District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
State Enforcement and Investigation Division
Student Hearing Office
Van Ness Elementary School
1150 5th St., S.E., Washington, D.C. 20003
Phone: (202) 698-3819 Facsimile: (202) 698-3825

OSSE
STUDENT HEARING OFFICE
2009 FEB 18 AM 7: 52

In Re the Matter of :	)	
	)	
Parent on behalf of Student,[1]	)	
	)	
Petitioner,	)	
	)	**Date of Complaint:** November 10, 2008
	)	**Date of Hearing:** January 23, 2009
v.	)	February 2, 2009
	)	
	)	
The District of Columbia Public Schools	)	**Student Case Number:**
825 North Capitol Street, N.W.	)	
Washington, D.C. 20002	)	
(DCPS" or "District")	)	
	)	
Respondent.	)	
	)	

HEARING OFFICERS' DECISION (HOD)

Hearing Officer: Attorney Ramona M. Justice

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

Counsel for DCPS: Laura George, Assistant Attorney General
Office of the Attorney General
825 North Capitol St., N.E., 9th Floor
Washington, D.C. 20002

1 Personally identifiable information is provided in the "Index" which is located on the last page of this Order and must be removed prior to public distribution.

INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004 (IDEIA), (Public Law 108-446)
DISTRICT OF COLUMBIA PUBLIC SCHOOLS
IMPARTIAL DUE PROCESS HEARING

I. INTRODUCTION

The student is years of age; and attends The a public school, offering an out of general education, full time special education program for students with severe cognitive limitations and the primary diagnosis of mental retardation.

The student is a resident of the District of Columbia; and identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)". The student's disability classification is mental retardation (MR).

On November 10, 2008, Counsel, on behalf of parent and student, filed a due process complaint alleging that the District of Columbia Public Schools ("DCPS"), denied the student a Free Appropriate Public Education ("FAPE"), by: (1) failing to provide the student an appropriate educational placement; and (2) failing to develop an appropriate Individualized Education Program (IEP).

The due process hearing convened on January 23, 2009, at 11:00 a.m.; and reconvened on February 2, 2009, at 1:00 p.m..at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

II. JURISDICTION

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

III. DUE PROCESS RIGHTS

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

IV. PROCEDURAL POSTURE

On November 10, 2008, Counsel, on behalf of parent and the student, filed a due process complaint. On November 20, 2008, Respondent filed "DCPS' Response to Parent's Administrative Due Process Complaint Notice". On November 24, 2008, the Hearing Officer issued a Pre-Hearing Notice scheduling the pre-hearing conference for December 2, 2008 at 3:00 p.m.. The pre-hearing conference failed to convene as scheduled, due to DCPS' unavailability.

The hearing was initially scheduled for December 12, 2008 at 3:00 p.m., however, was rescheduled to December 9, 2008, due to the Hearing Officer's unavailability. On December 8, 2008, Petitioner's Counsel filed a Motion for Continuance of the hearing, due to a medical emergency; and the Hearing Officer issued an Interim Order on Continuance rescheduling the hearing for January 12, 2009 at 11:00 a.m.. The due process hearing convened on January 12, 2009, at 11:00 a.m., however, was continued to February 2, 2009, because there was an insufficient amount of time for the parties to present and conclude their case. The due process hearing convened on February 2, 2009, at 1:00 p.m., as scheduled.

On November 20, 2008, DCPS filed "District of Columbia Public School's Response to and Motion to Dismiss Parent's Administrative Due Process Complaint". On January 21, 2009, Petitioner filed "Petitioner's Motion to Strike the District of Columbia Public School's Five Day Disclosures as Being Untimely Filed". The due process hearing convened on January 23, 2009, at 11:00 a.m., as scheduled; however was continued to February 2, 2009, to provide the parties a final opportunity to conclude their case.

V. PRELIMINARY MATTERS

As a preliminary matter, Petitioner invoked the rule on witnesses. At the hearing held on February 2, 2009, Petitioner objected to DCPS' introduction of photographs of the student's classroom, offered by Respondent on rebuttal, and subsequent to the disclosure period. The Hearing Officer sustained Petitioner's objection, and disallowed the photographs into evidence.

Petitioner also objected to Respondent's introduction of the students' December 10, 2008 IEP, developed after the date of the complaint. The Hearing Officer sustained Petitioner's objection, disallowing introduction of the IEP into evidence. Respondent also offered into evidence results of the students' Standard Assessment, Level 5, DC- CAS Alternative Assessment Report. Receiving no objections from Petitioner, the Hearing Officer allowed the report into evidence.

There were no other preliminary matters introduced by the parties, prior to proceeding with a hearing on the merits.

VI. ISSUE(S)

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

(2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to develop an appropriate Individualized Education Program (IEP)?

(2) Whether the student is entitled to compensatory education services due to DCPS' failure to provide the student an appropriate placement; and develop an appropriate IEP?

VII. RELIEF REQUESTED

(1) DCPS shall place and fund the student in one of the following program: the or the In the event he is accepted in another unidentified educational program, the parent will seek placement of the student in that program at the due process hearing;
(2) Within 15 days of placement within the program, DCPS shall convene an IEP meeting to review all evaluations and, determine compensatory education services;
(3) DCPS shall incur the cost of compensatory education services;
(4) DCPS shall provide compensatory education services as approved by the hearing officer;
(5) DCPS shall incur the cost of compensatory education services;
(6) All meetings shall be scheduled through counsel for the parent, Attorney Christopher West, in writing, via facsimile, at 202-742-2097/2098.
(7) DCPS shall pay parent's counsel, reasonable attorneys' fees.

VIII. DISCLOSURES

The Hearing Officer inquired whether disclosures were made by the parties; and whether there were any objections. Receiving no objections, the exhibits identified below were admitted into the record as evidence.

IX. DOCUMENTS ADMITTED INTO EVIDENCE ON BEHALF OF PETITIONER

Petitioner's Exhibits 01 through Petitioner's Exhibit 28; and a witness list dated December 5, 2008.

X. DOCUMENTS ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT

Respondent's Exhibits 01 through Respondent's Exhibits 31; and witness lists dated December 2, 2008, December 15, 2008, January 8, 2009, and January 27, 2009.

XI. STATEMENT OF CASE

1. The student is years of age; and attends The a public school, offering an out of general education, full time special education program for students with severe cognitive limitations and the primary diagnosis of mental retardation.

2. The student is a resident of the District of Columbia; and identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)". The student's disability classification is mental retardation (MR).

3. On April 27, 2006, DCPS developed an IEP for the student, while attending The The IEP classified the student as mentally retarded, and recommended 27.5 hours of specialized instruction, psychological services, and speech/language therapy. The IEP also recommended a Vocational Evaluation.

