

**THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, REAUTHROZIED AS
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 _____ School; a fully integrated public school located in the District of Columbia. Prior to attending _____ the student attended _____ also located in the District of Columbia.

The student is a resident of the District of Columbia; and identified as disabled and eligible to receive special education 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 July 13, 2009, Petitioner's Attorney initiated a due process complaint alleging that the District of Columbia Public Schools, hereinafter referred to as "DCPS" or "Respondent", denied the student a Free Appropriate Public Education ("FAPE"), by failing to: (1) provide and implement an appropriate Individualized Education Program (IEP) for the student, during the 2008/09 school year; and (2) provide the student an appropriate placement, during the 2008/09 school year.

The due process hearing convened on August 24, 2009, 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

The following issues are before the court:

- (1) 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 year?
- (2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement, during the 2008/09 school year?

V. RELIEF REQUESTED

- (1) Immediate placement at a setting of the parent/guardian's choosing (Accotink Academy); and
- (2) Transportation services between all academic programs and Plaintiff's residence.

VI. PROCEDURAL POSTURE

On July 13, 2009, Petitioner's Attorney filed a due process complaint alleging that the District of Columbia Public Schools, hereinafter referred to as "DCPS" or "Respondent", denied the student a Free Appropriate Public Education ("FAPE"), by failing to: (1) provide and implement an appropriate Individualized Education Program (IEP) for the student, during the 2008/09 school year; and (2) provide the student an appropriate placement, during the 2008/09 school year. On July 17, 2009, the Hearing Officer issued a Pre-hearing Notice scheduling the pre-hearing conference for August 13, 2009, at 4:00 p.m..

On July 20, 2009, Respondent filed "DCPS Resolution Session Waiver"; and on July 24, 2009, Respondent filed "District of Columbia Public School's Response to Petitioner's Due Process Complaint". On July 29, 2009, the Hearing Officer issued a Pre-hearing Conference Order, confirming the due process hearing for August 24, 2009, at 9:00 a.m.; and requiring the parties to file written disclosures and motions by August 17, 2009, at 5:00 p.m.. The due process hearing convened on August 24, 2009, at 9:00 a.m., as scheduled.

VII. PRELIMINARY MATTERS

The parties presented; and the court addressed no preliminary matters, prior to proceeding with a hearing on the merits.

IX. DISCLOSURES

The Hearing Officer inquired of the parties whether all disclosures were submitted by the parties; and whether there were any objections to the disclosures. 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 13; and a witness list dated August 17, 2009.

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT

- Respondent's Exhibits 01 through Respondent's Exhibits 14; and a witness list dated August 17, 2009.

IX. STATEMENT OF CASE

1. The student is _____ years of age, and a _____ grade student at _____ a fully integrated public school located in the District of Columbia. 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 is identified as disabled and eligible to receive special education 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 September 8, 2008, Petitioner's Attorney initiated a due process complaint alleging that the District of Columbia Public Schools ("DCPS"), denied the student a free appropriate public education (FAPE); by failing to: (1) identify the student as a student with a disability; (2) develop and implement an IEP for the student; and (3) provide the student an appropriate placement during the 2008/09 school years.

4. The due process hearing convened on November 12, 2008. Prior to proceeding with a hearing on the merits, the parties entered into joint Stipulations of Fact and requested that the court render judgment based, in effect, on a hearing upon the stipulated facts. The parties stipulated to the following facts:

- (1) On October 29, 2008, the student was identified, located, and determined eligible to receive special education services, under the IDEA; and developed an IEP for the student.
- (2) On October 29, 2008, the MDT determined that _____ is an inappropriate placement for the student, and the student requires an alternate placement.

5. On November 17, 2008, the Hearing Officer issued a decision finding that DCPS denied the student a FAPE, by failing to identify, locate, and evaluate the student consistent with the "Child Find" provisions of the IDEA; develop and implement an appropriate IEP for the student; and provide the student an appropriate placement; during the 2005/06 through 2008/09 school years.

6. On January 17, 2009, Interdynamics, Inc. completed a Psycho-educational Evaluation, to assist in the identification of issues and concerns that influence the student's ability to perform effectively in the classroom and to assist with the student's educational planning. The evaluation included a series of tests and a classroom observation.

