplication facts; which are all 3rd grade skills. The teacher noted that retention and remembering information has been a problem for the student in math and reading.

The teacher concluded that the student requires placement in special education, and special education services in order to produce significant gains academically. The teacher also indicated that behaviorally the student had never been an extreme behavior problem; and since receiving medication for ADD, she is calmer, listens, and is more attentive.

12. On July 7, 2008, a visiting nurse for the student's younger sister, wrote a letter expressing concern that during visits with the sibling, the student would run around, exhibit erratic behavior, spoke nonsensical and many times disrupted visits with loud outbursts and erratic behavior.

The nurse also indicated that during efforts to include the student in conversation, the student was unable to participate in a conversation and would forget her thought mid-sentence, in comparison to her younger sister, who was able to participate in conversation at a longer length of time. The nurse concluded that the student's mother complained regarding the student's lack of school progress, nutritional growth, and constant behavioral problems; and the nurse commented that there were instances, when she observed the student's lack of growth.

13. On September 26, 2008, DCPS convened an MDT meeting to discuss concerns regarding the student. The MDT meeting notes reflects the absence of a Comprehensive Psychological Evaluation; and the completed evaluation failed to include the ADHD and emotional components. The MDT meeting notes also reflect the absence of a Speech and Language Evaluation; and the completed evaluation failed to include recommendations.

The MDT meeting notes indicate that the student is in the inclusion setting, however, receives no services; is frustrated and not achieving. The team expressed concern that there is (currently) only one special education teacher; and that the teacher is "holding a class", specifically, a general education class, until another teacher can be hired; rendering the teacher unavailable to provide the student specialized instruction.

The MDT meeting notes indicate that parent and counsel requested a Speech and Language Evaluation and the ADHD/social emotional components of the Comprehensive Psychological Evaluation; reiterating that the student received no specialized instruction or OT services. The MDT meeting notes also indicate that parent's Attorney requested independent evaluations; and the team agreed to complete the SEP for independent evaluations.

Parent expressed concern regarding the level of difficulty of classroom assignments; and that the student's teacher "yells" at the student; that the class size is too large; and the student's frustration, and lack of interest in attending school. Parent advised the team that the student receives counseling at Mental Health; and visits at physician at Children's Hospital.

The MDT completed a SEP indicating concern that the student failed to receive any special education/related services and failed to receive evaluations in all areas of suspected disability. The SEP recommended independent Speech/Language, Social History, Educational, and ADHD/Clinical Components of a Comprehensive Psychological Evaluation.

14. On January 26, 2009, DCPS convened a MDT to review the independent evaluations. The Special Education Coordinator (SEC) reported that the student failed to receive specialized instruction "because there is only one special education teacher and this teacher is holding a general education class". The SEC provided the student's general education teacher a copy of the student's academic goals and objectives.

The team discussed the student's requirement for medication while at school, indicating that the student is administered the medication, later than prescribed. Parent advised the team that the student returns home from school in a rage because of frustration due to her inability to maintain the pace of other students, and harassment from other students; and exhibits her frustration through problematic behavior at home, and bed wetting.

The student's teacher reported that the student made improvement in the D.C. Basic Aptitude Skills (DCBAS) administered; indicating no below areas in Math. The Social Worker advised the team that the student fail to feel any cohesion with her teacher, and releases it at home (her emotions). The notes indicate that the student "puts up a front at school and releases her frustrations at home". The notes also indicate that the school has not seen any extreme behaviors of emotionality.

The Occupational Therapist advised the team that the student has difficulty with visual motor perception; her penmanship is "squished/squeezed together"; and she does not observe right/left margins; while passing both visual screenings with the physician and at school.

The notes indicate that _____ is a full inclusion school, and has no teacher (Special Education Teacher). Parent and the counsel requested a full time placement (and outside counselor); and an independent Neuropsychological Evaluation as indicated in the clinical, educational and speech/language evaluation recommendations.

Speech/Language Evaluation: The notes indicate that the student's weakness is in the receptive areas; higher processing skills are depressed; and she requires speech/language intervention. The team recommended direct services of 30 minutes weekly and 15 minutes monthly; and classroom modifications.

The MDT notes indicate that _____ has not provided the services the student requires due to lack of manpower." The advocate advised the team that the student requires or would benefit from a full time and gradually move back into inclusion; and parent strenuously stressed the need for a full-time placement for the student.

