District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
State Enforcement and Investigation Division
Student Hearing Office
Van Ness Elementary School
1150 5th St., S.E., Washington, D.C. 20003
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2009 DEC 15 AM 9:34 OSSE STUDENT HEARING OFFICE

In Re the Matter of :	)	
[1]	)	
Parent on behalf of Student,	)	
	)	
Petitioner,	)	
	)	**Date of Complaint:** October 15, 2009
v.	)	**Dates of Pre-Hearing Conferences:**
	)	November 17, 2009 and November 27, 2009
District of Columbia Public Schools,	)	**Date of Hearing:** December 4, 2009
("DCPS")	)	
	)	**Student Case Number:**
Respondent.	)	**Student Identification Number:**
	)	
	)	
	)	**Attending School:**
_____	)	School

HEARING OFFICERS' DECISION

Hearing Officer: Attorney Ramona M. Justice

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

Attorney for Respondent: Assistant Attorney General Daniel McCall
Office of the Attorney General
825 North Capitol St., N.E., 9th Floor
Washington, D.C. 20002

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1 Personally identifiable information is provided in the "Index" which is located on the last page of this Order and must be removed for public distribution. * The Hearing Officers' Decision is amended to accurately reflect the date of the pre-hearing conference and date of hearing.

I. 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.

II. INTRODUCTION

The student resides in the District of Columbia, and is identified as developmentally delayed (DD); and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)". The student is years of age, and in at a public school, located in the District of Columbia.

On October 15, 2009, Petitioner through her Attorney, filed a due process complaint, alleging that District of Columbia Public Schools, hereinafter referred to as "DCPS" or "Respondent", denied the student a free and 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) comprehensively evaluate the student in all areas of suspected disability; in violation of "The Individuals with Disabilities Education Act ("IDEA")"; reauthorized as the "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")."

III. PROCEDURAL POSTURE

On October 15, 2009, Petitioner through her Attorney, initiated the due process complaint; and on October 20, 2009, the Hearing Officer issued a pre-hearing notice, scheduling the pre-hearing conference for November 17, 2009, at 3:00 p.m.. On October 27, 2009, DCPS filed "District of Columbia Public Schools' Response to Petitioner's Due Process Complaint". On October 30, 2009, DCPS issued a "Due Process Complaint Disposition", indicating that the parties were unable to reach agreement at the resolution meeting held on that date. The pre-hearing conference convened on November 17, 2009 at 3:00 p.m., and reconvened for a status hearing on November 27, 2009. A "Pre-hearing Conference Order" was issued by the Hearing Officer on November 30, 2009, confirming the due process hearing for December 4, 2009, at 9:00 a.m..

On November 30, 2009, Petitioner filed a letter requesting a continuance of the due process hearing. On December 2, 2009, the Hearing Officer issued an "Interim Order on Continuance" granting Petitioner's request for a continuance, and continuing the hearing to December 8, 2009, at 9:00 a.m.. The due process hearing convened on December 8, 2009, at approximately 9:00 a.m., at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

IV. ISSUES

The following issues are identified in the *October 15, 2009* due process complaint?

(1) Whether the District of Columbia Public Schools denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate Individualized Education Program (IEP)?

(2) Whether the District of Columbia Public Schools denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement?

(3) Whether the District of Columbia Public Schools denied the student a free appropriate public education (FAPE); by failing to comprehensively evaluate the student in all areas of suspected disability?