4. On December 4, 2007, the District of Columbia Public Schools developed an IEP for the student, while attending The The IEP classified the student as mentally retarded, and recommended 27.5 hours of specialized instruction, psychological services, and speech/language therapy.

5. On March 3, 2008, DCPS developed an IEP for the student, while attending The The student's disability classification is identified as mental retardation. The IEP recommends 25.5 hours of specialized instruction, 1 hour psychological services, and 1 hour speech/language therapy, each week; in an out of general education setting

The students' present levels of academic performance reflect the following grade equivalencies: Math Calculations: 3.4, Math Reasoning: 2.0, Reading Comprehension: 1.5, and Basic Reading: K:3.

The MDT determined the student eligible for special education and related services; and requiring specialized instruction in reading, math, cognitive/adaptive and social emotional behavior. The students' IEP includes goals in math, reading, cognitive/adaptive behavior, social emotional behavioral, and communication.

Modifications/accommodations recommended by the MDT include: allowance of "extra think time", to allow the student to follow through with requests. However, the accommodation/modification is not included in the students' IEP.

The modifications/accommodations included in the student's IEP, to address the harmful effects include: the school will provide opportunities for the student to participate in community based activities with exposure to non-disabled peers. Instruction will be designed to access grade level academic standards.

6. On May 15, 2008, the parent through counsel, submitted to DCPS a written request for the student's educational records.

7. On May 20, 2008 DCPS developed a Student Evaluation Plan (SEP), identifying the following areas of concern: cognitive, communication, and adaptive behavior. The SEP recommended the following evaluations, pursuant to parents' request: Comprehensive Psychological with social/emotional and clinical data, Speech and Language Evaluation, and a Vineland Adaptive Behavior Assessment.

8. On June 10, 2008, DCPS completed a "Confidential Report of Psychological Reevaluation". The evaluator determined that the student presents as a student with mental retardation by history and emotional concerns specifically depression and relationship problems. It was recommended that the student remain in his present educational setting as long as his needs can be met. The evaluator also indicated that the assessment instruments used in this evaluation were of a global measure of intelligence that cannot account for all the factors impacting the student's cognitive, adaptive, and academic functioning.

The evaluator also indicated that there are a variety of environmental, temperamental, and cultural factors that may influence the student's performance on an intelligence test. Therefore, the results of any intelligence test must serve as only one of the components used to assess the student's educational needs; and the results of this evaluation should be reviewed in conjunction with other diagnostic data at MDT, IEP, and reevaluation meetings when making decisions regarding the student's individual educational plan.

The evaluator indicated that "John earned a raw score of 27 and a Quotient of 103. Therefore, it is safe to infer, according to xxxs' performance that his non verbal cognitive abilities fall within the average range with an age equivalent of a 15 year, 3 month old student.

The evaluator recommended:

- Continue psychological counseling intervention services to address concerns of unhappiness and relationship.
- Family therapy should continue to address parent child relationship, emotional and behavioral issues in the home.
- Consider psychiatric evaluation if social-emotional interventions provided in the school need community mental health support services for carry over in the home.
- The student's abilities and successes should be nurtured for encouragement and hope for future accomplishments. Good computer skills, video game skills, appears to enjoy the arts but will not let others know.

Summary of WIAT-II Subtest Scores reflect the following grade equivalents: Word reading: K:9, Reading Comprehension: 1st grade, Pseudoword Decoding: PreK5:0, Numerical Operations: grade 1:8, Math Reasoning: 1:9, Spelling: K:9, Listening Comprehension: 7:2, and Oral Expression: 1:2.

9. On June 12, 2008, DCPS issued a "Corrected Copy Confidential Report of Psychological Reevaluation".

10. On August 13, 2008, Petitioners' counsel forwarded a letter to the Special Education Coordinator at requesting that DCPS fund the following independent evaluations: Comprehensive Psychological Evaluation, Vineland Adaptive Behavior and Speech/Language Evaluation.

11. On September 30, 2008 and September 31, 2008, Di Con LLC completed an independent "Confidential Educational, Cognitive, Psychological, & Adaptive Evaluation". The DSM-IV TR Diagnostic Impressions reflect the following:

Axis I:	Learning Disorder NOS Mood Disorder NOS (PROVISIONAL)
Axis II:	None
Axis III:	Seasonal Allergies, Asthma
Axis IV:	Learning problems, limited interaction with peers, adverse family Situations
Axis V:	GAF=75 (current)

The results of the Woodcock Johnson III Tests of Achievement reflect that at the time of the evaluation the student was at a 8.1 grade. Test results indicate grade equivalencies ranging from <K.0-2.2.

The evaluator concluded that the student meets the criteria for an educational handicapping condition under multiple disabled for a specific learning disability and emotionally disturbed (FCI:10).

Recommendations include:

- A speech/language assessment to "rule out" or confirm needs in areas of expressive and receptive language delays.
- The student no longer meets the criteria for an intellectual deficiency, therefore, the MDT should discuss the appropriateness of the students' current academic placement. His current cognitive and adaptive ability suggests the student no longer requires an academic program that focuses on functional academics and life skills, but rather requires a program that teaches specific academic skill and remediates skills in reading, math, and written language.
- A small structured therapeutic and academic environment that provides access to individualized academic support, behavior interventions and supports, and social skills training; and where the student receives remediation in reading, math, and written language.
- The student is at risk for severe psychopathology and therefore, it is imperative that he receive psychological intervention and consistent monitoring.
- Community support.
- Combination of direct instruction (such areas as math, reading, and writing) and student choice learning (self directed learning, creativity and exploration of ideas).

- Continued repetition of directions and task; and placement in the classroom to provide immediate and regular access to the teacher.

- Rewards and verbal praise.

- Instruction in college readiness, and vocational resources that prepare the student for the transition from school to work.

12. On October 1, 2008, Di Con LLC completed an independent Speech and Language Evaluation. The evaluator recommended continued direct speech-language intervention; and reevaluation with formal and informal assessment measures on a triennial basis or upon request to monitor gains in skills and determine present levels of functioning in overall communication skills and determine necessary modification of any services to best address the student's educational needs.

13. On October 10, 2008, the DCPS School Certified Psychologist forwarded a letter to Petitioner's counsel indicating that subsequent to a discussion with the independent Psychologist, she determined an error in the June 12, 2008 Psychological Evaluation, and in fact the student had a raw score of 16 which converted to a Quotient of 83.

The evaluator explained that according to the Examiner's Manual of the TONI-3 Table 4.2 on page 61, Quotients ranging from 80-89 are described as below average, while quotients of 90-110 are described as average. Therefore, the students' Quotient of 83 indicates that his nonverbal cognitive abilities are below average.

14. On October 16, 2008, Petitioner's counsel forwarded a letter to the Special Education Coordinator at The with the independent evaluations; and request for an IEP team meeting to review the evaluations. The letter also apprised DCPS that it intended to seek a change in placement to a learning disabled program.

