

**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 resident of the District of Columbia. During the 2008/09 school year, the student attended _____ a private public charter school, located in the District of Columbia. During the 2007/08 school year, the student attended _____, a District of Columbia public charter school.

On May 28, 2009, _____ discontinued operations as a public charter school; no longer offering educational services to District of Columbia and/or other students. _____ is no longer able to meet the educational needs of District of Columbia students, therefore, the primary responsibility for providing a free appropriate public education to the District of Columbia students, who attended the school, is assumed by the Office of the State Superintendent of Education, as the State Education Agency (SEA).

The student 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 Other Health Impaired, under the disability category of Attention Deficit Hyperactivity Disorder (ADHD).

On April 22, 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 the student an appropriate Individualized Education Program (IEP); (2) provide the student an appropriate placement; and (3) that failure to provide the student an appropriate IEP and placement, entitles the student to compensatory education services.

The due process hearing initially convened on June 23, 2009, at 9:00 a.m.; and reconvened on August 14, 2009, at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

II. JURISDICTION

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

III. DUE PROCESS RIGHTS

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

IV. ISSUES

The following issues are before the court for hearing:

- (1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate Individualized Education Program (IEP)?
- (2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement?
- (3) Whether DCPS' failure to provide the student an appropriate IEP and placement denies the student a FAPE, entitling the student to compensatory education services?

V. RELIEF REQUESTED

- (1) A finding that DCPS failed to provide the student an appropriate IEP.
- (2) A finding that DCPS failed to provide the student an appropriate placement.
- (3) DCPS shall place and fund the student at the parent's placement of her choosing, and provide the student transportation services.
- (4) DCPS shall fund the parent's independent functional behavioral assessment.
- (5) DCPS within ten (10) school or business days, whichever occurs first, upon receipt of the functional behavioral assessment, shall reconvene the student's MDT meeting, at his new placement, develop an IEP which provides for the student to receive on a weekly basis, at a minimum, 27.5 hours of specialized instruction, 1 hour of individual psychological services, and a behavior intervention program.
- (6) DCPS shall fund the parent's compensatory education program.
- (7) All meetings shall be scheduled through counsel for the parent, Domiento C.R. Hill, Esquire, in writing, via facsimile, at 202 742-2097 or 202-742-2098.
- (8) A finding that parent is the prevailing party in this action thereby entitling the parent to the reasonable reimbursement of her attorneys' fees and related costs.

VI. PROCEDURAL POSTURE

On April 22, 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 the student an appropriate Individualized Education Program (IEP); (2) provide the student an appropriate placement; and (3) that failure to provide the student an appropriate IEP and placement, entitles the student to compensatory education services.

On April 27, 2009, the Student Hearing Office issued a Due Process Hearing Notice, establishing tentative dates for the pre-hearing conference and due process hearing. On April 28, 2009, the Student Hearing Office issued two (2) Revised Due Process Hearing Notices.

On May 1, 2009, Respondent filed "District of Columbia Public Schools' Notice of Insufficiency and Response to Petitioner's Due Process Complaint". On May 4, 2009, the Hearing Officer issued a Pre-hearing Notice scheduling the pre-hearing conference for June 3, 2009, at 4:00 p.m.. On May 6, 2009, Petitioner filed "Petitioner's Opposition to the Respondent's Notice of Insufficiency; and Memorandum of Points and Authorities in Support of Petitioner's Opposition to the Respondent's Notice of Insufficiency".

On May 11, 2009, the Hearing Officer issued a decision in response to Respondent's Notice of Insufficiency; and on May 13, 2009 issued a revised decision in response to Respondent's Notice of Insufficiency. The pre-hearing conference was held on June 3, 2009, at 4:00 p.m., and a Pre-hearing Conference Order issued confirming June 23, 2009 at 11:00 a.m., for the due process hearing.

On June 2, 2009, Respondent filed "District of Columbia Public Schools' Motion For Joinder", requesting to join _____ as a party to the Parent's administrative due process complaint. On June 4, 2009, Petitioner filed "Petitioner's Opposition to the District of Columbia Public Schools' Motion to Join _____ as a party to these proceedings. On June 5, 2009, Respondent filed "District of Columbia Public School's Reply to Petitioner's Opposition to DCPS' Motion for Joinder".

On June 10, 2009, the Hearing Officer issued an order requiring the parties to serve notice and provide the court proof of service of the Motion for Joinder and related pleadings upon _____ and providing _____ the opportunity to respond to said motion and opposition. On June 10, 2009, Respondent filed a "Certificate of Service", verifying service of the Motion for Joinder and pleadings upon _____. On June 11, 2009, Petitioner refiled its opposition to the motion for joinder, accompanied by a Certificate of Service, verifying service of all pleadings upon _____.