Results of cognitive testing revealed that the student is functioning in the Borderline range of cognitive functioning; his verbal reasoning abilities are in the borderline range; his nonverbal abilities are in the borderline range; and his working memory abilities are in the average range and his ability to process simple or routine visual information quickly and effectively are in the low average range. The student's overall achievement score on the WIAT-II is 70, placing the student's performance in the borderline range; the student's reading, written language, and oral language composite scores were all in the borderline range and his mathematics composite score was in the extremely low range.

The evaluator determined that the discrepancy shown between the student's cognitive and various academic abilities suggest the presence of a learning disability; indicating that the student would benefit from receiving additional assistance in helping him further develop all areas of academic functioning. The evaluator also indicated that testing revealed that the student may have some emotional difficulties that could make learning difficult.

The evaluator recommended special education services under the classification of learning disabled (LD); additional assistance in mastering his mathematic skills; tutoring in reading, writing, spelling, and reading comprehension; interventions for improving his written language skills, intervention for improving his spelling, reading, reading comprehension skills; a Clinical Psychological Evaluation to explore social and emotional issues influencing the student's effectiveness in the classroom. The evaluator concluded that based on the student's identified learning styles, he may benefit from the use of teaching/learning via several modalities.

7. On January 21, 2009, Interdynamics, Inc. completed a Speech and Language Evaluation. The student was referred for evaluation to assess his communication skills and determine current levels of performance and the impact, if any, on classroom performance.

The evaluator determined that the student exhibits difficulties with his ability to follow multi-step directions involving concepts, formulating grammatically correct sentences and identifying and expressing relationships between words. The evaluator determined that the student also exhibited a difficulty with expressive vocabulary in isolation; and in the classroom, may have difficulty with vocabulary, identifying relationships using vocabulary, analogies, formulating grammatically correct sentences verbally and in written expression.

The evaluator determined that the student presents with a moderate/severe communication deficit; indicating that such weaknesses may impact his ability to access the general education curriculum. The evaluator recommended that the student receive speech and language services 30 minutes a week; in individual sessions and/or small group, as well as service implementation in the classroom.

8. On January 21, 2009, Interdynamics completed a Clinical Psychological Evaluation to ascertain the degree to which the student's behavioral and/or emotional difficulties influence his school performance; and provide information that may be helpful in determining appropriate intervention strategies. The student was diagnosed with Dysthymic Disorder.

The evaluator recommended a Psychoeducational Evaluation to appropriately place the student in an academic setting; individual therapy; encouragement to participate in small group activities in the school; and community based programs to assist the student in broadening his peer-group interaction.

9. On January 22, 2009, Interdynamics, Inc. completed a Neuropsychological Evaluation to assess the student's current level of functioning; and determine whether there are any neuropsychological concerns impacting his learning. The student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Learning Disorder (Language based learning disorder and reading comprehension deficits); Mixed Expressive-Receptive Language Disorder.

The evaluator also identified several psychosocial stressors: poor language skills impacting academic performance, attention problems, and peer relational problems. The evaluator determined recent cognitive testing revealed that the student is functioning in the Borderline Range of Intelligence, based on his Full Scale IQ Score of 74; his verbal comprehension composite score was assessed in the Borderline Range; his perceptual reasoning composite score was assessed in the borderline range.

According to the evaluator, current neuropsychological testing indicates that the student is performing well below expectation in terms of his Attention/Executive Function, Sensor motor Function and Memory and Learning Function. Test results indicate significant difficulties with comprehension, memory for complex instructions, and attention; affecting various areas of functioning and rendering it difficult to work independently on tasks.

The evaluator determined that the student will require frequent monitoring and rephrasing of information in order for him to comply and do what is asked of him; and his poor comprehension suggest that he is likely to have difficulty in completing tasks at home and in school. The evaluator concluded that the student's pattern of scores on the NEPSY suggests that his deficits have a neurological basis; language disordered and would benefit from special education services to address this deficit.

The evaluator also concluded that the student would benefit from a placement in a language intensive special educational classroom setting; with a low student to teacher ration to maximize the student receiving one on one instructions, especially for subjects with significant verbal content, such as reading, language arts and foreign language. The evaluator also recommended speech/language therapy services, reading intervention to improve reading comprehension, and intervention s to address memory problems, counseling once a week, and a therapeutically structured environment to improve the student's overall functioning and confidence levels.