15. On November 7, 2008, the DCPS Psychologist completed "Addendum Review of Independent Assessment", which is an addendum to the Psychological Evaluation previously prepared by the Psychologist. The addendum provides that based on evaluation test results "it is evident that xxx has a history of and still fits the criteria for intellectual and adaptive functioning levels which fall within the range of mental retardation.

The DCPS Psychologist disagrees with the independent Psychologists' opinion that "although xxx demonstrates significant academic deficits, his current cognitive functioning and adaptive ability does not provides sufficient evidence of a disability classification of Mild Mental Retardation at this time". The DCPS Psychologist also disagrees with the following recommendation indicated by the independent Psychologist':

> "xxx no longer meets the criteria for an intellectual deficiency; therefore the MDT should meet to discuss the appropriateness of his current academic placement. His current cognitive and adaptive ability suggest that he no longer requires an academic program that focuses on functional academics and life skills, but rather requires a program that

teaches specific academic skill and remediate skills in reading, math, and written language".

The DCPS Psychologist concluded that although the student no longer requires a functional academic program, he continues to require a small structured therapeutic and academic environment that provides access to individualized academic support, behavior interventions and supports, and social skills training. Xxx will do best in an environment that provides remediation in reading, math, and written language.

The Psychologist further concluded that xxx requires a well-designed, purposeful individualized educational plan where he will receive the necessary related services such as psychological/social emotional behavior supports and speech and language therapies. Xxx will do best in an environment that provides repletion, rehearsal, modeling, hands-on-activities in order to make progress in reading, math, and written language.

16. On November 10, 2008, Counsel, on behalf of parent and student, filed a due process complaint alleging that the District of Columbia Public Schools ("DCPS"), denied the student a Free Appropriate Public Education ("FAPE"), by: (1) failing to provide the student an appropriate educational placement; and (2) failing to develop an appropriate Individualized Education Program (IEP).

17. On December 4, 2008, accepted the student as an appropriate candidate for enrollment in the schools' learning disabled program, at for the 2008/09 school years.

18. On December 10, 2008, DCPS convened an MDT/IEP review meeting. The purpose of the meeting was to review the following independent evaluations: Review of (DCPS) Independent Assessment performed by Crystal Dorn, School Psychologist, dated October 27, 2008 for an Educational, Cognitive, Psychological and Adaptive Evaluation dated September 30, 2008 and September 31, 2008 and the DCPS review of November 6, 2008 performed by Adrienne Dawson, Speech and Language Pathologist, for a Speech and Language Evaluation dated October 1, 2008.

The MDT meeting notes also indicate that DCPS will review an evaluation by DCPS-Addendum-Review of Independent Assessment and the Confidential Report of Psychological Reevaluation. The MDT notes indicate "DCPS will confirm xxx's disability classification and will also discuss placement. In addition, DCPS will review the IEP for determination of revision as per the results of this evaluation."

The MDT agreed to continue the goals and objectives from the student's March 3, 2008 IEP, and the student's placement at

XII. WITNESSES

Petitioner's Witnesses

Parent
Student
Psychologist
Education Advocate
Admissions Director,

Respondent's Witnesses

Student's Special Education Teacher
Occupational Therapist
School Psychologist
Special Education Coordinator

PETITIONERS' WITNESS TESTIMONY

Di Con LLC, Psychologist

The Psychologist testified that she utilized a variety of batteries, in evaluating the student, including: Record review, Standford Binet 5th Edition (SBV), Student Clinical Interview, Parent Interview, Teacher Interview, BASC-2 Self Report Rating Scales Adolescent, BASC-2 Parent Report Rating Scales Adolescent, Adaptive Behavior Assessment System-II Parent Form, Adaptive Behavior Assessment System-II Teacher Form, Classroom Observations, Kinetic Family Projective Drawings, Social Skills Rating Scale (SSRS)-Self Report and Teacher, and Woodcock Johnson Test of Achievement III-Form B.

The Psychologist testified that according to the Standard Diagnostics Statistical Manual and IDEIA, the student is functioning in the significantly sub-average range. The Psychologist also noted inconsistencies in the diagnosis rendered by the DCPS Psychologist. The Psychologist testified that according to the June 10, 2008 Psychological Evaluation the student earned a raw score of 27 and a Quotient of 103, which is inconsistent with the finding that the students' non verbal cognitive abilities fall within the average ability range. The Psychologist testified further that a standard score of 103 falls within the mild mentally retarded range; and not the average ability range, as represented by the DCPS Psychologist.

The Psychologist testified that the instruments utilized by DCPS were not comprehensive; and that cognitive assessments were utilized as opposed to the necessary comprehensive battery to review all areas. The Psychologist testified that although DCPS subsequently corrected its report to reflect an accurate score in this category, the score is so high that it should have prompted DCPS to conduct additional assessments, to update the students' level of functioning.

The Psychologist testified that she observed the student on five occasions, twice at school, one on one, and during two testing sessions. The Psychologist testified that the student has a more of a slow learner profile, with an IQ between 71 and 85; however not mentally retarded. A slow learner profile requires language response intervention, have cognitive limitations, however, with certain supports can learn; and have average levels of functioning. The Psychologist testified that the student has a specific learning disability which is impacted by his difficulty with mood; he demonstrates a particular verbal weakness; and the pattern of scoring fail to equate to mental retardation.

The Psychologist testified that during the classroom observation, the student presented with instability of mood, withdrawn, failed to interact well; however able to complete all work independently. During the second classroom observation on the next day, the student was happy, engaged with others, inquisitive, worked independent of teacher assistance. The class focused more on functional academic skills, and not much content specific information in any classes. The mentally retarded students focused on skills regarding health and safety, and less focus on academics.

The slow learner profile demonstrates reading ability, has low cognitive functioning, responds to academic remediation; and not cognitively efficient, however, has academic strengths. The Psychologist testified that the student would benefit from an academically enriched environment; with remediation in reading, writing, math; and mood stabilization which impacts his overall functioning. The Psychologist testified further that the student would benefit from a curricular program with focus on the students' academic and functional needs; in a small structured environment.

The Psychologist testified that in observing the students at the students have more profound mental retardation issues and the student would benefit from a different environment; and has no opportunity to work on those skills at the school. The student requires an environment with academic enrichment and functional life skills; and should he remain in the environment at he will make small gains, however, is flatlining, and will begin to look the same as other students.

The Psychologist testified that the indicates that the student is a student who makes gains, however, the students' goals in his IEPs remained very similar from when he first started school, in 2005; although the students' performance is beyond other students in his class. During cross examination, the Psychologist testified that the student qualifies as multiple disabled, with a mood disorder and specific learning disability; and a specific learning disability, because of deficits in specific cognitive processing which leads to a learning disorder.