On June 17, 2009, Petitioner filed written disclosures and a witness list; and on June 18, 2009, Respondent filed written disclosures and a witness list. The due process convened on June 23, 2009 at 11:00 a.m., at which the court requested that the parties present their respective positions in response to Respondent's Motion for Joinder of _____, as a party in the complaint. After hearing argument from the parties, the it was determined that _____ closed is operations on May 28, 2009; and as a result, could not be joined as a party in the complaint, and DCPS, on behalf of the Office of the State Superintendent of Education, was a proper party to the proceedings. The court also determined that there remained an insufficient amount of time to proceed with a hearing on the merits, the hearing required an additional five (5) hours; and continued the hearing.

On July 23, 2009, the Hearing Officer issued to the parties an Interim Order of Continuance, continuing the due process hearing from June 23, 2009, to July 27, 2009, at 10:00 a.m.. On July 23, 2009, Respondent filed a "Letter Motion of Continuance", due to her unavailability for the hearing scheduled on July 27, 2009, requesting that the hearing reconvene on August 14, 2009, at 9:00 a.m.. Absent opposition from Petitioner, and the Respondent having shown "good cause", for granting the continuance, on July 24, 2009, the Hearing Officer issued an Interim Order of Continuance, continuing the hearing to August 14, 2009, at 9:00 a.m.. The due process hearing reconvened on August 14, 2009, at 9:00 a.m., as scheduled.

VII. PRELIMINARY MATTERS

At the June 23, 2009 due process hearing, the court requested that the parties present their respective positions in response to Respondent's Motion for Joinder of _____ as a party in the complaint. After hearing argument from the parties, the court determined that since _____ is no longer in operation, closing its school on May 28, 2009; it could not be joined as a party to the complaint.

The court also determined that since _____ was no longer in the business of providing educational services for District of Columbia students, who are also residents of the District of Columbia, that the primary responsibility for educating the students of the District of Columbia, who attended the school, returned to the District of Columbia, upon closure of the _____. Based on the above, the court denied DCPS' motion to join _____ as a party to the complaint.

Thereafter, Respondent argued that it is not a proper party to the complaint, and that the Office of the State Superintendent of Education (OSSE) is the proper party. The court heard arguments from the parties on this matter; and determined that first, DCPS' argument that it is not a proper party to this proceeding is untimely; and second, the argument is without merit. The court determined that DCPS, is the representative party, serving on behalf of the Office of the State Superintendent of Education; and was a proper party to these proceedings. The court proceeded with a hearing on the merits.

The court ultimately determined that the two (2) hours initially allotted for the hearing were insufficient; and an additional five (5) hours was required to provide the parties sufficient time to introduce its witnesses and present its case. The due process hearing reconvened on August 14, 2009, at 9:00 a.m.. There were no preliminary matters introduced by the parties, or addressed by the court. The court proceeded with a continuation of the June 23, 2009 due process hearing

IX. DISCLOSURES

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

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF PETITIONER

- Petitioner's Exhibits 01 through Petitioner's Exhibits 72; and a witness list dated June 16, 2009.

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT

- Respondent's Exhibits 01 through Respondent's Exhibits 8; and a witness list dated June 16, 2009.

IX. STATEMENT OF CASE

1. The student is _____ years of age, and a resident of the District of Columbia. During the 2008/09 school year, the student attended _____ a private public charter school, located in the District of Columbia. During the 2007/08 school year, the student attended _____ a District of Columbia public charter school.

2. The student 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 Other Health Impaired, under the disability category of Attention Deficit Hyperactivity Disorder (ADHD).

3. A Functional Behavioral Assessment and Intervention Behavior Plan were developed for the student on March 20, 2008.

4. On May 5, 2008, Diagnostic Consultants-DiCon, LLC completed a Social Work Evaluation Report. The evaluator recommended a Functional Behavioral Assessment, and Intervention Behavioral Plan to focus on specific behaviors in order to create a more suitable learning environment.

5. On May 6, 2008, Diagnostic Consultants-DiCon, LLC completed an Educational Evaluation Report. The evaluator determined that the student's oral language skills are average when compared to others at his age level; his overall level of achievement is average; his fluency with academic tasks is low average; and his academic skills and ability to apply those skills are both within the average range.

When compared the others at his age level, the evaluator reports that the student's performance is average in broad reading, mathematics, math calculation skills, written language, and written expression. No discrepancies were found among the student's achievement areas.

6. On May 10, 2008, Diagnostic Consultants-DiCon, LLC completed a Confidential Cognitive/Clinical Evaluation to assess the student's cognitive, social, and emotional functioning to assist with educational planning. The student was diagnosed with Academic Problem, and a "rule out" was recommended for Attention Deficit Hyperactivity Disorder (ADHD), Predominantly Inattentive Type.