10. On January 23, 2009, DCPS completed a Speech and Language Therapy Services, Speech and Language Review. The evaluator determined that based on the results of the independent Comprehensive Speech and Language Evaluation, he was in agreement with the data which was representative of a mild to moderate speech and language delay when compared to his cognitive functioning.

The evaluator also determined that the weaknesses documented would surely impact the student's ability to make connections between words, follow multi-step directions, influence his ability to answer questions based on information heard, and listening comprehension for higher information processing.

The evaluator concluded that according to the DCPS guidelines for speech and language therapy, the student meets the guidelines for speech language impaired with greater than 1.5 standard deviation below the test mean, which is a standard score of (SS78) for a receptive and expressive delay. The evaluator recommended that weekly half-hour direct speech and language sessions be considered as a related service need by the IEP team; and classroom accommodations.

11. On February 5, 2009, Interdynamics, Inc. completed a Psychiatric Evaluation. The student was referred for evaluation to diagnose the emotional, behavioral or developmental delays of the student; and determine appropriate psychiatric therapeutic interventions to treat the problems.

The student was diagnosed with Dysthymic Disorder, and Attention Deficit Hyperactivity Disorder, Combined Type. The evaluator determined that the student requires a therapeutic school environment with supportive educational services in math, reading, and speech and language services. The evaluator recommended individual therapy to treat the student's chronic depression as it relates to his body image and academic struggles due to his poor performance and grade retention for two consecutive years. The evaluator also recommended family therapy.

12. On February 18, 2009, DCPS issued to parent a Letter of Invitation to attend a meeting on February 18, 2009 at 11:30 a.m., to review results of the student's initial evaluation and determine eligibility for special education and related services; develop initial or revise the existing IEP; and discuss placement.

On February 18, 2009, DCPS convened the MDT meeting to review the January 22, 2009, Neuro-psychological Evaluation. The DCPS Psychologist reviewed the evaluation with the team. The DCPS Psychologist indicated that the evaluation reconfirm the ADHD/LD diagnosis; while indicating that the school staff knows more about the student than the Licensed Clinical Psychologist who only spent enough time to observe and test the student.

The student's teacher advised the team that she observed various behaviors that could indicate that the student presents with diabetes; while noting that there is a history of exposure to drugs in utero. The teacher also reports that the student is a good "homework doer"; he has a system in place to complete tasks; and takes time to complete classroom assignments; and-

receives extra time for DC-BAS testing. The team also reviewed the Speech/Language Evaluation, indicating that speech and language goals and objectives would be added to the IEP.

Petitioner's Attorney recommended an increase in the student's specialized instruction services, based on the evaluation recommending a therapeutic setting. The team agreed to increase the student's hours of specialized instruction from 15.50 to 16.00 hours; to include 15 hours of specialized instruction, .5 hours of counseling, and .5 hours of speech and language services, weekly. The team developed an IEP for the student providing for 15 hours of specialized instruction per week within a general education setting; and 30 minutes per week of speech language services in an out of general education setting; and 30 minutes per week of counseling services, in an out of general education setting.

Petitioner's Attorney advised the team that the student was accepted at _____ and the team responded that the student would not benefit from a setting of all disabled students; and cannot justify increasing the student's special education services from 16 hours to 27.5 hours weekly. The MDT notes indicate that it is the grandfather's desire that the student and his twin brother attend the same school; and the MDT recommended that the student remain at _____ for the remainder of the school year.

The team recommended extended school year (ESY) services for the student, in EASY IEP; and agreed that the student would receive 16.0 total hours of specialized instruction and related services; eligible for ESY; would receive testing accommodations; and his placement would remain at _____. The MDT notes indicate that Petitioner's Attorney agrees with the team; and agreed that after consultation with Petitioner, the Attorney would advise the team regarding the areas of compensatory education deemed necessary.

The team issued a Prior Notice, documenting the student's initial placement in special education, in an inclusion setting, at _____ and the student would begin receiving counseling and speech language services. The team also developed a Student Evaluation Plan (SEP), pursuant to the November 17, 2008 IEP; indicating that the team and student's Attorney agreed that all evaluations are up to date.