The Psychologist testified that the students' full scale IQ in general is in the borderline range; and no IQ test can guarantee scoring, therefore, must consider the confidence interval. The Psychologist also testified that reviewing an IQ score fail to establish a students' disability; and that FSIQ of 75 is not inconsistent with a disability classification of mental retardation.

The Psychologist also testified that given the student's mood fluctuation, his performance varies, however, he can work independent of teacher support; and works well beyond other student's. The Psychologist testified that the student has flatlined and will continue to do so, should he remain at The Psychologist concluded by testifying that a FSIQ of 75 is not inconsistent with a disability classification of mental retardation.

Education Advocate

The Education Advocate testified that she conducted a classroom observation of the student on January 21, 2009, for approximately a one hour period; and at the December 10, 2008 MDT meeting, the team determined that the student remains eligible for special education services as a mentally retarded student, and remain at The advocate testified that she failed to agree with DCPS' recommendation; and the independent evaluation indicates that the student was misdiagnosed and is not mentally retarded, and requests a new placement for students with a learning disability.

The advocate also testified that she agrees with the findings in the independent Psychological Evaluation, and recommended to the MDT the students' placement at the or because the student would benefit more if with peers with same level of academic functioning. The advocate testified that she is not convinced that the student is mentally retarded because prior evaluations include such a finding.

The advocate testified that the students' current classroom has approximately 8 students, one Teacher, and one teacher's Aide. The advocate also testified that during the observation, the student engaged in work, sat with other students, in a chair that is matted, however, unclean. There were occasions when other students walked around inappropriately, there is a high noise levels from students and the teacher had to redirect students.

The advocate testified that the student responded to most questions, failed to require a lot of prompts; answers were muted and spoken softly. The advocate testified that the student is more socially advanced than other students; who require more self help skills and two of the students actually slept during class. The advocate testified that fail to provide an adequate program for the student; who requires exposure to higher academics.

The advocate testified further that a report from Children's Hospital identified the student as mentally retarded; and determinations regarding a students' disability classification is made by the MDT which utilizes available records, teacher reports, Psychological evaluations, and input from service providers.

Parent

Parent testified that she has two other children attending the diagnosed with Autism, Santose Disorder, and mild mental retardation. Parent testified that the independent evaluation diagnosed the student with a learning disability; although DCPS diagnosed the student as mentally retarded. Parent testified further that the student is functioning higher than her other mentally retarded child.

Parent testified that she oppose the student remaining at the because he requires academics and socialization; and she prefers the because of the atmosphere, class sizes. Parent testified that the student also visited the and was pleased with the school because of the atmosphere, size of class, and all the students performing their work.

During cross-examination parent testified that the student attended the National Children's Center as a baby because of developmental delays; and testing completed at Childrens Hospital diagnosed the student with mental retardation, when he was 8 or 9 years of age. Parent testified that the student was small when he first began attending however, she feels the school can no longer meet the students' needs.

Admissions Director,

The Admissions Director testified that is a school for the learning disabled, multiple disabled, mentally retarded, and other health impaired students. The school focuses on academics, behavior modification, and utilizes a point system to manage student behavior. The school is staffed with teachers certified in special education, three Speech and Language Pathologists on staff, four Clinical Licensed Social Workers, there is a 3 to 1 student to teacher ratio, and a total of 51 students at the school.

The Director testified that he met student on December 4, 2008 and provided parent and student a tour of the school; reviewed student's March 3, 2008 IEP, and determined that the school can implement the student's IEP. The Director also testified that the student would be placed in School for learning disabled students.

The Director testified that the student's IEP classified him as mentally retarded, and the school can provide the student a small classroom, of 8-10 students, can address academic deficits, and the student was accepted to the school, and can be placed immediately. The Director also testified that should the student's disability classification change from mentally retarded to learning disabled, he would remain in the same class.

The Director also testified that offers two (2) schools, one for emotionally disturbed students, and one for learning disabled students; and the ED students with serious emotional disturbance issues are located in Southwest, D.C.. The Director testified that the classroom identified for the student has 9 students, coed, and the students primary disability is learning disabled, and more academic related. The Director also testified that the class will include one student with a disability classification of mentally retarded.

Student

The student testified the he enjoys math; and oppose bullies, harassment from children, abuse, and the is not quiet. The student also testified that he visited the and he likes the school, there are no bullies, and it is quiet, and he would like to attend the school.

The student testified that at his classroom work consists of math, and puzzles; and the work is easy to solve, especially the puzzles. The student also testified that his classes include Art and reading, which he does well.

RESPONDENT'S WITNESS TESTIMONY

Special Education Teacher

The students' Special Education Teacher testified that she is a certified teacher, has been teaching for 15 years; been at for 3 years; and always had at least a couple of mentally retarded students in her class. The teacher also testified that all the students at are mentally retarded.

The teacher testified that she has been the student's teacher since August, 2008, there are 8 students in the class, 1 Teacher and 2 full-time Aides for the class. The teacher testified that the student is in her class all day, instruction is based on the D.C. Standards, and the students are working on 8th grade standards. Class instruction include: math, language arts, science, energy, and IEP objectives.

The teacher testified that the student has not mastered his IEP objectives by December, 2008, because he has a year to master them. Socially, the student was initially quiet and getting along with other students except for one incident of bullying from another student. The class includes three 9th grade students, five 8th grade students-one of 2 lower functioning. The teacher testified that the student performs higher than other students in math and works harder at it; and is very gifted with drawing; and not much time is spent on functioning life skills.

The teacher testified that is may appear that the student has flatlined, however his absenteeism impacts his learning, because of his poor retention, he has to revisit material already learned, each time he returns to school. The teacher testified that she fail to recognize the student as learning disabled.

The teacher also testified that the students arrive to school between 7-7:30 a.m., the Aide transitions the students to breakfast, students return at 8:00 a.m., and school opens with review of the daily plan, and students sharing. Thereafter, the students have a morning writing assignment regarding general topics, and language/arts which includes English and reading. The student's receive group instruction, and multiple mean words; and participate in group activities and individual activities focusing on their individual skills. At 11:00 a.m. the students recess for lunch, and return at approximately 12:15 p.m., receiving quiet time. AT 12:30 p.m., the students engage in math, and science on alternate days, and U.S. History. Students are dismissed at 2:00 p.m..

The teacher testified that on Tuesday mornings the students visit the Fillmore Apartments where they participate in music, dance, art class, drawing, painting, drama, arts and crafts; and on Fridays they participate in the special Olympics and bowling.