The student's cognitive ability as estimated by the WISC-IV, is in the average range (FSIQ=93); verbal comprehension and perceptual reasoning abilities were also both in the average range, suggesting that his ability to think with words is comparable to his ability to reason without the use of words. On his verbal reasoning domain, the student achieved his best performance on comprehension subtest; the student's general working memory abilities are in the average range, and general processing speed abilities are in the borderline range.

The student's sub-average processing speed abilities constitute the areas of most pronounced weakness and suggest that he will experience difficulty with being able to mentally process simple or routine information without making errors. The evaluator concluded that despite the student's cognitive strengths, he struggles with underlying feelings of insecurity and inadequacy; has a strong desire to be seen by others as composed, charming, and appealing; and fail to respond well to rejection and criticism.

The evaluator recommends a nurturing, supportive, non-punitive classroom setting; require additional time to complete routine tasks; opportunities to participate in structured recreational activities of his interest to promote his self efficacy/self esteem, increase level of social activity, as well as decrease his boredom.

7. On May 12, 2008, an Addendum to the Psychological Evaluation was completed to clarify diagnostic, educational and treatment needs of the student; and recommendations; in light of information not available at time of the initial evaluation. The evaluator determined that according to the Cumulative Student Conduct Log for the student, it was replete with citations for disruptive behaviors, consistent with a diagnosis of ADHD; and numerous suspensions. The evaluator reasoned that the student's behavioral difficulties may be reflective of underlying affective disturbance, as such behaviors are commonly seen in children and adolescents with emotional difficulties.

The evaluator concluded that the student meets the criteria for a definitive diagnosis of ADHD, predominantly the inattentive type. The evaluator also determined that the student meets the criteria for special education services and thus is in need of increased academic and social support. The evaluator also concluded that in light of the seriousness of the student's problematic behavior, particularly as they significantly impact his academic functioning, the student is clearly in need of a more structured educational program that incorporates interventions for behavioral and emotional issues.

The evaluator determined that the student would function best in a small student to teacher ratio classroom setting; as opposed to his current class of 20 students at

The evaluator opined that apparently the student's placement at _____ was unsuccessful; and the student is unhappy with this placement as he is embarrassed by the fact that he is repeating the 6th grade, placing him two grades behind his peers.

The evaluator indicated that the student's placement at _____ doesn't appear to be appropriate for the student; and the student would benefit from an academic program where he is surrounded by peers of his academic level and interest, where his behavior can be closely monitored, and a behavior modification plan consistently implemented.

The evaluator also strongly recommended that the student participate in individual supportive counseling 1 hour weekly to address his feelings of insecurity, low self-esteem, and explore possible underlying emotional difficulties, and opportunities to participate in structured recreational activities of his interests, both at school and in the community, to promote his self-esteem, increase his level of social activity, as well as decrease his boredom.

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

On November 10, 2008, Counsel, on behalf of student, initiated a due process complaint alleging that the District of Columbia Public Schools, hereinafter referred to as DCPS, denied the student a Free Appropriate Public Education ("FAPE"), by failing to: (1) complete the Psychiatric Evaluation, in violation of 34 C.F.R. §300.304(c)(4) and 30 DCMR §3005.9(g); (2) reconvene the student's MDT meeting to review the findings and recommendations of the Psychiatric Evaluation; and (3) whether the student is entitled to compensatory education services. The due process hearing convened on December 11, 2008, at 9:00 a.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

The initial HOD was issued on August 11, 2008, and pursuant to a Request for Reconsideration filed by Petitioner, on December 29, 2008 the Hearing Officer issued a Revised Hearing Officer Decision, concluding that the procedural violations in question impedes the child's right to a free and appropriate public education; significantly impedes the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; and causes a deprivation of educational benefit to the student; resulting in denial of a FAPE; and entitling the student to compensatory education services.

The Hearing Officer granted, in part, the following relief:

- (1) That DCPS shall fund an independent Clinical Psychiatric Evaluation;

- (2) That DCPS shall within ten (10) school days of receipt of the independent Clinical Evaluation, reconvene the student's MDT/IEP meeting to review the findings of all evaluations, develop an appropriate IEP for the student, and issue a Prior Notice of Placement to an appropriate special education program, as appropriate; and
- (3) That at the MDT/IEP Team meeting, DCPS shall discuss and determine the appropriate amount of compensatory education services the student is entitled, and develop a Compensatory Education Plan.