13. On July 13, 2009, Petitioner's Attorney initiated a due process complaint alleging that the District of Columbia Public Schools hereinafter referred to as "DCPS" or "Respondent", denied the student a Free Appropriate Public Education ("FAPE"), by failing to: (1) provide and implement an appropriate Individualized Education Program (IEO); and (2) provide the student an appropriate placement.

14. The due process hearing convened on August 24, 2009, at 9:00 a.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

X. ISSUE 1

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 year?

Petitioner represents that on October 29, 2008 Respondent developed an IEP for the student providing for 15.5 hours of specialized instruction and related services; and on February 18, 2009 developed nearly the same IEP for the student, except to increase the student's related services by .5 hours. Petitioner further represents that Respondent continue in its failure to implement the student's IEP, by failing to provide the student the services recommended in his 2008/09 IEP, resulting in denial of a FAPE to the student.

Petitioner concludes by representing that parent agreed to allow the student to remain at Brightwood during the 2008/09 school year because Respondent committed to provide the student the 15 hours of specialized instruction and 1 hour of related services included in the 2008/09 IEP, and the necessary support. Petitioner argues that parent was misled in this regard, and subsequently learned that Respondent failed to provide student the services provided in his IEP, or necessary support.

Petitioner concludes that the student testified that he receives 1 hour of specialized instruction per day, totaling 6.5 hours of specialized instruction per week, although his IEP provides for 15 hours of specialized instruction per week. Petitioner argues that 6.5 hours of specialized instruction services per week is substantially less than the 15 hours of specialized instruction provided in the student's February 18, 2009, and October 29, 2008 IEP; representing a material violation under *Rowley*, and denial of a FAPE to the student. See, *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982).

Petitioner concludes by representing that in the prior hearing, the Special Education Coordinator testified that _____ could not provide the student 15 hours of specialized instruction, and that the student's classroom included approximately 25 students; and the student had difficulty changing classes throughout the day. Petitioner also concludes that the student was denied a FAPE because his 2008/09 IEP was not implemented; prior evaluations revealed that _____ is an inappropriate placement, and unable to implement the student's IEP; Respondent represents that the student is making academic progress, however, failed to present evidence of the student's progress, and the student testified that fail to receive the educational services provided in his IEP, and requires assistance in math.

Petitioner concludes that *Rowley* requires an appropriate educational program, uniquely designed to address the student's educational needs; and the student's performance, although not indicative, adds probative value to a finding of denial of a FAPE.

Respondent represents that the student's 2008/09 IEP is implemented, provides the student educational benefit; and his report card reflects academic improvement. Respondent represents further that evaluations are merely recommendations and are not mandates, requiring the school to adopt its findings and recommendations.

Respondent concludes that according to *Rowley*, a FAPE is provided if the student receives educational benefit; and the student in this instance received educational benefit. Respondent also concludes that the student's IEP does not provide for a full-time special education program; therefore, placement of the student in a full-time environment would be provide the student the least restrictive environment, and would not provide the student the opportunity to interact with non-disabled peers.

Discussion

As a preliminary matter, the Hearing Officer finds that this issue would generally be barred under the Doctrine of Res Judicata, because the September 8, 2008, due process complaint alleged that the District of Columbia Public Schools ("DCPS"), denied the student a free appropriate public education (FAPE); by failing to: (1) identify the student as a student with a disability; (2) *develop and implement an IEP*; and (3) provide the student an appropriate placement during the 2008/09 school years. However, the court finds that this issue is not barred under the Doctrine of Res Judicata, for reasons represented herein.

On November 17, 2008, the Hearing Officer issued a decision finding that DCPS denied the student a FAPE, by failing to identify, locate, and evaluate the student consistent with the "Child Find" provisions of the IDEA; develop and implement an IEP; and provide the student an appropriate placement during the 2005/06 through 2008/09 school years. At the time of the prior complaint, the issue related to the student's IEP pertained to DCPS' failure to *develop and implement an IEP*; and at the time of the complaint, DCPS had not developed an IEP for the student; and therefore was incapable of implementing an IEP.

In the instant complaint, the issue regarding the student's IEP pertains to DCPS' alleged failure to provide and implement an appropriate IEP, specifically, the February 18, 2009 IEP. For these reasons, the court finds that this issue is not barred under the Doctrine of Res Judicata.