The team agreed that _____ is not an appropriate placement for the student; and the Social Worker agrees that the student requires a full-time placement. The DCPS team proposed 20 hours of specialized instruction (resource/pullout), 30 minutes of OT, 30 minutes (weekly) speech language therapy, and 15 minutes monthly for consultation. The team determined that 21 hours or full time placement cannot be implemented at]

The team agreed that the student's disability classification is multiple disability (MD), to include ADHD (OHI) and Learning Disabled (LD). There was also a decision regarding daily dissemination of the student's medication. The DCPS team requested consultative social emotional counseling; and parent requested 30 minutes weekly. The team also agreed to reconvene to develop academic goals/objectives based on the Educational Evaluation, revised on December 16, 2008; and discuss compensatory education services.

15. On September 26, 2008, the Education Advocate developed MDT meeting notes, documenting the unavailability of the student's evaluation for ADHD; the student's IEP provides that the student should receive 10 hours of specialized instruction, 1 hour of occupational therapy, however, the school is full inclusion, therefore, the student's IEP is not being implemented.

The advocate indicated that the team failed to provide recommendations or provide MDT meeting notes; and at that time the school had one special education teacher, and the regular education teacher. The notes also indicate that parent and the advocate requested an independent speech/language evaluation, and the ADHD and a component to the Psycho-educational Evaluation; and that the student was receiving no specialized instruction or OT services. The notes also indicate that that a Social History and Educational Evaluation would be completed.

The notes reflect that the student has a class of 30 students, and is unable to complete the classroom assignments; and the Psychologist was not present at that initial IEP meeting, intended to review the evaluation and discuss its content.

16. On January 26, 2009, DCPS developed an IEP for the student, for the 2008/09 school years. The student's disability classification is identified as Specific Learning Disability (SLD); and the IEP recommends 600 minutes per week of specialized instruction, 30 minutes per week of occupational therapy services, and 30 minutes per week of speech-language pathology services.

The Least Restrictive Environment, Speech-Language Pathology section of the IEP provides that the type of delay and educational complications warrants small group and sensory controlled environment which prevents instruction at the classroom level.

The IEP also provides that eligibility for extended school year (ESY) services will be determined at a later date; and compensatory education was discussed and the MDT decided that it is warranted, however the amount is yet to be determined.

17. On March 29, 2009, a "Confidential Neuropsychological Evaluation" was completed by Diagnostic Consultants, LLC. At the time of the evaluation the student was attending _____ and was _____ years of age. The evaluator determined that _____ does not appear to be an appropriate placement for the student, as there is no special education teacher on staff.

The evaluator also diagnosed the student with ADHD (Continuous); Dysthymic Disorder, Learning Disability, Reading Disorder, and a Mathematics Disorder; and offered the following recommendations, to address the student's cognitive, academic, emotional, and behavioral difficulties, resulting from a complex set of variables and dynamics, warranting a multimodal intervention:

- The student is delayed academically, therefore, she requires a fulltime, highly structured specialized education program that has a low pupil to teacher ratio with an instructional learning environment that utilizes multiple presentation formats to include visual, auditory, kinesthetic and tactile modalities.
- The curriculum should focus on academic enrichment which focuses on reading and mathematics, oral and written language; a therapeutic focus providing access to both psychotherapeutic and psychopharmacological intervention.
- Designated breaks and a desk void of clutter, situated in an areas void of visual distractions.
- Additional time to complete assignments; several reminders, several minutes apart, before changing assignments, as she become frustrated when unable to complete a task.
- Opportunity to break assignments into segments of shorter tasks, with small sequential steps that are monitored. Assignments thoroughly explained and a model of end product.
- Continued Psychiatric Consultation.
- Behavior Management Strategies.
- Consideration of recommendations included in prior evaluations, during next school placement.
- Parent communication with school regarding the student's academic, behavioral, emotional and social progress to increase the student's compliance with completion of school assignments.
- Weekly individual and group therapy, to address underlying correlates to her emotional distress, as well as promote her self-esteem and enhance her coping skills.
- School based counseling services, to address any problems she may encounter getting along with peers.
- Supportive home environment void of criticism.
- Big Sister/mentor who could provide her with additional support, and serve as a role model for appropriate and adaptive behaviors.

18. On April 2, 2009, Inc. forwarded a letter to the Special Education Advocate indicating that the school can provide the required and appropriate services for the student; and can accept the student at the facility upon receipt of funding, pending space availability.