9. On February 11, 2009, DiCon, LLC completed a Confidential Psychiatric Evaluation of the student, to "rule out" ADHD. The evaluator concurred with the diagnosis of ADHD, given the combination of the student's history, testing results, and clinical presentation on interview. The evaluator indicated that behavioral issues such as disruptiveness, impulsivity, and disregard for rules, are often associated with ADHD. Executive problems such as self-direction and organization are also part of the syndrome. The evaluator indicated that a medication trial is warranted; and that the student would be best served by small classrooms, high teacher/student ratio, a structured classroom environment and incentives to stay on task and complete his work.

The evaluator also recommended accommodations such as sitting near the teacher's desk, one on one assistance, extra time to complete tasks; and psycho educational support and/or psychological therapy to develop and reinforce organization skills, self-control, impulse management, avoidance of distractions and otherwise coping with ADHD would also be beneficial.

10. On March 15, 2009, Petitioner's Attorney forwarded a copy of the completed Psychiatric Evaluation to the Placement Specialist/Monitor for _____; and on April 2, 2009 and April 10, 2009, forwarded letters to the Office of Special Education-Legal Unit regarding noncompliance with a prior HOD requiring that DCPS reconvene the student's MDT meeting to review the Psychiatric Evaluation, determine the student's eligibility, placement, and compensatory education.

11. On April 17, 2009, DCPS convened an IEP team meeting. The meeting was attended by parent, the student's Education Advocate, DCPS Case Manager, Special Education Coordinator, Principal, the student's Special Education Teacher; and Clinical Psychologist, who participated via conference call. The evaluations were reviewed with the team by the Clinical Psychologist. The team discussed the student's behavior, failure to attend class, the school's attendance policy; and the student's failure to attend class; academic performance, and counseling services the student received.

The Clinical Psychologist questioned an outside mentor or after school activities which could influence the student's self esteem; and the inquired regarding the student's medication. The Clinical Psychologist also indicated that possibly the student could be placed in a "buy-in" program to increase his attendance.

The Education Advocate inquired regarding the potential that the student be retained a third time; and the need for a full-time special education placement. The Clinical Psychologist responded by addressing the student's cognitive ability; and the advocate advised the team that the student could benefit from a smaller program where all areas would be addressed.

The Clinical Psychologist opined that changing the student's placement would not curtail the student's attendance issues; and discussed a 504 plan for the student, as well as counseling needs. The SEC advised the team that a 504 plan could be developed immediately, and the DCPS Case Manager indicated that because the student does not have a special education diagnosis, a 504 plan would be appropriate. The Education Advocate requested something more than a 504 plan for the student.

The SEC continued to question whether a special education class would harm the student any further, perhaps giving him an OHI disability and attendance was not an issue. The Clinical Psychologist reiterated and the team agreed that the student meets the qualifications for Other Health Impaired; and also recommended counseling services for the student. The team agreed that goals and objectives in the IEP would focus on counseling (motivation, organization, self-esteem); and the SEC stated that the team would reconvene for an IEP meeting; and the Clinical Psychologist agreed to develop the IEP goals.

The advocate and parent requested a full-time special education program for the student. The Principal indicated that the school would continue to implement counseling services until the IEP team reconvened. The DCPS Case Manager indicated that the student's placement at is appropriate, except for the student's attendance issues.

12. On April 17, 2009, the Education Advocate developed written notes from the MDT meeting held on this date. The advocate indicates in his notes that the gravity of the student's current school status is reflected in his failing grades, and risk of a third grade retention; and an inordinate number of absences and carries partially establishing the adverse effects of the student's disability. The advocate also indicated that the student incurred several suspensions for disciplinary reasons which are reflective of the compound effects of ADHD and underlying emotional issues.

The advocate also indicated that he and the parent expressed their belief that the IEP, once developed should reflect the student's need for a full-time, separate special education school setting for students with OHI (ADHD); and 27.5 hours of total special education services.

13. On April 17, 2009, DCPS issued a Letter of Invitation to the parent proposing to reconvene the student's IEP team on May 11, 2009, May 12, 2009, or May 13, 2009, at 2:00 p.m., to develop/review the student's IEP, discuss placement, and discuss compensatory education.

14. On April 22, 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 the student an appropriate Individualized Education Program (IEP); (2) provide the student an appropriate placement; and (3) that failure to provide the student an appropriate IEP and placement, entitles the student to compensatory education services.

15. On April 24, 2009, Petitioner's Education Advocate forwarded a letter to the Principal at _____ indicating that the student continued to evidence tremendous difficulty as it relates to school attendance; and stressing the importance of development of an IEP as soon as possible, to ensure that the student receive some level of support. The letter also included a request for completed IEP goals and objectives; and information regarding the amount of time the student is recommended for specialized instruction and related services.