During cross-examination the teacher testified that she was absent from school from October 21, 2008 until the second week in November, 2008; and 1.5 weeks in December, 2008. The teacher also testified that there is one student in the class who requires assistance with toileting. The teacher testified that the students in the class have similar academic levels; and the eighth graders range from the mid 1st grade to the 3rd grade, that 8th grade standards are broken down so the students can access the general curriculum, as other 8th graders, except they perform on varying levels. The teacher testified that the student works independently in Math, for the most part; and has difficulty with retention because of poor attendance, so he is always starting over; and although making steady progress, information must be consistently repeated.

The teacher testified that during the classroom observation performed by the independent Psychologist, the student had merely began in her class; however, he receives intensive academic instruction, when he attends school.

Special Education Coordinator (SEC),

The SEC testified that she has served at for 13 years, and has 34 years experience in special education. The SEC qualified as an expert in mental retardation.

The SEC testified that regarding her participation on the MDT that determined the students' disability classification of mentally retarded; and the decision was based on existing data dating back to age 3, and an assessment completed by Georgetown University.

The SEC also testified that the MR disability classification rendered by the MDT on April 27, 2006, March 7, 2007, December 4, 2007, and March 3, 2008, were based on the results of the Woodcock Johnson Assessment and test results.

The SEC testified that learning disabled students have at least average intelligence, and could not be learning disabled with an IQ of 75; learning disabled students do not have deficits in adaptive functioning; and the DSM-IV is not utilized to determine disabilities of students because it is a clinical diagnosis; and cannot conclude from a DSM-IV a diagnosis that the student is learning disabled.

The SEC testified that mental retardation is genetic; and one must consider the family history, and all of the students' siblings are diagnosed with mental retardation; learning disabled students do not have delays; however may have deficits; and the team considered everything on the student in deciding his disability classification. The SEC also testified that the student receives assistance with reading once a week from a Reading Teacher. The SEC testified that the student is exposed to higher functioning students in his class, works with other students in the reading program; and receives speech and language services.

The SEC testified that the last two (2) Summers she served as a Case Manager and was assigned to MDT meetings at the and it is not an appropriate placement for the student. The SEC also testified that the student has a difficult time with transition from one setting to another.

During cross-examination the SEC testified that learning disabled students do not have cognitive ability in the very low range; and the students' general intellectual ability is scored at a 62.

The SEC testified that prior to attending the student attended a school offering a self contained MR class, and it was unsuccessful; and parent has rejected prior MDT recommendations for an alternate placement for the student, offered in 2005 and 2006.

On redirect the SEC testified that to be eligible as a student with a learning disability, there has to be a significantly sub-average intellectual functioning.

DCPS School Psychologist

The Psychologist testified that she has known the student since November, 2005, when he initially enrolled at The DCPS Psychologist testified regarding completion of the June 12, 2008 "Confidential Report of Psychological Reevaluation".

The Psychologist testified that the students' earned a raw score of 27 and a Quotient of 103. Therefore, it was safe to infer that according to the student's performance that his non-verbal cognitive abilities fall within the average range with an age equivalent of a 15 year, 3 month old student. The DCPS Psychologist also testified that June 12, 2008 Psychological Reevaluation was amended the reflect that the students' cognitive abilities are below average, his disability classification of MR is based on the full report, and results of all evaluations which indicate a disability classification of MR; and since age 2 the student attended special needs day care.

The Psychologist testified that the initial score of 103 indicated in her initial evaluation was incorrect; and the student actually scored an 83, placing the student in the below average range, instead of the average range. The Psychologist testified that she completed another intelligence report, administered 2 intelligence scales, social emotional scale, achievement scale, and reasoning cognition assessment; and the student has intellectual and adaptive functioning deficits, therefore, fail to qualify as learning disabled.

The Psychologist testified further than learning disabled students have more average intellectual functioning and fail to perform on grade level in certain areas, not able to read, however, test scores demonstrate that the student can read, and no adaptive scores in the mental retardation range. The Psychologist concluded by testifying that a student cannot have a disability classification of MR and LD.

XIII. DISCUSSION AND CONCLUSIONS OF LAW

ISSUE 1

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

Petitioner represents that under the IDEA, "all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs". 20 U.S.C. Section 1400(d)(1)(A).

Petitioner further represents that the student is years of age and has attended the School since April, 2005. "The students' most current IEP, dated March 3, 2008 provides that the students' disability classification is mental retardation; and recommends 27.5 hours of services in specialized instruction, counseling, and speech/language therapy. The parent obtained an independent evaluation that noted the student has significant academic deficits, however, his current cognitive functioning and adaptive ability failed to meet the criteria for mental retardation. xxx's current educational placement, is an out of general education program that addresses students diagnosed with mental retardation. As such their educational programming is limited."

"In addition, the independent recommended xxx should be placed in a program that focuses on academic skills and remediates reading, math, and written language. Xxx's current placement limits his cognitive and achievement abilities and does not appropriately address his identified needs. It appears that District of Columbia Public Schools identified xxx's special education disability and limited his needs to that of his siblings. Furthermore, xxx's current placement is limited because it is based on the needs of his peers, who do not require the same educational programming as xxx."

"xxx has remained in an educational program, since 1995, that has limited and stunted his academic growth. In denial of FAPE, the public school system has yet to provide xxx an educational placement that addresses his special education disability and recommended intellectual needs".

DCPS represents that the students' program and location of services are consistent with the student's disability classification of mental retardation. "The independent evaluation asserts that the student has made academic progress at His progress has not been limited. The program focuses on the development of academic skills and not just life skills.

DCPS also represents that it attempted to convene two MDT/IEP meetings to consider the student for a less restrictive environment. "However, the parent was opposed to the proposed alternative placement and asked that the student remain at She told school staff, "I don't want him to go any other place."

DISPOSITION

IDEA, 34 C.F.R. §300.116 provides that in determining the educational placement of a 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;
(3) is as close as possible to the child's home.

First, the record reflects that on ***March 3, 2008***, a Multidisciplinary Development Team (MDT) meeting convened to conduct an annual review of the student's IEP; and discuss the students' progress. ***Participants included***: parent, Special Education Teacher, the Special Education Coordinator, Principal, Speech and Language Pathologist, and Psychologist.

The team included the Principal, a DCPS representative qualified to provide, or supervise the provision of specially designed instruction to meet the unique needs of the student; and knowledgeable about the availability of resources of the public agency.

However, IDEA 34 C.F.R. §300.116(a)(1) also requires among others, that the placement decision is made by a group of individuals qualified to discuss placement options. Although the team determined that the student's placement would remain at the team failed to discuss; and include on the team a Placement Specialist or other individual qualified to discuss placement options for the student; in violation of subparagraph §300.116(a)(1).

The Hearing Officer finds that the IEP team failed to comply with IDEA, 34 C.F.R. §300.321(a), which requires that the public agency ensure that the IEP team for each child with a disability include certain qualified individuals; therefore, DCPS failed to ensure that the placement decision was made in accordance with IDEA, 34 C.F.R. §300.116 (a)(1); and §300.321.