19. On April 3, 2009, DCPS convened a MDT meeting to review the independent Neuropsychological Evaluation. The school Psychologist reviewed the evaluation, noting a decline in the student's overall IQ score; performance abilities were in the borderline range; and the student fail to require a behavior/intervention plan; and required individual/group therapy to address emotional issues. The Psychologist advised the team that the evaluation recommended a full time placement; and the team agreed that is not the appropriate placement for the student. The Psychologist expressed to the team that a full-time placement would be an extreme-in light of the student's overall IQ.

The School Psychologist expressed reservations regarding a change in the student's program from 10 hours per week to a full time placement, while indicating that the fact that the student failed to receive the necessary services on her IEP, and the school's inability to meet the student's needs, the student may benefit from a more structured, rigorous educational/therapeutic environment.

Parent recommended and presented the team with a letter of acceptance from the school. The Social Worker indicated that she failed to observe any "acting out" behavior at school. Parent advised the team that the student is on medication three (3) times daily (morning, afternoon, and evening). The student's teacher and counselor indicated that the student's behavior fail to impact classroom progress. The parent, Attorney, and external counselor opined that the student's behavior is impacting her ability to access the curriculum and content.

The MDT meeting notes indicate that "the majority of the MDT agreed that a full time placement/setting is warranted and the IEP would be changed to reflect such". The team indicated that the student is accepted at specialized instruction is increased to 26.5 hours, speech/language: 30 minutes; occupational therapy: 30 minutes, for a total of 27.5 hours of specialized instruction and related services, weekly. The notes also indicate that DCPS (Brightwood MDT) cannot make a placement or issue a letter of placement; therefore, the information will be submitted to the Office of the State Superintendent of Education (OSSE), for placement consideration.

The MDT and advocate's meeting notes reflect that the Education Advocate requested two (2) years of specialized instruction for compensatory education for services missed due to the lack of personnel in the school setting, and the team agreed. The MDT and advocate's notes also indicate that compensatory education would be discussed at the 30 day review.

20. On April 15, 2009, DCPS prepared a "Student Report of Progress" which reflects that during the 1st and 3rd reporting period certain goals were "just introduced" or "not introduced".

21. On May 22, 2009, Petitioner's Attorney forwarded a letter to the SEC regarding its intent to place the student at _____ eleven business days from the date of the letter. The letter also reiterated that on April 3, 2009, the MDT indicated its inability to issue a Notice of Placement, requesting that parent await a referral for the placement decision to OSSIE, for a placement recommendation; and more than thirty (30) days had since lapsed; without a decision. The letter also includes a request for public funding and an immediate DCPS placement at Rock Creek Academy, as provided in 34 C.F.R. §300.148.

22. On June 2, 2009, DCPS provided "Service Tracker" forms verifying related services provided from May 1, 2009 through May 31, 2009. The service tracker form reflects that on May 4, 2009, the student was not available for speech/language services; on May 11, 2009, the student was absent for speech/language services; on May 18, 2009, the provider was unavailable to provide speech/language services; and on May 25, 2009, the school was closed, as a result, the student failed to receive speech/language services.

23. The student's 4th Grade Report Card from _____ reflects that the student received an overall score of 2 indicating that the student approached the standard (Basic) in Reading/English Language Arts, during the 1st, 3rd, and 4th Advisories; which indicates that the student showed a basic working knowledge of skills/concepts; produces satisfactory; usually applies skills/concepts correctly. Overall, the student rated below the basic standard in this area during the 2nd Advisory, indicating that the student failed to show basic working knowledge of skills/concepts; seldom produces work of satisfactory quality.

In mathematics, science, social studies, and music, the student received an overall score of 2 during the 1st through the 4th Advisories, indicating that the student showed a basic working knowledge of skills/concepts; produces satisfactory; usually applies skills/concepts correctly. In Art, the student received an overall score of 3 during the 1st, 3rd, and 4th Advisories, indicating that the student met the standard; and a 2 indicating that the student approached the standard during the 2nd Advisory. In Health and Physical Education the student received an overall score of 3 during the 1st, 3rd, and 4th Advisories indicating that the student met the standard (proficient); and during the 2nd Advisory, the student received a score of 2, indicating that the student approached the standard (Basic).

Under the category of Work Habits, Personal, and Social Skills, during the 1st through the 4th Advisories the student performed independently in the majority, if not all areas. Teacher comments reflect that student requires assistance in reading and mathematics, and practice in these areas.