16. On April 27, 2009, _____ issued a Letter of Invitation to the parent's Education Advocate proposing to reconvene the student's IEP team on May 11, 2009, May 12, 2009, or May 13, 2009, at 2:00 p.m., to develop/review the student's IEP, discuss placement, and discuss compensatory education.

17. On April 28, 2009, Petitioner's Attorney forwarded a letter to the SEC at _____ accepting the offered date and time of May 11, 2009 at 2:00 p.m., to convene the student's IEP team meeting.

18. On April 30, 2009, _____ completed an IEP Addendum indicating that the student's IEP is appropriate and reasonable for the student; all or most IEP goals are not being achieved; the severity of the student's disability requires individualized programming in areas of self sufficiency and independence from caretakers; the student's record does not show serious regression following interruptions in the school program; the student's record does not show inability to recoup skills a reasonable time following regression; student has no critical need for continuity in programming to facilitate achieving educational benefit from his education program; transportation services are not needed; and extended school year (ESY) services, are not recommended.

19. On April 30, 2009, _____ issued a Letter of Invitation to the parent proposing to reconvene the student's IEP team on May 11, 2009, May 11, 2009, at 2:00 p.m., to develop/review the student's IEP, and discuss placement.

20. On May 11, 2009, DCPS issued a Letter of Invitation to the parent proposing to reconvene the student's IEP team on April 28, 2009 at 1:00 p.m., to develop/review the student's IEP, review evaluation or reevaluation information; which Petitioner's Attorney responded.

21. On May 13, 2009, DCPS issued a Letter of Invitation to the parent proposing to reconvene the student's IEP team on May 28, 2009, at 1:00 p.m., to develop/review the student's IEP.

22. On May 18, 2009, the student was accepted at _____ of Montgomery County; indicating that acceptance is conditioned on a full-time IEP, and prior to enrollment, IEP and immunizations must be submitted.

23. On May 28, 2009, the IEP team reconvened to develop an IEP for the student to include counseling services. The IEP team developed an IEP for the student, providing for 45 minutes of individual counseling, and 1 hour of group counseling, per week. The student's disability classification is Other Health Impaired, under the category of ADHD. The advocate stated that it would be helpful for the objectives to be more specific indications of coping skills and modalities to assist his next school in understanding the student's deficiencies; and the DCPS Compliance Manager responded that the specifics of the objectives would be determined by the service providers.

The DCPS Compliance Manager indicated that the student leaving the building would be addressed within a Functional Behavioral Plan. The advocate requested amending the IEP goals prior to the student attending a new school; and the SEC responded that once placed in the new school the goals must be reviewed with service providers an amended/expanded by the Clinical Psychologist. The team recommended 45 minutes of individual and 1 hour of group counseling services, per week. The team discussed placement, and DCPS indicated that it is to fund a less restricted area; and at that time 1 hour 45 minutes a week would not substantiate enough support. The SEC recommended implementing a plan for the student, prior to determining outside placement.

The team agreed that DCPS would issue a Prior Notice of Placement to the student's _____ and _____, and the advocate's office. The team agreed to disagree regarding the student's IEP. The team discussed compensatory education services, with DCPS proposing 2 hours per week of counseling for 6 months, by parent's choice and will not exceed the Chancellor's guidelines. The advocate recommended activities to improve the student's self-esteem, and counseling services, for a total of 225 hours.

_____ was a program (4-8 hours per week), that the advocate had reviewed (small group instruction, Monday-Sunday/year round). The DCPS Compliance Manager counter offered with 6 hours a week for 6 months to be provided by a provider of parent's choice and funded by DCPS. The team discussed the student's possible retention and was advised that the student's grades would be determined based on the work he previously turned in and completed; and his work demonstrates that he is functioning on grade level. The team also authorized transportation services for the student, to include bus tokens. Parent and advocate disagreed with the IEP and refused to sign the IEP.

24. On May 28, 2009, the Education Advocate developed meeting notes indicating that the IEP goals and objectives should reflect greater specificity; the objectives are quite vague in their reference to the student's need to begin "practicing new coping skills" as well as his need to "apply his new coping skills to improve motivation".

The notes also indicate that parent and the advocate expressed concern that the student's IEP reflects no academic goals and objectives, although the student was twice retained; and is at risk for a third retention. The advocate expressed concern that a month had elapsed since the student was determined eligible to receive special education services, on April 17, 2009; and IDEA's requirement that the IEP be implemented the following day; which failed to occur in this matter.

The advocate's notes indicate that parent and the advocate disagree with proposition that the goals and objectives reflected in the student's IEP can and should be implemented in a neighborhood school or another charter school. The advocate indicated that the student's four year history of retentions, suspensions, truancy, distractibility, and oppositional behavior are a clarion trumpet call for transition to a full-time special education school setting for OHI and LD students; which disagrees.