In addressing the issue in this matter, the court refers to "The Individuals with Disabilities Education Improvement Act ("IDEIA") of 2004" which requires that all students be provided with a Free Appropriate Public Education ("FAPE"). 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; meet the standards of the SEA, include an appropriate school; and are provide in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

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.

According to IDEIA, 34 C.F.R. §300.15 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 in §300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and... *See, IDEA, 34 C.F.R. §300.306(a).*

Once a student is 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).*

Additionally, 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 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, IDEIA, §300.306 (c)(1)(i)(ii).*

Finally, IDEA, 34 C.F.R. §300.324 (a)(1) provides that 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.

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.

First, the record reflects that on February 18, 2009, DCPS convened a MDT meeting to review the January 22, 2009, Neuro-psychological Evaluation. The team reviewed the Neuro-psychological and Speech and Language evaluations. Petitioner's Attorney recommended an increase in the student's specialized instruction services, based on the Neuro-psychological evaluations' recommendation for a therapeutic setting.

The team agreed to increase the student's hours of specialized instruction and related services from 15.50 to 16.00 hours; to include 15 hours of specialized instruction, .5 hours of counseling, and .5 hours of speech and language services, weekly. The team developed an IEP for the student providing for 15 hours of specialized instruction per week within a general education setting; and 30 minutes per week of speech language services in an out of general education setting; and 30 minutes per week of counseling services, in an out of general education setting. The IEP team indicated that it could not justify increasing the student's special education services form 16 hours to 27.5 hours weekly; to provide for a full-time special education placement.

Second, since the 2005/2006 school year, DCPS has evaluated the student, and the evaluations have remained consistent in its findings and diagnoses. The evaluations have included diagnoses of one, several or a combination of the following: ADHD (Mixed Type), Oppositional Defiant Disorder (ODD), Learning Disorder, Reading Disorder, Adjustment Disorder (Unspecified); Dysthymic Disorder, Speech and Language Impairment (SLI); which continue to have an adverse impact on the student academically, developmentally, and functionally.

Additionally, the evaluations include findings and recommendations for a small structured environment; one on one instruction in all subject areas; modifications and accommodations; various teaching modalities; and/or other interventions and supports that can only be implemented, by placing the student in a full-time special education program, in a small structured therapeutic environment, with a group of his peers, with similar disabilities; where he can receive the one on one instruction, interventions, and supports that he requires, and educational benefit.

As indicated in the prior Hearing Officer Decision, the record is replete with evaluations, and information supporting a finding that the nature and extent of the student's disabilities are such that education of the student in a general education classroom, even with the use of supplementary aids and services cannot be achieved satisfactorily.

Third, at the August 24, 2009 due process hearing, the student testified that each day of school, he receives 1 hour of specialized instruction out of the general education environment, for a total of 5 hours per week, and the special education teacher assists with his assignments; and not the 15 hours per week of specialized instruction, as recommended in his IEP. The student also testified that he receives 1.5 hours a week of speech language services; and no counseling services. The student also testified that he receives no special assistance or accommodations in the classroom, when needed; and receives the same level of support in the classroom, as non-disabled students.

The student testified that although he receives assistance from the Special Education Teacher for 1 hour each day, including assistance with his math; he requires more assistance than he receives in math; and in the classroom. Parent testified that the student's teachers continue to inform him that the student is improving academically, however, the student is not capable of understanding or completing homework assignments; is very confused; and because of the student's inability to comprehend the class assignments, he hired a private tutor to assist the student in completing his homework. Parent also testified that throughout the 2008/09 school year he repeatedly received telephone calls from the school regarding the student's problematic behavior.

Fourth, the record reflects that the student is diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD), Reading Disorder, and Adjustment Disorder, however, the student's IEP continue to reflect a disability classification of specific learning disability, and fail to include the OHI classification, based on the student's ADHD. The student's IEP also fail to include the level of specialized instruction and related services, interventions or supports, necessary to meet the student's needs in these areas; or address the student's diagnosis of ODD, reading, and adjustment disorder.