V. RELIEF REQUESTED

1. A finding that the student requires an IEP that includes the classification of autism and Other Health Impaired (OHI), that includes a dedicated aide; and a placement in a school/program where the students are closer to his level and that is designed to meet his unique needs;
2. That the Hearing Officer either develop the IEP as requested here or order DCPS to do so;
3. That DCPS be ordered, or agree to:
   a. Provide appropriate compensatory education services in the form of funding for a reasonable amount of private one-on-one tutoring and counseling for the violations and periods specified above;
   b. That DCPS complete an assessment to rule out autism within 15 days;
   c. Convene an MDT meeting within 10 days of completing the last of the assessments to revise the IEP, determine compensatory education, and determine placement with placement to be issued within 10 days;
   d. Alternatively, fund placement and provide transportation to the student to attend:
      i)
      ii)
      iii)
      iv)
      v) Some other non-public or public school.
   e. That DCPS provide any other relief deemed appropriate and relating to the violations committed here, including additional compensatory education; and
   f. Pay parent's reasonable attorney's fees and costs.

4. All meetings shall be scheduled through counsel for the parent, Miguel A. Hull, Esquire, in writing, via facsimile at 202-742-2097/98.

VI. PRELIMINARY MATTERS

As a preliminary matter, Petitioner withdrew Issue 3 of the complaint. There were no other preliminary matters presented for consideration by the court.

VII. DISCLOSURES

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

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF PETITIONER

- Petitioner's Exhibits 01 through Petitioner's Exhibits 30; and witness list dated December 1, 2009.

DISCLOSURES ADMITED INTO EVIDENCE ON BEHALF OF RESPONDENT

- Respondent's Exhibits 01 through Respondent's Exhibits 05; and a witness list dated December 1, 2009.

VIII. DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

ISSUE 1

Whether the District of Columbia 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 a free appropriate public education ("FAPE") consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs. 20 U.S.C. §1401 (9); 34 C.F.R. §300.17; D.C. Mun. Regs. Tit. 5 §3000.1. See also *Scott v. District of Columbia, (D./C. Cir.) 03-1672 DAR (March 431, 2006)*; and Board of Educational of the *Hendrick Hudson Central School District v. Rowley, 458 U.S. 276, 182 (1982)* ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP").

Petitioner represents that the student's current Individualized Education Program ("IEP") is not appropriate because it fail to properly classify the student's disability to include ADHD, and provide for a dedicated Aide.

Petitioner represents that the student's assessments reveal a student with a very low level of functioning with significant needs; and according to the Neuro-psychological evaluation completed on June 12, 2009, the student was exposed to drugs in-utero, found very low cognitive abilities in all areas; significantly delayed memory and attention abilities; low expressive and receptive language abilities; extremely low visual motor integration abilities; very low gross motor skills; and significantly low social emotional functioning.

Petitioner also represents that the report also diagnoses the student with Attention Deficit Hyperactive impulsive type-severe; cognitive disorder; mixed expressive/receptive language disorder; developmental coordination disorder; and recommends "intensive educational programming, small classroom, and one-to-one specialized instruction; intensive speech/language therapy services; occupation therapy services, and physical therapy services.

Respondent represents that the student's IEP is calculated to provide him educational benefit; the student receives full-time specialized instruction and related services; in a class with a teacher, Aide, and four other students. Respondent also represents that the student receives individualized attention in his class and benefits from exposure to higher functioning students.

Respondent also represents that the student receives services with a disability of developmentally delayed, and it is aware and has taken into account the student's ADHD; and although it is not addressed in the student's IEP, the student is in a small classroom with other students diagnosed with developmental delays; the student is making slow progress, and meets the standard set forth in *Rowley,* which is that he receive the basic floor of opportunity, some educational benefit; and access to the general curriculum.

Discussion

A free appropriate program or FAPE is defined as special education and related services provided at public expense, under public supervision, and without charge; that meets the standards of the State Education Agency (SEA), including an appropriate school; and are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

According to the 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).

IDEIA, §300.306 (c)(1)(i)(ii) also provides that 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.