25. On May 28, 2009, discontinued operations as a public charter school; no longer offering educational services to District of Columbia and/or other students. is no longer able to meet the educational needs of District of Columbia students, therefore, the primary responsibility for providing a free appropriate public education to the District of Columbia students, who attended the school, is assumed by the Office of the State Superintendent of Education, as the State Education Agency (SEA).

26. On May 29, 2009, DCPS issued a Prior to Action Notice indicating that on May 28, 2009, the MDT decided to change the student's placement from to which the parent disagreed.

27. The student's 2008/09 Report Card from reflects that during the 1st Advisory the student received a grade of "C" in language arts, social studies, science; a "B" in physical education; "D" in math, with an average grade point average of 2.0; and during the 2nd Advisory received grades of "F" in language arts, social studies, science, and physical education; and "D" in math; and during the 3rd Advisory received grades of "D" in language arts, math, and physical education; and "F" in social studies, science.

28. The due process hearing initially convened on June 23, 2009, at 9:00 a.m.; and reconvened on August 14, 2009, at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

X. ISSUE 1

Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate individualized education program (IEP)?

Petitioner represents that "The Individuals with Disabilities Education Improvement Act ("IDEIA") of 2004" 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, 30 DCMR §3001.1.

Petitioner further represents that 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)

Petitioner represents that 34 C.F.R. §300.323(c) states that each public agency must ensure that “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 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.” 34 C.F.R. §300.323 (a) provides that a child’s IEP must be in effect at the beginning of each school year.

Petitioner argues that here, according to several evaluations, the student requires special education and its related services as a result of his being Other Health Impaired, under the disability category of ADHD, counseling services to address the student’s self-esteem and underlying social emotional issues. Petitioner also argues that the IEP Team, at the student’s April 17, 2009 MDT meeting agreed that the student was in need of said services, however, DCPS was not prepared to develop the student’s IEP on the day of the meeting. Petitioner represents that as a result, despite the student’s current academic struggles, is left without the services of an IEP; and DCPS’ failure to develop an appropriate IEP amounts to denial of a FAPE.

At the hearing, Petitioner argued that although the student was twice retained, and has a history of problematic behavior, the May 28, 2009 IEP fail to include specialized instruction in academic areas, social emotional goals, Intervention Behavioral Plan, present levels of performance; or academic goals and objectives. Petitioner also argues that the IEP is not appropriate because it is not uniquely tailored to meet the student’s needs; and the placement is inappropriate because the student requires a full-time special education program, which is not available at _____, the placement proposed by DCPS.

Respondent represents that the MDT met on April 17, 2009 and determined that the student qualifies for special education as a student with other health impairment (ADHD); and the team decided to reconvene to develop the IEP to ensure that all of the necessary people were present. Respondent also represents that DCPS proposed three dates and is waiting for a response from Petitioner; and the student is receiving counseling services in the interim.

At the hearing, Respondent indicated that it is unable to defend what occurred at _____ although it had an obligation to ensure compliance with the December 29, 2008 HOD. Respondent argued that Petitioner failed to satisfy its burden by indicating what the student’s IEP should include, such as specific goals and accommodations; and the student has poor grades because he fails to attend class. Respondent argues that Petitioner failed to establish a nexus between the students’ ADHD, failure to attend class, and behavior problems. Respondent concluded that parent was aware of the fact that the student failed to attend class; and there is no guarantee that another placement would improve the student’s attendance.

Discussion

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

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).*

To ensure that each eligible student receives a FAPE, the IDEA requires that an individualized education program (“IEP”) be developed 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).

According to IDEA, 34 C.F.R. §300.323 (c) (1), each 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.

The record reflects that on April 17, 2009, the MDT meeting convened to determine the student’s eligibility for special education services. The MDT determined the student eligible for special education services under the disability classification of Other Health Impaired (OHI), and Attention Deficit Hyperactivity Disorder (ADHD). An IEP was not developed for the student.

On April 17, 2009, DCPS issued to parent a Letter of Invitation, proposing to convene the student’s IEP team on May 11, 2009, May 12, 2009, or May 13, 2009, at 2:00 p.m., to develop/review the student’s IEP, discuss placement, and discuss compensatory education.

On April 22, 2009, approximately five (5) days after the April 17, 2009 MDT meeting where the student was determined eligible for special education services; and Respondent issued the Letter of Invitation, 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 the student an appropriate Individualized Education Program (IEP); (2) provide the student an appropriate placement; and (3) that failure to provide the student an appropriate IEP and placement, entitles the student to compensatory education services.