Second, IDEA, 34 C.F.R. §300.116, subparagraph (a)(2) requires that the placement decision is made in conformity with the Least Restrictive Environment (LRE) provisions of this subpart, including §300.114 through §300.118.

The LRE requirement reflects the IDEAs' 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, IDEAs' 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)*.

According to the student's March 3, 2008, an out of general education setting, and small structured environment to accommodate the students disabilities, is recommended.
School provides the student an out of general education setting; and small structured environment. However, the MDT meeting notes of November 4, 2005, reflect that the MDT determined that available data supported the students' placement in an alternative setting, indicating that the student would benefit from an environment in a neighborhood/regular school in a self-contained MR classroom. The MDT meeting notes also reflect that the MDT proposed the students placement at as "more appropriate" placement; however such proposal was rejected by parent. As a result, since 2005, the MDT maintained the students' placement at School.

The SEC offered conflicting testimony at the hearing. Initially, the SEC testified that on two occasions, beginning in 2005, the MDT proposed an alternative placement for the student, which was rejected by parent. Thereafter, the SEC testified that is an appropriate placement for the student, and the student receives educational benefit at the school; which is inconsistent with the November 4, 2005 MDT meeting notes.

The Hearing Officer finds that determination in 2005 that the student would benefit from an alternative placement, is consistent with the findings and recommendations included in the September 31, 2008 independent Psychological Evaluation which recommends an alternative placement for the student, albeit for varying reasons. The independent Psychological Evaluation recommends an educational placement that teaches specific academic skills in reading, math, and written language, and not a program that focuses on functional academics and life skills, as currently provided the student at the School.

The student also requires a small structured therapeutic and academic environment that provides access to individualized academic support, behavior interventions, and supports, and social skills training.

The Hearing Officer finds that according to the independent Psychological Evaluation test results, the student is diagnosed with a specific learning disability in reading and mathematics, and an emotional disability. In addition, the students' cognitive and adaptive ability suggest that he no longer requires an academic program that focuses on functional academics and life skills, which he currently receives at the . The student requires a program that teaches specific academic skills; and remediates skills in reading, math, and written language.

The Hearing Officer concludes that is not the least restrictive environment for the student, and is an inappropriate placement. DCPS' decision in 2005 to disregard available data supporting an alternative placement, and maintaining the students' placement at the was inappropriate; and not made in conformity with the Least Restrictive Environment (LRE) requirements of IDEA, 34 C.F.R. §300.116, subparagraph (a)(2).

Third, IDEA also provides that in selecting the LRE, consideration is given to any potential harmful effects on the child or on the quality of services that he or she needs. *See, 34 C.F.R.§300.116.*

The Hearing Officer finds that DCPS failed to consider the potential harmful effects on the student and quality of services the student requires, by maintaining the students placement at although aware that available data supported the students placement in a different educational environment where he could receive educational benefit; which he failed to receive at the

The record reflects that in 2005, the MDT discussed with parent, at length, the least restrictive environment for the student, and determined that available data supported a finding that the student would benefit from an environment in a neighborhood/regular school in a self contained MR classroom. In addition, the MDT proposed as an alternative and "a more appropriate placement" for the student. However, parent rejected the placement because she wanted to the student to remain in the same school as his sibling. Although DCPS determined that was not the LRE for the student, and the student would benefit from a more appropriate placement, since 2005, the student remained at an inappropriate placement.

The Hearing Officer finds that based on the evidence presented, DCPS' decision to maintain the students' placement at the since 2005; was not made in accordance with the ***Least Restrictive Environment (LRE)*** requirements of IDEA; or in the best interests of the student. is not the least restrictive environment for the student; and the nature of the student's disability is such that placement in a school with students with severe mental disabilities, denies the student access to the general curriculum, and educational benefit. The student requires an academic program that teaches specific academic skill and remediates skills in reading, math, and written language.

Fourth, IDEA requires that 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.

The Hearing Officer finds that although DCPS convened annually to review the students; IEP, it failed to determine the students' placement annually, as require, and as contemplated by IDEA. Maintaining the students' placement at because the parent opposed an alternate appropriate placement for the student, defies IDEA.

IDEA contemplates that during an annual review of a student's IEP, the IEP team will review the student's IEP, academic progress, progress in his current placement, evaluations, academic history, input from parent and others, and determine whether the placement is appropriate to meet the student's academic, developmental, and functional needs. If it is determined that the placement is inappropriate, IDEA expects that the team will revise the student's IEP, as appropriate, to provide for an appropriate placement, ensuring that the students' IEP, including placement, is reasonably calculated to provide the student "some educational benefit"; the student's needs can be met in the placement, his IEP implemented, and he can receive educational benefit.

Fifth, IDEA also requires that the student's placement is based on his IEP. The record reflects that the student's March 3, 2008 IEP recommends the student's placement in an out of general education small structured environment, to address his disabilities. school can provide the student a small environment, however, is unable to provide the student the structured environment he requires, and is necessary for him to receive educational benefit. Therefore, the students' IEP is not reasonably calculated to provide the student educational benefit; and School is not an appropriate placement.

In addition, on September 31, 2008 an independent Comprehensive Psychological Evaluation diagnosed the student with a specific learning disability in reading and mathematics, and an emotional disability. However, at the December 10, 2008 MDT/IEP team meeting, the MDT disregarded the findings and recommendations in the independent evaluation; and continued the students' placement at School, a school for students with severe mental retardation.

Finally, the court determined that the students' March 3, 2008 IEP is inappropriate, therefore, the students' placement which is based on the IEP, is also inappropriate.

Sixth, if the student received any value from the education afforded by DCPS, even with the use of appropriate accommodations/modifications, supplementary aides and services, it was trivial and not sufficient; and the student is likely to continue to regress, and not progress, academically, emotionally, and behaviorally.

In addition, the educational benefits available to the student in a classroom with mentally retarded students, although diagnosed with a specific learning disability and emotional disability, as compared to the benefits provided in an academic program for learning disabled and emotionally disturbed students, that teaches specific academic skills and remediates skills in

reading, math, and written language, are no more than de minimis, and fail to satisfy *Rowley's* "some educational benefit" standard.

Based on the aforementioned, 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, in violation of IDEA, 34 C.F.R. §300.116, *et seq.*, resulting in denial of a FAPE.

The statute of limitations precludes consideration of violations occurring more than two (2) years prior to filing of the complaint, unless it is demonstrated that Petitioner was unaware of the violation prior to such time. Absent such a showing, although the evidence supports a finding that DCPS failed to provide the student an appropriate placement since at least November 4, 2005, the court is limited to finding that DCPS failed to provide the student an appropriate placement from November 10, 2006 through November 10, 2008.

School

Petitioner proposes school as an appropriate alternative placement for the student. DCPS represents that is not an appropriate placement for the student, and absent a finding that DCPS denied the student a FAPE; a private school placement is not warranted.