According to the IDEA, 34 C.F.R. §300.324, in developing each child's IEP, the IEP team must consider: 1) the strengths of the child; 2) concerns of the parents for enhancing the student's education; and 3) results of the initial or most recent evaluation of the student; and academic, developmental, and functional needs of the child. In the case of a child whose behavior impedes the child's learning, as in this case, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See, IDEA, 34 C.F.R. §300.324.*

In this matter, the record reflects that on March 6, 2008, the D.C. Public Schools Central Assessment Referral and Evaluations (C.A.R.E.) Center completed an "Occupational Therapy Evaluation Report". The evaluator determined that the student exhibits significant delays in his fine motor skills and self-help skills according to his performance on the BSID-III Motor Scales Fine Motor Subtest; and has sensory processing concerns that impact his ability to explore objects in his environment and also interact in his environment in a functional way. The evaluator noted that the student's performance during the evaluation may have been impacted by the effects of his seizure medication.

The record also reflects that on May 5, 2008, the D.C. Public Schools Central Assessment Referral and Evaluations (C.A.R.E.) Center completed an "Educational Evaluation Report". The evaluator determined that the student demonstrates significant delays in Attention and Memory, Reasoning and Academic Skills and Perception and Concepts, in the three (3) areas assessed.

On May 5, 2008, the D.C. Public Schools Central Assessment Referral and Evaluations (C.A.R.E.) Center completed a "Physical Therapy Evaluation Report". The evaluator indicated that during the evaluation the student was very active, became frustrated easily and failed to show interest in the evaluation items; and failed to follow specific verbal/visual commands. The evaluator concluded that the student's muscle tone, range of motion and muscle strength were within the normal limits throughout his body and joints. The student received below average scores in the Stationary Subtest, Locomotion, and Object Manipulation). The evaluator recommended a variety of gross motor experiences and activities which should be available at home, pre-school setting, in community programs, and on playgrounds.

On May 5, 2008, the D.C. Public Schools Central Assessment Referral and Evaluations (C.A.R.E.) Center completed a "Speech and Language" Evaluation. The evaluator determined that the student presents with global communication delays characterized by a severe delay in receptive and expressive language and speech articulation skills; and does not have functional communication skills lacking the use of words for a variety of pragmatic functions.

On June 2, 2008, a Multidisciplinary Development Team (MDT) developed an Individualized Education Program (IEP) for the student, providing for 25. 0 hours of specialized instruction, 1.0 hours of speech therapy, and 1.5 hours of occupational therapy, per week. The IEP also identified the student's disability as Developmentally Delay (DD); and recommended an out of general education classroom setting. The student was placed at . School, in a special education class of approximately 5-8 students, where he receives group instruction; general education classes for art, science, music, library, and physical education; and related services.

The student's September 8, 2009 IEP, similar to his 2007/08 IEP recommends 24.5 hours of specialized instruction, 1 hour of speech/language, 1 hour occupational therapy, and 1 hour physical therapy services, weekly, 30 minutes per week of speech-language pathology consultation services; and an out of general education classroom setting. The MDT recommended the student's continued placement at . in a special education class of approximately 5-8 students, where he receives group instruction; general education classes for art, science, music, library, and physical education; and related services. Other students in the class do not present with the gross motor, incontinence, and speech language deficits, exhibited by the student. The MDT determined that a dedicated Aide was not warranted.

An independent Neuro-psychological evaluation was completed on May 20, 2009. The purpose of the evaluation was to assist in determining the student's neuropsychological functioning and identify the neuropsychological concerns that may impact his ability to perform effectively in the classroom; and assist in educational planning. The results of the evaluation indicate that the student's cognitive abilities are functioning in the very low range across all areas and equivalent to that of a child between 7 months and 15 months of age; and the range of functioning is better than only 1% of his same aged peers.

The report indicates that the student's performance during the evaluation indicate that he has not made any gains in the past 12 months with regard to cognitive development; compared to results obtained during an educational evaluation performed by the C.A.R.E. Center 12 months prior. The report indicates that in comparison to his results on the BDI at age 3 years 4 months, performed by the D.C. Public Schools C.A.R.E. Center, approximately one year prior, the student has made no developmental gains in the area of attention and memory; and in measuring his expressive language the student is currently functioning at an age equivalent to a child of a approximately 12-15 months. The report also indicates that the student has made some expressive language gains within the past 12 months.