24. On June 4, 2009, Attorney, on behalf of parent, initiated a due process complaint alleging that the District of Columbia Public Schools, hereinafter referred to as Respondent or "DCPS", denied the student a Free Appropriate Public Education ("FAPE"), by failing to: (1) provide special education instruction as provided in the student's IEP during the 2007/08 and 2008/09 school years; and (2) provide the student an appropriate placement, in violation of "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

X. DISCUSSION AND CONCLUSIONS OF LAW

ISSUE 1

Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to provide the student special education instruction, as recommended in the student's December 17, 2007; and January 26, 2009 Individualized Education Programs (IEPs)?

Discussion

Petitioner represents that the student's December 17, 2007 provides for 10 hours of specialized instruction and 1 hour of occupational therapy (OT) services, per week. Petitioner further represents that DCPS failed to provide the student the specialized instruction, and related OT services recommended in the student's December 17, 2007 IEP.

Petitioner represents that the student's January 26, 2009 IEP provides for 10 hours of specialized instruction, 30 minutes of occupational therapy (OT) services, and 30 minutes of speech/language services per week. Petitioner further represents that DCPS failed to provide the student the specialized instruction, and related OT and speech and language services, as recommended in the student's January 26, 2009 IEP.

Petitioner concludes that the student has regressed academically; and has exhibited academic difficulties for years. Petitioner represents that the student's behavior is controlled with medication that is administered morning, noon, and evening, to address her ADHD and other behaviors; and visits with an outside therapist, which accounts for her failure to exhibit behavioral problems at school.

Petitioner also represents that cognitive tests, and the recent Neuropsychological Evaluation indicates that the student is several grade levels behind, academically; and the student has not had a special education teacher for two (2) years, or received the necessary services, as provided in her IEP. Petitioner argues, that as a result, the student regressed academically and behaviorally, frustration increased, the student engaged in behavioral outbursts, refused to attend school because she is several grade levels behind; is unable to comprehend or complete the assignments, and is harassed by other students; resulting in an increase in the student's medication.

Respondent rested on the record, and advised the court that there is no dispute that D.C. Public Schools failed to provide the student special education instruction, due to staffing shortages; and an appropriate placement. However, Respondent disputes that it failed to implement the student's IEP, by failing to provide the student the related services, as recommended in the December 17, 2007, and January 26, 2009 IEPs.

Respondent represents that the student was not denied a FAPE, due to its failure to provide special education instruction; and failure to implement the student's IEP, is not a denial of a FAPE. Respondent further represents that from January, 2009-June, 2009, there were two (2) teachers in the student's classroom.

Respondent represents that Petitioner failed to present evidence that the student was retained, failed classes, failed to approach the standards; and according to the student's 2008/09 4th Grade Report Card, the student received a score of "3" in all subjects, indicating that she met the basic standard in all subjects. Respondent also represents that the problematic behavior witnessed by parent at the student's residence, was not witnessed at school.

Respondent argues that Petitioner failed to present evidence of harm to the student, and that the student has a specific learning disability which is the reason she is not on grade level; and that she made progress in math during the 2nd Advisory. Respondent also concludes that Petitioner failed to satisfy its burden of proof, and that failure to implement an IEP, is not representative of denial of a FAPE.

Individualized Education Program ("IEP")

Federal law requires that an IEP be developed for children with disabilities; which includes services to ensure that students are able to make functional use of what they learn, in addition to ensuring academic growth. Generally, IEPs must comply with both procedural and substantive requirements of IDEA.

According to IDEA, at 34 C.F.R. Section 300.323(c) (2), as soon as possible following development of a student's IEP, special education and related services are made available to the child in accordance with the child's IEP. 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.* 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..."

The record reflects that on December 17, 2007, an IEP was developed for the student identifying the student's disability classification as learning disabled (LD); and recommending 10 hours of specialized instruction, and 1 hour of occupational therapy, weekly. Areas requiring specialized instruction and related services include: math, reading, and language arts/English.

It remains undisputed that during the 2007/08 school year, while attending the student failed to receive the 10 hours per week of special education instruction, as provided in her IEP, due to the unavailability of a special education instructor at the school.

In addressing the related services recommended in the student's December 17, 2007 IEP, the Education Advocate testified that although the student's IEP provided for 1 hour per week of occupational therapy, the IEP failed to include occupational therapy goals or objectives; and there were no service provider logs reflecting that the student received occupational therapy services, during the 2007/08 school years.

The Special Education Coordinator (SEC) at _____ testified that she has served at _____ for one year; and was unfamiliar with the student's 2007/08 IEP; and was unable to testify regarding the provision of specialized instruction or related services to the student.