Fifth, the student's 208/09 Report Card includes Teacher comment, such as: the student continues to make basic progress; the student has made basic progress. He must improve his social skills; the student is making satisfactory progress. He must concentrate on following school and class rules; the student is improving socially. He must dedicate himself to improvement of his study habits. He is performing at the basic level; the student continues to make "basic progress". He is always punctual with his assignments.

However, the student's 2008/09 Report Card, reflect that the student "approached the standard" in reading/English language arts, mathematics, science, social studies, art, music, health and physical education; however, in each of these subject areas was identified as either at the "beginning", or "developing" level of performance. The student failed to meet the standard, which would indicate that the student is proficient, in any of the subject areas identified on his report card, throughout the entire school year.

Finally, as indicated in the prior complaint, _____ deliberately disregards the findings and recommendations included in evaluations completed by qualified professionals, and fail to provide the student the level of services he requires, in an appropriate environment.

Furthermore, deliberately disregarded the Hearing Officer's findings, decision, and court order dated November 17, 2009; which ordered DCPS to, among others, develop an IEP for the student, which includes a full-time special education program; provide the student an appropriate placement in a therapeutic environment; issue a Prior Notice of Placement to parent, placing the student in a full-time special education program; and therapeutic environment; develop an IEP for the student that includes ESY services; develop an Intervention Behavioral Plan; and Compensatory Education Plan, for the student.

Findings of Fact

1. The February 18, 2009 IEP is not reasonably calculated to enable a child to receive educational benefits; because the special education and related services included in the IEP are not specifically designed to meet the student's unique educational needs, supported by level of services, as are necessary to permit the child to benefit from the instruction.

During the 2008/09 school year, DCPS failed to develop an IEP for the student, specifically designed to address the student's unique educational needs, based on his diagnosis of ADHD (Mixed Type), Oppositional Defiant Disorder (ODD), Learning Disorder, Reading Disorder, Adjustment Disorder (Unspecified), Dysthymic Disorder, and Speech and Language Impairment (SLI).

2. DCPS failed to ensure that as soon as possible following development of the student's February 18, 2009 IEP, the student's IEP was implemented by providing the student 15 hours of specialized instruction; and .5 hours of counseling services, per week; as recommended in the student's IEP.
3. The February 18, 2008 IEP provides that the student's placement shall remain at , although the SEC advised the court at the prior hearing that the school is incapable of implementing the student's IEP, by providing the student the 15 hours of specialized instruction services as recommended in his IEP; or an out of general education full-time special education program, in a therapeutic environment, as necessitated by the student's disabilities; because is a full-inclusion school.
4. The February 18, 2009 IEP fail to include the student's present levels of educational performance, needs, and impact on the student, in mathematics, reading, written expression, and emotional, social, and behavioral development, which the evaluations identify as specific areas of weakness for the student.
5. The student's February 18, 2009 IEP fail to include a sufficient level of services the student requires to meet his unique specific education and related service needs; or provide placement in a full-time special education program, in a therapeutic environment.

6. The student's February 18, 2009 IEP includes accommodations primarily focused on testing; and includes no other accommodations, modifications, interventions, or supports for the student, specifically designed to address the student's educational need, or identified areas of weakness.
7. In interpreting the evaluation data for the purpose of determining whether the student has a disability under IDEIA, §300.98, including the data in all evaluations completed for the student, the MDT failed to draw upon information from a variety of sources, including the student's academic and behavioral history, aptitude and achievement tests, parent, teachers, and advocate input, as well as information about the child's physical condition, social and cultural background, and adaptive behavior.
8. DCPS failed to carefully consider the information obtained from the various sources, in accordance with IDEIA, §300.306 (c)(1)(i)(ii); and ensure that the information obtained from all of these sources was documented and carefully considered.
9. In developing the student's IEP, the IEP team failed to consider:
 - 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).
10. DCPS failed to comply with the substantive requirements of the IDEA, 34 C.F.R. Sections 300.320 through 300.324, in developing, reviewing, and revising the student's 2008/09 IEP.

Conclusion of Law

It is the Hearing Officer's Decision that Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to provide and implement an appropriate IEP for the student during the 2008/09 school year; representing a substantive violation of 34 C.F.R. §300.323 (c)(2) and §300.324 (a)(1) and (2) of "The Individuals with Disabilities Education Act, reauthorized as the Individuals with Disabilities Education Improvement Act of 2004".