The report reflects that in the area of receptive language, consistent with his expressive abilities, the student is functioning at an age equivalent of a child between 7-12 months of age; and with regard to visual motor integration, the student's abilities place him at a developmental age of less than 2 years 2 months, indicating he is in the extremely low range of visual motor integration. In the area of fine motor development, the student is at an age equivalent of 1 year and 3 months; and his gross motor skills are at an age equivalent of 1 year 5 months, better than only 1% of his peers. The student scored high on the sensation seeking and sensory sensitivity thresholds; and his social emotional functioning consistently fell at an age equivalent of 2 years 0 months. According to the evaluator the student was unable to achieve developmental gains within the past 12 months in adult interaction and peer interaction scales of the BDI.

The report also reflects that the student was exposed in-utero to controlled substances, and has numerous additional medical difficulties. The report indicates that the student suffers from grand mal seizures, is diagnosed with ADHD, and is administered medication for the ADHD, has gastrointestinal problems and difficulty eating; left side numbness, falls frequently, and suffers with incontinence.

The DSM-IV, Axis 1 diagnosis, reflects a cognitive disorder, mixed expressive and receptive language disorder-severe, attention deficit hyperactivity disorder, hyperactive impulsive type-severe, developmental coordination disorder-per history, and neglect of a child. The Axis III diagnosis reflects seizures, in-utero exposure to ecstasy, embalming fluid, marijuana, and cigarettes.

The evaluator concluded that the student's neuropsychological functioning is significantly impaired in all areas, indicating a diffuse and severe Cognitive Disorder likely related to the history of in-utero exposure to a variety of Teratogens in the form of cigarettes, drugs, subsequent seizure disorder, and legally documented neglect. The evaluator also concluded that with regard to educational implications, the student's hyperactivity, severity of delay, and various needs in all areas of development indicate that an intensive, specialized, therapeutic early childhood special education placement is the primary avenue by which he will make educational gains.

The evaluator recommended: continuation of medical treatment for neurological, gastrointestinal, psychiatric, and primary care; testing for hearing acuity; intensive educational programming using evidence based treatments for children with developmental delays; a small classroom, one to one specialized instruction, and skills based instruction; intensive speech/language therapy services, at least 2 hours per week due to severity of delay; continued occupational therapy services to address fine motor development and self help skills; physical therapy to address his gross motor development. The evaluator stressed the importance of exposing the student to a variety of developmentally appropriate and educational community activities; while noting that the student requires close monitoring during the events as he may tend to become over stimulated and/or tired.

On September 8, 2009, the Education Advocate conducted a classroom observation of the student. The advocate testified that a Teacher and Aide were in the classroom; and although the Teacher reports a class size of five (5) students, on the date of the observation the class consisted of eight (8) students. The advocate reported that during the observation, the student was inattentive and disoriented; lacked comprehension; fine motor skills were deficient; and the student had an unsteady "gate", and was unable to walk along with other students because he walked slower; and was unable to walk safely or manipulate stairs without assistance, because of his severe gross motor problems and poor balance, not exhibited by other students.

The advocate also testified that the Teacher's Aide had five (5) other students requiring attention, and the Teacher was occupied, therefore, the student failed to receive the one on one attention he requires. The advocate testified that the student interacts with non-disabled students during music, lunch, and recess; the student's IEP has no goals for music, physical- education, or library, and fail to address the student's needs. The advocate testified that the student is unable to meet the goals currently in his IEP, or complete assignments because he fail to recognize colors, numbers, and the goals in the IEP; and assignments are not specifically designed or tailored to meet his needs.