According to IDEA, 34 C.F.R. §300.148, an LEA is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. The Hearing Officer finds that DCPS failed to provide the student an appropriate placement, therefore, the court must identify an appropriate placement for the student.

The Admissions Director at testified that is a school for the learning disabled, multiple disabled, mentally retarded, and other health impaired students. The Director also testified that offers two (2) schools, one for emotionally disturbed students, and one for learning disabled students; and the ED students with serious emotional disturbance issues are located at a different facility, in Southwest, Washington, D.C.. According to the Admissions Director, the school focuses on academics, behavior modification, and utilizes a point system to manage student behavior. The school is staffed with teachers certified in special education, three Speech and Language Pathologists on staff, four Clinical Licensed Social Workers, there is a 3 to 1 student to teacher ratio, and a total of 51 students at the school.

The Director testified that he met student on December 4, 2008 and provided parent and student a tour of the school; reviewed student's March 3, 2008 IEP, and determined that the school can implement the student's IEP. The Director also testified that the student would be placed in School for learning disabled students.

The Director testified that the student's IEP classified him as mentally retarded, and the school can provide the student a small classroom, of 8-10 students, can address academic deficits, and the student was accepted to the school, and can be placed immediately. The Director also testified that should the student's disability classification change from mentally retarded to learning disabled, he would remain in the same class.

The Director testified that the classroom identified for the student has 9 students, coed, and the student's primary disability is learning disabled, and more academic related. The Director also testified that the class will include one student with a disability classification of mentally retarded.

The Hearing Officer finds that the evidence is sufficient to support a finding that is an appropriate placement for the student; and the student can receive educational benefit.

ISSUE 2

Whether DCPS denied the student a free appropriate public education, by failing to develop an appropriate IEP?

Petitioner represents that under IDEA, "all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs". 20 U.S.C. Section 1400(d)(1)(A).

Petitioner further represents that the student is years of age and has attended the since April, 2005. The most current IEP, dated March 3, 2008, classified the student mentally retarded; and recommended 27.5 hours of services in specialized instruction, counseling, and speech/language therapy.

"The District of Columbia Public Schools conducted a Psychological Evaluation, dated June 12, 2008. This evaluation stated xxx tested on the kindergarten level for word reading; the 1st grade level for reading comprehension; the 1.9 grade level for math; and the 7.2 grade level for listening comprehension. The assessment consisted of a TONI-3 screener which estimated xxx's non-verbal cognitive functioning is estimated for a child 15 years old."

"The parent obtained an independent Psychological Evaluation, dated September 31, 2008, that noted xxx obtained a FSIQ of 75. Also, the assessment found that xxx's current cognitive functioning and adaptive ability did not meet the criteria for mild mental retardation. The assessment also detailed recommendations to address xxx's low levels of academic functioning."

"To date, the IEP remains the same and was developed to address a student diagnosed mental retardation. Specifically, the goals/objectives were not developed for a student with an ability to obtain academic skills."

"In denial of FAPE, DCPS has yet to develop an IEP reflecting the recommendations of the completed assessments and reflecting xxx's current levels of functioning and special education needs."

Petitioner concludes that the student is a student with a learning disability and requires a program for a student with a learning disability and not a program for students with severe mental retardation. Petitioner also concludes that what has been lacking in the student's education profile is a comprehensive assessment detailing his current levels of academic functioning and achievement.

Petitioner also concludes that based on the testimony of the parents' Psychologist, the student is progressing in the special education services, however, is not benefitting from his IEPs because it does not contain goals on the level of his cognitive abilities.

DCPS represents that DCPS did not fail to provide an appropriate educational program for the student. "The results of the independent evaluation dated September 13, 2008, presents a DSM-IV TR clinical diagnosis and is not identified by IDEA. The evaluation reports that the student's current cognitive functioning and adaptive ability does not provide sufficient evidence of a disability classification of mental retardation. This statement is considered inaccurate based on factual evidence of the student's past and present evaluations inclusive of the independent evaluation referenced above, the student's developmental history, and the definition and classification of mental retardation."

DCPS further represents that "disability classifications are to be determined by a multidisciplinary team using all evaluative data. The reauthorization of IDEA disallows LEAs from determining disability classifications based on a single evaluation. The above-referenced evaluation supports the student's classification of mental retardation. The student's developmental history and adaptive behavior reporting by the parent clearly supports a diagnosis of mental retardation. Additionally, the student's performance on the cognitive assessment performed by DCPS on October 27, 2008, the Reynolds Intelligence Assessment Scale, and Vineland II Adaptive Behavior Composite both indicate that the student has a history of and still fits the criteria for intellectual and adaptive functioning levels, which fall within the range of mental retardation."

According to DCPS, "the student's program and location of services are consistent with the student's disability classification of mental retardation. The independent evaluation asserts that the student has made academic progress at His progress has not been limited. The program focuses on the development of academic skills and not just life skills. The current IEP contains academic goals and objectives identified specifically for the student, not his siblings or classmates. These goals and objectives are based on the academic standards of DCPS and No Child Left Behind. In addition, the student's receives reading instruction from a reading teacher."

"DCPS has attempted to convene two MDT/IEP meetings to consider the student for a less restrictive environment. However, the parent was opposed to the proposed alternative placement and asked that the student remain at She told school staff, "I don't want him to go any other place." At the age of four, the student was diagnosed by Georgetown University Medical Center with developmental delays and there is a family history of mental retardation. Attendance problems (over 50 days absence in 2006) and other factors warranting involvement with Child Protective Services may have impacted the student's academic progress early on."

DCPS concludes by representing that it presented extensive testimony to support its determination that xxx is MR, that his IEP is being implemented at and that the student is making academic progress.

DCPS also concludes that the SEC testified that all of the students' teachers report to her with respect to implementation of the student's IEP, as a result she has first- hand knowledge that the student's IEP is being implemented. DCPS also represents that the students' academic progress was demonstrated by his progress reports and his scores in the DC CAS exam; and the fact that his last two IEPs failed to reflect significant changes to his goals and objectives does not show that he has not made progress, but is rather due to the fact that an IEP is supposed to last for one full year, however xxx's IEP was re-written twice this year, as a result of parent's request.

DCPS represents that according to the DCPS Psychologist, the student is not a slow learner as opined by the independent Psychologist.

DISPOSITION

Appropriate Individualized Education Program (IEP)

The FAPE requirement under IDEA, addresses substantive and procedural violations, which may result in denial of a FAPE. When there is a challenge regarding the appropriateness of a program or placement offered to a disabled child by a school district under the IDEA, a reviewing court must undertake a two-fold inquiry: (1) procedural compliance (Procedural FAPE); and (2) conferral of some educational benefit (Substantive FAPE).