Free Appropriate Public Education (FAPE)

When parents challenge the appropriateness of a program or placement offered to their disabled child by a school district under the IDEA, a reviewing court must undertake a twofold inquiry: (1) procedural compliance (Procedural FAPE); and (2) conferral of some educational benefit (Substantive FAPE).

The FAPE requirement is satisfied when the State provides personalized instruction that is reasonably calculated to permit the child to benefit educationally. *See, Hendrick Hudson Board of Education v. Rowley, 458 U.S. 176, 203-204 (1982)*

Procedural FAPE (Procedural compliance)

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

Substantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process. Procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute a denial of a FAPE under the IDEA. *See, Babb v. Knox County Sch. Sys.*, 965 F.2d 104, 109 (6th Cir. 1992); *W.G.*, 960 F.2d at 1484.

In this matter, Petitioner alleges that DCPS' failure to develop and implement an appropriate IEP for the student during the 2008/09 school year; represents a substantive violation of the IDEA.

Substantive FAPE (Conferral of Educational Benefit)

The *second* prong of *Rowley*, requires that the court determine whether the individualized education program ("IEP"), offered by the LEA, is reasonably calculated to enable the child to receive educational benefit. The benefit cannot be trivial, *Rowley*, 458 U.S. 176, at 177 206-207. For the benefit to be sufficiently meaningful, the IDEA was enacted to assure that all children with disabilities have available to them a (FAPE), which emphasizes special education and related- services designed to meet their unique needs, supported by such services, as are necessary to permit the child to benefit from the instruction.

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

Findings

1. Since the 2005/06 school year, DCPS failed to develop and implement an appropriate IEP, for the student.
2. The student's 2008/09 Report Card reflects academic regression, and no progression; and although argued, Respondent failed to present evidence that the student progressed academically, during the 2008/09 school year.

3. DCPS failed to comply with the statutory elements of the student's IEP, and the goals and objectives in the IEP are not reasonable, realistic or attainable; provided the current level of services in the student's IEP, and maintaining the student's placement at
4. The special education and related services in the student's IEP are not reasonably calculated to enable the child to receive educational benefit, and is likely to continue to produce regression, and not progression; academically and behaviorally.
5. Failure to provide the student an appropriate IEP and placement, denies the student access to the general curriculum; and the opportunity to receive educational benefit.

Conclusion

The Hearing Officer concludes that DCPS' failure to develop and implement an appropriate IEP for the student, during the 2008/09 school year, represents a substantive violation of the IDEA, affecting the student's substantive right to a free appropriate public education (FAPE).

It is the Hearing Officer's decision that DCPS' failure to develop and implement an appropriate IEP for the student, during the 2008/09 school year; represents denial of a FAPE to the student; and a continuing 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 the student an appropriate placement, during the 2008/09 school year?

Petitioner represents that each evaluation completed since the year 2005 recommends a small structured therapeutic environment for the student, which Respondent has failed to provide. Petitioner represents that the MDT dismissed the findings and recommendations included in the various evaluations, representing that the student's teachers who are more familiar with the student are more apt to determine the student's needs.

Petitioner represents that during the prior hearing the SEC testified that the school was unable to provide the student 15 hours of specialized instruction per week, each class has approximately 25 students; and students are required to change classes regularly, which was a challenge for the student.

Petitioner represents that _____ is an appropriate placement for the student, and the student can receive educational benefit. Petitioner also represented that the Principal at _____ advised the MDT that the student is progressing, however, she has never taught the student; and presented no evidence to support that the student is making progress.

Petitioner concluded that if the student was progressing academically, academic progression is not the standard for determining whether a student received a FAPE.

Respondent represents that the student's IEP does not provide for a full-time special education program, therefore, a full-time placement would not provide the least restrictive environment for the student; and the student would have no interaction with his peers. Respondent concluded that evaluations are not mandates; and the student does not require a full-time placement, because the student is making progress.

Discussion

As a preliminary matter, the Hearing Officer addresses an issue regarding the court's jurisdiction and authority to decide this issue. On September 8, 2008, Petitioner filed a due process complaint alleging that the District of Columbia Public Schools ("DCPS"), denied the student a free appropriate public education (FAPE); by failing to: (1) identify the student as a student with a disability; (2) develop and implement an IEP; and (3) *provide the student an appropriate placement during the 2008/09 school years*. The court finds that this issue is barred under the Doctrine of Res Judicata, for reasons represented herein.