The advocate testified that according to the Neuro-psychological Evaluation, within the last year, the student showed no improvement in three (3) out of the five (5) areas tested, specifically: cognitive, social/emotional, and communication. The advocate also testified that the student has had several accidents since attending the school, and returned home from school in soiled clothing due to the incontinence occurring at school. The advocate testified that the special education teacher leaves at noon on each Tuesday; and according to advocates MDT meeting notes of September 8, 2009, the student's teacher advised the MDT that although he has a small classroom, the student requires a very small classroom and one on one instruction. During testimony, the student's teacher was unable to recall such comments to the team.

During cross examination the advocate testified that before the student was not cooperating in class, and according to his Teacher he now cooperates, and according to the student's June 11, 2009 Progress Report, he is progressing in several areas; although she disagrees that the student is making progress.

The student's Special Education Teacher testified that the student is deficient in the developmental areas, speech, fine motor skills, and mobility; has difficulty with "gate" control; and is challenged in verbal communication. The teacher also testified that most students, including other students in the class, have a small vocabulary of 500-700 words; however, the student has a vocabulary of 4 or less words. The teacher testified that the student models behavior and repeats what he hears; has improved with self help skills; is able to identify pictures with upcoming event, however, requires prompting.

The teacher testified that the student recognizes letters of the alphabet, requires modeling, and will participate in class as long as he has the attention; and does more "babbling", and exhibits less resistance to efforts to acquire his attention; and hopes that through repetition his skills will improve.

According to the teacher's testimony, the student is unable to meet the majority of IEP goals, even with assistance; the student benefits from one on one instruction (i.e. during book reading); and instruction is provided in a group setting. The teacher also testified that it is not realistic for the student to meet all of the goals in his IEP; however, during group instruction, if he closes the physical space between him and the student, and provides him one on one attention, the student's performance improves.

Findings of Fact

1. The student's September 8, 2009 IEP is inappropriate because the goals in the IEP are not reasonable, realistic, or attainable by the student because they exceed and fail to consider the student's developmental, psychological, emotional, neurological, and physical abilities and limitations.

2. The September 8, 2009 IEP is not specifically designed and tailored to meet the student's unique educational, developmental, and functional needs, or provide the student the support services, necessary to permit the child to benefit from the instruction. Therefore, the IEP is not reasonably calculated to provide the student access to the general curriculum; or enable the student to receive educational benefit.

3. The September 8, 2009 IEP identifies the students' disability as developmentally delayed; however, fail to address the student's prior and recent diagnosis of ADHD, a disability recognized by the IDEA, under the category of Other Health Impaired.

4. Supplemental supports and services identified in the September 9, 2009 IEP are insufficient to meet the student's educational needs, merely consisting of: "Specific scheduling for related service needs".

5. The student's September 8, 2009 IEP includes the following classroom accommodations: small group work, display examples/models, pointing response, flexible scheduling, extra time for completion of tasks, and manipulatives; however, fail to accommodate the student's ADHD. The IEP also provides for regular statewide assessment *without* accommodations; although the student requires accommodations; at all times.

   The IEP includes no accommodations or support services during interaction with non-disabled peers, specifically, the general education classes (i.e. art, music, library, physical education, science; lunch and recess). The IEP provides no support services for the student, in all areas, at all times; or accommodate the student's history of seizures.

6. The student's September 8, 2009 IEP fail to include goals for art, music, physical education, adaptive-daily living skills, library, science; or social/emotional, and cognitive, which are two (2) of the five (5) areas of weakness identified in the Neuro-psychological evaluation.

7. The District of Columbia Public Schools "Evaluation Summary Report" dated September 17, 2009 reflects that the educational needs of the student cannot be achieved satisfactorily in a special education or regular education setting, even with curricular modification and accommodations, without assistance.

8. In interpreting the evaluation data for the purpose of determining whether the student has a disability under IDEIA, §300.98, including the data in the evaluations, the MDT failed to draw upon information from a variety of sources, including the student's evaluation findings and recommendations, parent, teacher, and advocate input, as well as information about the nature and extent of the child's disabilities, and ability to function effectively in a special education class; or a general education class, recess, and lunch, where he interacts with non-disabled students, without adequate modifications, accommodations; and support services.