The record also reflects that on January 26, 2009, DCPS developed an IEP for the student. The student's disability classification is identified as Specific Learning Disability (SLD); and the IEP recommends 10 hours per week of specialized instruction, 30 minutes per week of occupational therapy services, and 30 minutes per week of speech-language pathology services.

It remains undisputed that during the 2008/09 school year, the student failed to receive the 10 hours per week of special education instruction, as provided in her IEP, due to the unavailability of a special education instructor. This was confirmed by testimony from the SEC; and Education Advocate.

In addressing the related services recommended in the student's January 26, 2009 IEP, the SEC testified that the student received OT services during the 2008/09 school year, although in March, 2009, there was an interruption in services because the Occupational Therapist was on maternity leave; however, the services were ultimately resumed by another therapist.

The SEC also testified that the student received speech and language services during the 2008/09 school years. DCPS presented one Service Tracker form reflecting speech and language services received by the student, from May 1, 2009 through May 31, 2009.

Findings of Fact

1. DCPS failed to provide the student special education instruction services, as recommended in the student's December 17, 2007; and January 26, 2009 Individualized Education Programs (IEPs) Individualized Education Programs (IEPs).
2. DCPS failed to comply with the procedural requirements of IDEIA, at 34 C.F.R. Section 300.323(c) (2), by ensuring that as soon as possible following development of a student's IEPs, special education services were made available to the child in accordance with the child's IEP.
3. DCPS failed to comply with the procedural requirements of the D.C. Municipal Regulations, Title 5, §3010.2 (2003), by failing to implement the student IEPs, as soon as possible after the meetings where the IEPs were developed.

4. Petitioner failed to present evidence sufficient for a finding that the student failed to receive occupational therapy, or speech and language services during the 2007/08 and 2008/09 school years, as recommended in the December 17, 2007, and January 26, 2009 IEPs; through witness testimony or documentary evidence.

Conclusion of Law

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 special education instruction, during the 2007/08 and 2008/09 school years; in violation of the Individuals with Disabilities Education Act, reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA); and the D.C. Municipal Regulations, Title 5, §3010.2 (2003).

ISSUE 2

Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement, during the 2007/08 and 2008/09 school years?

It remains undisputed that DCPS failed to provide the student an appropriate placement during the 2007/08 and 2008/09 school years; and _____ was an inappropriate placement for the student. It is also undisputed that the student requires a full-time special education placement.

However, the issue which remains in dispute is whether the student *was denied a FAPE*, as result of DCPS' failure to provide the student an appropriate placement; which is discussed below.

Free Appropriate Public Education (FAPE)

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 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."

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. 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. *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006).

In this matter, Petitioner alleges that DCPS' failure to provide the student special education instruction and an appropriate placement, during the 2007/08 and 2008/09 school years, represents not only a procedural violation, but also a substantive violation of the IDEA.

The record reflects that for two (2) academic years DCPS failed to implement the student's IEP, by failing to provide the student the specialized instruction she was entitled to receive under the IDEA; and that was necessary for the student's academic growth and development. Additionally, during these two (2) years, the student's placement was inappropriate, denying the student access to the general curriculum.

More profound is the impact that the violation has had upon the student, academically, psychologically, emotionally, and behaviorally. The evidence reflects, and teachers' reports indicate that although the student exercised significant effort, she remained below grade level throughout her academic history, and continued to regress academically.

Parent testified that upon inquiry, she was advised by the student's teachers that the student could not be retained in grade, because she was a special education student. The student's academic history reflects that the student was advanced in grade; although she continued to regress academically. Advancing a student in grade does not relieve the LEA of its obligation to ensure that the student receives a FAPE. Additionally, once the student was determined eligible for special education and related services she failed to receive the special education instruction necessary, to access the general curriculum, receive educational benefit, and progress academically. Instead, the student continued to regress academically.

On January 26, 2009, and April 3, 2009, the MDT determined that _____ was an inappropriate placement for the student, and on April 3, 2009, determined that the student requires placement in a full-time special education setting. However, as of the date of hearing, DCPS failed to identify a full-time special education placement for the student, or issue a Notice of Placement identifying an alternate placement for the student.

On May 22, 2009, Petitioner forwarded a 10-day letter to the SEC at _____ regarding its failure to identify a full-time special education placement for the student, as recommended by the MDT on April 3, 2009, and its intent to proceed with placement of the student at _____. DCPS failed to respond, and the student began attending Creek Academy in July, 2009. However, prior to the student's placement at _____, DCPS failed to identify a placement for the student, and maintained the student's placement at _____ although aware of the adverse impact the placement continued to have upon the student.