On November 17, 2008, the Hearing Officer issued a decision finding that DCPS denied the student a FAPE, by failing to identify, locate, and evaluate the student consistent with the "Child Find" provisions of the IDEA; develop and implement an IEP; and provide the student an appropriate placement during the 2005/06 through 2008/09 school years.

In the instant complaint, Petitioner alleged, in part, that DCPS denied the student a FAPE, requests the court to determine whether DCPS denied the student a FAPE, by failing to provide the student an appropriate placement during the 2008/09 school years; which is identical to the issue in the September 8, 2008 due process complaint, and decided in the November 17, 2008 HOD.

At the August 24, 2009 due process hearing the Hearing Officer inquired of Petitioner's Attorney whether there were any prior decisions, settlement agreements, or decisions issued in this matter, that may raise res judicata issues for the court to decide; and Petitioner's Attorney advised the court of the November 17, 2008 HOD; and responded in a manner that the court understood that the issues in the instant complaint were not the issues in the prior complaint; presented no res judicata issues for the court to decide; or were barred under the Doctrine of Res Judicata.

However, after reviewing the evidence, it is clear the issue in this matter regarding the appropriateness of the student's placement at _____, is identical to the issue in the September 8, 2008 due process complaint; and decided by the court in an HOD dated November 17, 2008.

The record reflect that on November 17, 2008, the court issued a decision finding that _____ is not an appropriate placement for the student; the student required placement in a full-time special education program, and therapeutic environment; and ordered DCPS to undertake certain actions to ensure that the student received an appropriate placement.

It is the Hearing Officer's decision that the court lacks jurisdiction and authority to decide the issue anew; and the issue is barred under the Doctrine of Res Judicata.

XI. ORDER

Based on the aforementioned, it is hereby:

1. **ORDERED**, that Issue 2 of the complaint is dismissed, "with" prejudice; and I is further
2. **ORDERED**, that pursuant to paragraph 4, of the November 17, 2008 HOD, no later than 5:00 p.m. on September 4, 2009, DCPS shall issue parent/guardian a Prior Notice of Placement, funding the student's placement in a full-time therapeutic program, and transportation; for the student to attend and it is further
3. **ORDERED**, that should DCPS fail to comply with paragraph 1 of this decision and order, parent/guardian shall enroll the student at and shall be entitled to tuition reimbursement and related expenses, provided parent'/guardian presents adequate verification of the same; and it is further
4. **ORDERED**, that within thirty (30) days of the student's placement at DCPS shall convene an MDT/IEP team meeting with staff to develop an appropriate IEP for the student providing for a full-time special education program, in a therapeutic environment; ESY services for the student, if available at Revision of the student's IEP to include the appropriate disability classifications, goals and objectives, to include OHI, to address the student's ADHD, and ODD, to address the student's social/emotional difficulties, and the Specific Learning Disability in Reading; a Reading program and/or services, to address the student's reading disability; counseling services to address the student's social/emotional deficits, and adjustment disorder; a behavioral intervention and/or modification program to address the student's problematic behavior; speech and language services to address deficits in this area; and it is further
5. **ORDERED**, that the MDT/IEP referenced herein, carefully review and consider findings in the student evaluations; adopt and incorporate in the IEP, recommendations included in the student evaluations; and it is further
6. **ORDERED**, that within sixty (60) days from the date of the student's enrollment at DCPS shall convene a meeting with staff, to develop a compensatory education plan for the student to compensate the student for the services the student failed to receive during the 2005/06 through 2008/09 school year, to include, at least, after school tutoring and extended school year services; and it is further

7. **ORDERED**, that the MDT/IEP team shall consist of qualified professionals, including individuals qualified to assist in development of an appropriate IEP, and compensatory education plan, consistent with IDEA, 38 C.F.R. §300.321; and it is further
8. **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
9. **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
10. **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
11. **ORDERED**, that this decision and order are effective immediately

XII. APPEAL RIGHTS

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

Ramona M. Justice

8-26-09

 Attorney Ramona M. Justice
 Hearing Officer

Date Filed: _____

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