9. DCPS failed to carefully consider the information obtained from the various sources (i.e. prior occupational therapy, physical therapy, speech and language, educational, and neuropsychological evaluations, diagnoses, findings, and recommendations; and classroom observation), in violation of IDEIA, §300.306 (c)(1)(i)(ii); and failed to-ensure that the information obtained from all of these sources was documented and carefully considered in developing the student's IEP.

10. On September 8, 2009, the MDT failed to review and revise the student's IEP, as appropriate, based upon the findings and recommendations of the May 20, 2009 Neuro-psychological Evaluation, although the evaluation provides that within the prior twelve month period, the student failed to make developmental gains in his cognitive functioning, attention and memory, speech and language, social, behavior, emotional functioning, attention and memory, and his receptive language functioning scored at an age equivalent of less than two (2) years 0 months; and is diagnosed with ADHD.

11. In developing the student's IEP, the IEP team failed to consider the strengths of the child, concerns of the parents for enhancing the student's education, results of prior and recent evaluations of the child; and the academic, developmental, and functional needs of the child; in violation of IDEA, 34 C.F.R. §300.324.

12. The student's IEP does not provide "a basic floor of opportunity", some educational benefit, or access to the general curriculum, as articulated by Respondent, because the IEP is not specifically designed and tailored to meet the student's unique needs; denying him access to the general curriculum, and educational benefit. 20 U.S.C. §1414(d); 34 C.F.R. §300.300(a)(3)(ii).

Conclusion of Law

It is the Hearing Officer's Decision that Petitioner satisfied 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. §300.320 and 300.324.

ISSUE 2

Whether the District of Columbia Public Schools denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement?

Petitioner represents that a student's placement is to be the least restrictive environment and in a school that is capable of meeting the student's special education needs. See, Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C/ §1402(9)(D). Petitioner further represents that the Neuropsychological Evaluation recommends "intensive educational programming, small classroom, and one on one specialized instruction; intensive speech/language therapy services; occupation therapy services, and physical therapy services.

Petitioner also represents that the observation revealed that the teacher has five students and one Aide and that the other students are developmentally delayed, however, function at a higher level than the student, because they can communicate verbally and present no gross motor functioning difficulties. Petitioner concludes that the student requires a dedicated Aide in a safe environment; and placement in a school/program that is geared towards his needs where the other students are more on his level of functioning.

Respondent represents that the student is in a class with a teacher, an aide, and four other Students, and at this time, the team does not believe the student requires a dedicated aide. Respondent also represents that the student receives individualized attention in his class and benefits from exposure to higher functioning students.

Respondent also represents that the IEP is designed for the student to make progress, and according to the student's guardian and teacher the student has started to improve with toileting. Respondent represents that Petitioner presented no testimony regarding appropriate goals and expectations for the IEP. Respondent represents that the remedy should not be a private placement; an Aide can be provided at the student's current placement; and the student's academic program can be adjusted to accommodate his needs.

Discussion

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

(a) The placement decision—
(1) Is made by a group of persons, ***including the parents***, and other persons ***knowledgeable about*** the child, the meaning of the evaluation data, and the ***placement options***; and
(2) Is made in conformity with the ***Least Restrictive Environment (LRE)*** provisions of this subpart, including Sections 300.114 through 300.118;
(b) The child's placement—
(1) Is determined at least annually;
(2) Is ***based on the child's IEP***; and

(3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if non-disabled;

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

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

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

The record reflects that on June 2, 2008 DCPS issued a "Prior Notice" and notice of "Initial Placement", recommending an out of general education setting for the student; and rejecting general education and combination settings because they would not meet his needs at that time. The MDT recommended and placed the student at
although aware that the school is unable to provide the student a full-time, out of general education, special education program. The team also failed to discuss or consider other placement options for the student.