The record also reflects that the student's disabilities, failure to receive necessary special education instruction, and an inappropriate placement, exacerbated the student's psychological and emotional status. It is evident that the student's defiance and reluctance to attend Brightwood ES school was attributed to the frustration she experienced as a result of her –

inability to comprehend or retain the information received in class, the constant need for one on one instruction from a special education instructor, and her inability to access the general curriculum; and her self esteem was affected because of the ridicule she continued to receive from students who were not her peers.

In addition, according to parent, the student became increasingly frustrated and refused to attend school, and when she attended school she would suppress her frustration, until she arrived home, at which time she would release her frustration through emotional outbursts and aggressive behavior towards parent and the siblings. According to parent, the student's frustration with school, and resulting behavior, necessitating an increase in the student's medication to address the ADHD, Dysthymic Disorder; aggressive behavior; and she continued to require psychiatric therapy .

The evidence, including teacher reports, also reflect that the student had a positive attitude, "tried to do her best", continued to work hard to access the curriculum, and without one on one assistance was unable to access the curriculum, even with accommodations and modifications in the classroom and assignments. On June 9, 2008, the student's 3rd grade teacher documented concerns regarding the student's academic progress; indicating that although the student received lower grade assignments (1st grade), she continued to struggle academically, and remained below grade level.

Findings of Fact

1. During the 2007/08 and 2008/09 school years, DCPS failed to comply with the procedural and substantive requirements of the IDEA, and the DCMR, by failing to provide the student the special education instruction services, recommended in the student's December 17, 2007, and January 26, 2009 IEPs her IEPs; and an appropriate placement.

The *procedural* violations in this matter, are to such an extent, that the violations are serious and detrimentally impact upon the student's *substantive* right to a free and appropriate public education (FAPE) under the IDEA; resulting in substantive harm to the student, and denial of a FAPE.

2. The procedural violations 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.
3. The procedural violations impeded the child's right to a free and appropriate public education; and caused the student a deprivation of educational benefit.
4. The student's December 17, 2007 and January 26, 2009 IEPs are not reasonably calculated to enable the student to receive educational benefit. The IEPs are not designed to meet the student's unique needs, supported by such services, as are necessary to permit the child to benefit from the instruction.

The IEPs also recommend the student's placement at _____ a school incapable of providing the student the full-time special education program, she requires; or an appropriate placement.

5. _____ School is an inappropriate placement for the student. _____ is an appropriate placement for the student, providing an educational setting that fosters academic, emotional and character growth; which in turn promotes the personal and social development of the students we serve. This is accomplished through:

- A student teacher classroom ration of 6:1
- The creation of a safe and therapeutic environment that allows for learning to transpire without unnecessary distractions.
- The implementation of related services, (speech and language therapy, occupational therapy, physical therapy, psychological counseling, substance abuse counseling, adeptice physical education, 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.
- Behavioral management program, crisis intervention, therapeutic interventions and supports.

_____ 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; where she can have access to the general curriculum. The student can receive educational benefit at _____ and access the academic curriculum, in a highly structured environment, with her peers.

Conclusions of Law

It is the Hearing Officers' Decision that during the 2007/08 and 2008/09 school years, DCPS failed to comply with the *procedural and substantive* requirements of IDEA; resulting in substantive harm to the student, and denial of a FAPE, in violation of "The Individuals with Disabilities Education Act", reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004".

XI. ORDER

Based on the aforementioned, it is hereby:

- (1) **ORDERED**, that DCPS shall fund the student's placement and transportation to attend _____ school, effective July, 2009; and it is further

- (2) **ORDERED**, that DCPS shall conduct a review of the student's IEP, within thirty (30) school days from the beginning of the 2009/2010 school year; to update the student's January 26, 2009 IEP, reflecting a full-time special education program, consistent with recommendations in the March 29, 2009 Neuropsychological Evaluation; and it is further
- (3) **ORDERED**, that during the thirty (30) day review, the MDT shall discuss and determine compensatory education services for the two (2) years the student failed to receive special education instruction; and it is further
- (4) **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 of this decision.

Ramona M. Justice

7-26-09

Date Filed: _____

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Nia Fripp, Office of the Attorney General
Attorney Charles Moran: Fax: 703-261-6571