On April 28, 2009, six (6) days after filing the due process complaint, Petitioner responded to DCPS' April 17, 2009 Letter of Invitation, accepting the proposed date and time of May 11, 2009, at 2:00 p.m., to convene the student's IEP team meeting. Petitioner's response also indicated that by agreeing to meet on this date and time it is not agreeing to waive, delay, or cancel parent's current and pending administrative due process complaint notice.

Findings of Fact

1. At the time that Petitioner filed the due process complaint, approximately five (5) days had lapsed since the April 17, 2009 eligibility determination; and the determination that the student requires special education and related services.

According to the IDEA, 34 C.F.R. §300.323 (c) (1), DCPS was required to ensure that a meeting to develop an IEP for the student was conducted within 30 days of the April 17, 2009 determination that the child needs special education and related services; which would have expired on May 17, 2009.

Petitioner filed the due process complaint on April 22, 2009, prior to expiration of the May 17, 2009 due date for DCPS to conduct a meeting, and develop an IEP for the student.

2. Petitioner presented evidence regarding the inappropriateness of the May 28, 2009 IEP; however, the inappropriateness of the May 28, 2009 IEP is not an issue before this court, for the following two (2) reasons:

First, the appropriateness of the May 28, 2009 IEP is not an allegation in the April 22, 2009 due process complaint; and

Second, the April 22, 2009 due process complaint was filed, prior to development of the May 28, 2009 IEP.

Conclusion of Law

It is the Hearing Officer's Decision that Petitioner failed to satisfy its burden of proof by presenting evidence that DCPS failed to develop an appropriate IEP for the student, in violation of IDEA, 34 C.F.R. §300.323(c)(1), resulting in denial of a FAPE to the student.

ISSUE 2

Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement?

Petitioner represents that DCPS, as the local and state education agency, is to make certain that the educational placement, for each child with a disability within its jurisdiction, is able to implement the student's Individualized Education Program, pursuant to 34 C.F.R. §300.17.

Petitioner also represents that DCPS shall implement an IEP for each student with a disability; and according to D.C. Mun. Regs. Tit. 5, §3010.2 (2003), DCPS “shall implement an IEP as soon as possible after the meeting where the IEP is developed...” Petitioner argues that pursuant to 34 C.F.R. §300.115(a), DCPS “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.”

Petitioner argues that the student, according to recent evaluations, and given the student’s academic and behavioral shortcomings, requires placement in a full-time, separate, special education program; and to date, DCPS has yet to place the student in an appropriate placement; amounting to denial of a FAPE.

At the hearing, Petitioner concluded by referencing the May 28, 2009 IEP, arguing that the IEP is not appropriate because it failed to include present levels of performance, goals and objectives, specialized instruction, or an Intervention Behavioral Plan to address the student attendance issues.

Respondent represents that placement will be determined after the IEP is developed; and a full-time special education program is too restrictive; and less interventions should be considered prior to placing the student in a more restrictive environment. Respondent also represents that this is the student’s first experience with special education and it must consider less restrictive environment first; and before placing the student in a full-time special education program.

Discussion

According to 34 C.F.R. Section 300.116, in determining the *educational placement* of a child with a disability, including preschool child with a disability, each public agency must ensure that—

- (a) The placement decision—
 - (1) Is made by a group of persons, *including the parents*, and other persons *knowledgeable about* the child, the meaning of the evaluation data, and the *placement options*; and
 - (2) Is made in conformity with the *Least Restrictive Environment (LRE)* provisions of this subpart, including Sections 300.14 through 300.118;
- (b) The child’s placement—
 - (1) Is determined at least annually;
 - (2) Is *based on the child’s IEP*; and
 - (3) Is as close as possible to the child’s home;
- (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if non-disabled;

- (d) In selecting the LRE, consideration is given to any ***potential harmful effect on the child*** or on the ***quality of services that he or she needs***;... *Individuals with Disabilities Education Improvement Act of 2004, 34 C.F.R. Section 300.116.*

The LRE requirement also reflects the IDEA's preference that "[to] the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled", and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when ***the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.*** *See also, 34 C.F.R. Section 300.114(a)(2); 34 C.F.R. Section 300.116(a)(2); and D.C. Municipal Regulations Title 5, Section 3011.*

However, IDEA's preference for "mainstreaming" disabled students is not absolute; Section 1412(a)(5) ***permits the delivery of educational services to disabled students in less integrated settings as necessitated by the student's disability.*** *A. B. ex rel. D.B. v. Lawson, 354 F.3rd 315, 330 (4th Cir. 2004).*

The record reflects that on April 17, 2009, the MDT meeting convened to determine the student's eligibility for special education services. The MDT determined the student eligible for special education services under the disability classification of Other Health Impaired (OHI), and Attention Deficit Hyperactivity Disorder (ADHD). An IEP was not developed for the student at the meeting.