In identifying the least restrictive environment for the student, the team determined that the student requires a specialized environment to meet his needs, when receiving specialized instruction, speech-language pathology, occupational therapy, and physical therapy, however, on September 8, 2009 DCPS issued a "Prior Written Notice" recommending a continuation of the student's placement at where the student was unable to receive a full-time special education program. The notice reflects that the team failed to discuss or consider other placement options for the student.

Petitioner recommends the student's placement, transportation, and funding at or the however, only presented evidence regarding the educational program at the

Findings of Fact

1. On September 8, 2009, the MDT recommended a continuation of the student's placement at and failed to consider other placement options although during the 2007/08 school year the student demonstrated regression and no progression; and the May 20, 2009 Neuropsychological Evaluation provides that with regard to educational implications, the student's hyperactivity, severity of delay, and various needs in all areas of development indicate that an intensive, specialized, therapeutic early childhood special education placement is the primary avenue by which the student will make educational gains.

2. At the September 8, 2009 MDT meeting the placement decision was not made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and ***the placement options***.

3. In identifying a LRE for the student, DCPS failed to consider any potential harmful effects on the child or on the quality of the services he requires; and failed to provide the student an out of general education placement, based on the child's needs; and as recommended in his June 2, 2008, and September 8, 2009 IEPs.

4. Prior and recent evaluations support a finding that the nature and severity of the student's disabilities are such that the student requires an intensive, specialized, therapeutic early childhood special education placement; and the assistance of a dedicated Aide in all classes, during lunch and recess; to access the general curriculum and receive educational benefit. DCPS failed to comply with the ***Least Restrictive Environment (LRE)*** requirements of the IDEA, 34 C.F.R. §300.116, in determining the educational placement of the student.

5. The record reflects that education of the student in regular classes (i.e. music, physical education, and library), with the use of supplementary aids and services cannot be achieved satisfactorily.

6. The student's September 8, 2009 IEP recommends an out of general education setting, however, the student expends a percentage of his time in general education classes, without accommodations, or support services. Therefore, integrating the student with non-disabled students for educational instruction is inconsistent with his IEP.

7. DCPS failed to develop an appropriate IEP, upon which the student's placement can be determined; and based on the evidence presented; is not an appropriate placement for the student. The school is unable to provide the student the full-time special education program, or the small, structured, intensive, specialized, therapeutic early childhood special education placement he requires; and which is necessary for the student to access the general curriculum and receive educational benefit.

8. Petitioner's proposed placement at the consists of a placement of the student in a classroom of eight (8) students, in addition to the student, for a total of nine (9) students, representing a greater number than his current placement; the classroom is staffed with an Aide and one Teacher, who awaits a provisional certification in special education. Some students in the class present with emotional disabilities, posing a potential safety risk for the student; and the student's acceptance is conditioned upon provision of a dedicated Aide. The student would expend all time in same class, except a resource room for related services.

9. Absent an appropriate IEP, a decision regarding the appropriateness of an alternate placement for the student is premature. However, based upon the testimony of the Admissions Manager at the the Hearing Officer is not convinced that the proposed placement is appropriate, representing a small, structured environment, therapeutic early childhood special education placement, where the student can receive the intensive, specialized instruction he requires, taught by a certified Special Education Teacher; which is necessary to access the general curriculum and receive educational benefit.

Conclusion of Law

It is the Hearing Officer's Decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS failed to provide the student an appropriate placement, for the 2009/10 school year, in violation of "The Individuals with Disabilities Education Act ("IDEA")", Public Law 101-476, reauthorized as "The Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA")", 34 C.F.R. §300.116.

Free Appropriate Public Education

In order for FAPE to be offered, a school district must show it complied with the statutory elements of an IEP, and the goals and objectives in the IEP must be reasonable, realistic and attainable. The special education and related services must be reasonably calculated to enable the child to receive an educational benefit and must be likely to produce progress not regression. The MDT failed to comply with 34 C.F.R. Section 300.324, in developing the student's IEP. The team failed to consider the following:

(i) The strengths of the child;
(ii) The concerns of the parents for enhancing the education of the child;
(iii) The results of the initial or most recent evaluation of the child; and
(iv) The academic, developmental, and functional needs of the child.

In addition, in evaluating the student, the LEA ensured that the evaluations were ***sufficiently comprehensive*** to identify all of the child's special education and related services needs, whether or not commonly linked to the-disability category in which the child has been classified. However, in developing the student's September 8, 2009 IEP, the MDT failed to carefully consider the evaluation findings, and recommendations, to ensure that the IEP for the student, was specifically tailored to address the student's areas of educational needs.

DCPS failed to comply with the statutory elements of the student's IEP, by developing an IEP that is reasonably calculated to provide the student access to the general curriculum and educational benefit. The goals and objectives in the IEP are not reasonable, realistic, or attainable; and as a result, the special education and related services are not reasonably calculated to enable the child to receive an educational benefit; are not likely to produce progression, however, reflects the student's regression during the past twelve (12) months.

Based on the aforementioned, the Hearing Officer finds that DCPS' failure to provide the student an appropriate IEP and placement during the 2009/2010 school year; denied the student a FAPE, entitling the student to compensatory education services.

Compensatory Education Services

Based on a review of the evidence and testimony presented in this matter, it is the Hearing Officer's decision that Petitioner satisfied its burden by presenting evidence sufficient for a finding that DCPS failed to comply with the procedural and substantive requirements of the IDEA in developing an IEP and identifying an appropriate placement for the student; resulting in denial of a FAPE to the student; and entitling the student to compensatory education services. However, Petitioner failed to satisfy its burden by presenting evidence regarding the nature and amount of services the student failed to receive; or the harm the student suffered as a result of DCPS' failure to provide the student an appropriate IEP and placement.

Petitioner also failed to present sufficient evidence of the nature and amount of the compensatory education services, necessary to place the student in the position he would have been, had he received the services denied; for the student to receive educational benefit; and that would assist the student in making the progress that he would have made, if he received the services he was entitled to receive under IDEIA.

Testimony of the advocate regarding recommended compensatory education services was difficult to discern, thus unreliable. Therefore, although the student is entitled to compensatory education services, the evidence presented by Petitioner is insufficient for the Hearing Officer to determine the nature and amount of compensatory education services the student is entitled to receive.

IX. ORDER

Based on the aforementioned, it is hereby:

1. **ORDERED**, that within fifteen (15) school days, DCPS shall convene an IEP team meeting, to review and revise the student's September 8, 2009 IEP as appropriate, and consistent with the student evaluations; and findings of the Hearing Officer
(i.e. an IEP that addresses the student's Attention Deficit Hyperactivity Disorder (ADHD), under the Other Health Impaired (OHI) disability classification; a dedicated Aide in all areas, at all times; goals and objectives specifically designed

and tailored to meet the student's educational, developmental, and functional needs; and it is further

2. **ORDERED**, that at the IEP team meeting referenced in Section 1 of this Order, the IEP team shall identify an appropriate placement for the student, to include a full-time early childhood special education program in a small, structured, therapeutic environment, where the student can receive intensive, specialized instruction, access to the general curriculum, and educational benefit; and it is further

3. **ORDERED**, that DCPS shall issue a Prior Notice of Placement to the parent, within five (5) school days, if the placement is a public school, and thirty (30) calendar days, if the placement is a non-public or private school; and it is further

4. **ORDERED,** that all meetings shall be scheduled through counsel for the parent,
Miguel A. Hull, Esquire, in writing, via facsimile at 202-742-2097/98.

5. **ORDERED**, that any delay in meeting any of the deadlines in this Order because
of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives; and it is further

6. **ORDERED**, that this decision and order are effective immediately.

X. 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 Date Filed: *12-14-09*

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Kendra Berner, Office of the Attorney General
Attorney Miguel Hull: Fax: 202-742-2098