The team discussed the student's placement, however, failed to render a decision regarding the student's placement. According to the Education Advocate's notes of April 17, 2009, parent and the advocate expressed to the MDT their belief that the student's IEP, once developed, should reflect the student's need for a full-time special education program for students with OHI (ADHD). The advocate's notes also indicate that the student's IEP should reflect 27.5 hours of total special education services.

On April 17, 2009, DCPS issued to parent a Letter of Invitation, proposing to convene the student's IEP team on May 11, 2009, May 12, 2009, or May 13, 2009, at 2:00 p.m., to *develop/review the student's IEP, discuss placement, and discuss compensatory education.*

On April 22, 2009, approximately five (5) days after the April 17, 2009 MDT eligibility determination meeting; and Respondent issued to parent the Letter of Invitation, Petitioner's Attorney initiated the 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 the student an appropriate Individualized Education Program (IEP); (2) provide the student an appropriate placement; and (3) that failure to provide the student an appropriate IEP and placement, entitles the student to compensatory education services.

Findings of Fact

1. On April 17, 2009, an MDT convened to determine the student's eligibility. The MDT discussed with parent and the Education Advocate the advocate's request for a full-time placement for the student; however, the team failed to render a placement decision.
2. According to the IDEA, 34 C.F.R. §300.116 (b)(2) a child's placement is based on the child's IEP.
3. On April 17, 2009, DCPS issued a Letter of Invitation requesting a meeting with parent to develop/review the student's IEP, discuss placement, and discuss compensatory education.
4. On April 22, 2009, at the time Petitioner filed the due process complaint, DCPS had not convened a meeting to develop an IEP, upon which the student's placement could be based.
5. Petitioner's allegation that DCPS failed to provide the student an appropriate placement, is premature; and absent an IEP, upon which the student's placement is based, any determination regarding the appropriateness of the student's placement is premature.

Conclusion of Law

It is the Hearing Officer's Decision that Issue 2 of the complaint is premature, and not ripe for review by the court; and that the best interests of the student would be served if the issue is dismissed, "without" prejudice.

ISSUE 3

Whether DCPS' failure to provide the student an appropriate IEP and placement denies the student a FAPE, entitling the student to compensatory education services?

Petitioner represents that *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) the Court stated that "courts and hearing officers may award "educational services...to be provided prospectively to compensate for a past deficient program." Id. citing *G. ex. Rel. RG v. Fort Bragg Dependent Schs*, 343 F.3d 295, 309 (4th Cir. 2003). Compensatory education is an equitable remedy crafted to remedy educational deficit created by "an educational agency's failure over a given period of time to provide FAPE to a student". Id. Petitioner further represents that "Appropriate compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have provided in the first place." Id. The compensatory education requested was reasonable in light of DCPS' continued failure to provide FAPE to this student.

Petitioner argues that moreover, in Mary McLeod Bethune Day Academy Public Charter School v. Bland, Civil Action No. 07-1223, the U.S. District Court for the District of Columbia found that, "if a parent presents evidence that her child has been denied FAPE, she has met her burden of proving that he is entitled to compensatory education."

Petitioner also represents that in the instant matter, the student has been and continues to be deprived of his needed educational services because of DCPS' inactions. Specifically, the student, due to DCPS' inactions, is being left to suffer without an IEP in educational program, through no fault of the parent that is not providing the student an educational benefit. DCPS should be held accountable for these actions and ordered to provide compensatory education for this student.

Respondent represents that compensatory education is a form of relief, not an issue; and when the team develops the IEP, the team will also discuss compensatory education.

Findings of Fact

1. The issue of whether the student is entitled to compensatory education services is a form of relief which the court may grant, upon a determination that the student was denied a FAPE; and is not a separate issue upon which a hearing on the merits is warranted.
2. All evidence presented regarding the student's entitlement to compensatory education services, will be considered by the court in determining the appropriate relief to be granted the parties.

Conclusion of Law

It is the Hearing Officers' Decision that the student's entitlement to compensatory education services is not a separate issue appropriate for review by the court.

XII. ORDER

Based on the aforementioned, it is hereby:

1. **ORDERED**, that Issues 2 of the complaint is dismissed, "without" prejudice; and it is further
2. **ORDERED**, that Issue 3 of the complaint is dismissed, "with" prejudice; and it is further
3. **ORDERED**, that this decision and order are effective immediately.

XIII. 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

8-21-09

Date Filed: _____

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Kendra Berner, Office of the Attorney General
Attorney Domiento Hill: Fax: 202-742-2098