Procedural FAPE (Compliance with Procedural Requirements of IDEA)

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

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

First, according to IDEA, 34 C.F.R. §300.324, each public agency must ensure that, subject to paragraphs (b) (2) and (b) (3) of this section, the IEP Team—

(i) Reviews the child's IEP ***periodically***, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) Revises the IEP, as appropriate, to address—
(A) Any lack of expected progress toward the annual goals, and in the general education curriculum, if appropriate;
(B) The results of any reevaluation conducted under §300.303;
(C) Information about the child provided to, or by, the parents, as described under §300.305(a)(2);
(D) The child's anticipated needs; or
(E) Other matters.

The Hearing Officer finds that DCPS failed to comply with IDEA, Section 300.324 (b); which requires that the IEP team ***reviews*** the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; ***and revises*** the IEP, as appropriate, to address any lack of expected progress toward the annual goals, and in the general education curriculum, if appropriate; the results of any reevaluation conducted under Section 300.303; information about the child provided to, or by, the parents, such as the independent Psychological Evaluation; the child's anticipated needs; and other matters.

The record reflects that although the MDT/IEP team convened periodically to review the student's IEP, the IEP teams failed to review the student's IEPs as intended and contemplated by IDEA. For instance, the IEPs developed for the student from 2005 through 2008, were developed without the benefit of, or without adequately addressing and considering the results of comprehensive evaluations. In addition, the MDT meeting notes indicate that documents were reviewed, and served as the basis for the teams' decisions regarding the students' IEP and placement, however, there is no evidence of the documents reviewed, or the teams' discussion regarding the documents, or evaluation results, which served as the basis for the teams' decisions regarding the students' IEPs and placement.

The record also reflects that although the MDT convened on December 10, 2008, to review the independent evaluations, according to the MDT meeting notes, the team only reviewed the evaluation completed by the DCPS Psychologist, the DCPS Psychologists' review of the independent Psychological Evaluation; and the October 1, 2008 Speech and Language Evaluation. The team failed to review and adequately consider the findings and recommendations included in the September 31, 2008 independent Educational, Cognitive, Psychological, & Adaptive Evaluation; and relied solely upon the findings and recommendations included in the evaluation completed by the DCPS Psychologist; and the review of the independent evaluation, as provided by the DCPS Psychologist.

In addition, it appears that prior to convening the meeting, the MDT had decided that it would adopt the findings and recommendations provided by the DCPS Psychologist; confirm the independent evaluation that test results indicate that the student presents with a learning and emotional disability. This is supported by the fact that the MDT meeting notes provide that "DCPS will ***confirm*** xxx's disability classification, and will also discuss placement."

The Hearing Officer also finds that although the student demonstrated satisfactory academic progress towards his IEP goals, each year the team developed the students' IEPs without the benefit of comprehensive evaluations, which were instrumental in determining the students' present levels of performance; a means of measuring the students' progress towards achieving the goals and objectives in his IEP; and whether the goals and objectives were specifically designed to provide the student educational benefit.

The MDT also failed to determine whether the annual goals in the IEPs were specifically designed to address areas of weakness (i.e. mathematics, academic training, functional academics, mood disorder, community use, and self care).

In addition, during the annual review of the students' IEPs, the MDT failed to determine whether the goals and objectives required updating or revision to provide more advanced academics; or address the students' placement.

IDEA also sets forth certain procedures in determining whether a student presents with a Specific Learning Disability (SLD), as indicated in the September 31, 2008 independent Psychological Evaluation; which the MDT failed to consider on December 10, 2008, when it decided that the student failed to present with a SLD and confirmed that the student presents with a disability of mental retardation.

Finally, the team failed to consider other matters, such as, whether the students' poor attendance was a manifestation of his disability; or attributed to an inappropriate program, and/or placement.

Second, IDEA, 34 C.F.R. §300.303 (b)(2) provides that a reevaluation conducted under paragraph (a) of this section must occur at least once every three (3) years, unless the parent and the public agency agree that a reevaluation is unnecessary. Reevaluations are necessary to measure the students' progress towards meeting the goals and objectives in his IEP.

The record reflects that a Psychological Evaluation was completed on November 24, 2000; a Psycho Educational Reevaluation Report completed on September 24, 2004; a Psychological Reevaluation completed on June 12, 2008; and an independent comprehensive Psychological Evaluation completed on September 31, 2008. There is no evidence that parent and the agency agreed that reevaluation was unnecessary, therefore, DCPS was required to reevaluate the student at least once every three (3) years; however, failed in this regard.

The Hearing Officer concludes that DCPS failed to comply with the procedural requirements of IDEA, 34 C.F.R. Section 300.324, in developing, reviewing, and revising the students IEPs; and IDEA 34 C.F.R. §300.303(a)(2) and §300.303(b)(2), in reevaluating the student.

Free and Appropriate Public Education (FAPE)

In determining whether a procedural defect has deprived a student of a FAPE, the Court must consider the impact of the procedural defect, and not merely the defect *per se*. See *Doe*, 915 F.2d at 661-662. The Weisses list twenty-seven acts of the School Board which the Weisses claim denied Samuel a FAPE.[5]

Procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute a denial of a FAPE under the IDEA. *See, Babb v. Knox County Sch. Sys., 965 F.2d 104, 109 (6th Cir. 1992); W.G., 960 F.2d at 1484.*

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

(1) impedes the child's right to a FAPE; or
(2) significantly impede the parent's opportunity to participate in the decision making process;
(3) deprives the student educational benefit.

It is the Hearing Officer's decision that Petitioner satisfied its burden by presenting evidence sufficient for a finding that the procedural inadequacies in this matter: (1) impede the child's right to FAPE; and (2) deprives the student educational benefit; causing substantive harm to the student and his parent, representing denial of a FAPE.

Substantive FAPE (Conferral of Educational Benefit)

In alleging substantive violations of IDEA, a party challenges the ***substantive*** content of the educational services the disabled student is entitled to receive under the IDEA; and courts have held that substantive harm may also occur when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process.

Having concluded under the first prong of *Rowley* that DCPS failed to comply with the procedural requirements of IDEA in developing, reviewing, and revising the student's IEP; and reevaluating the student, the Hearing Officer proceeds to the ***second*** prong of *Rowley*.

The ***second*** prong of Rowley, which is the ***substantive*** prong of the FAPE analysis, assesses whether the individualized education program ("IEP"), offered by the LEA, is reasonably calculated to enable the child to receive some educational benefit. Some educational benefits refer to a "basic floor of opportunity" which might not have existed without the IDEA. *Id.*

According to Rowley and Doe, 915 F.2d at 658; an IEP need not maximize the potential of a disabled student, it must provide "meaningful" access to education, and confer "some educational benefit" upon the child for whom it is designed. However, in its interpretation of *Rowley*, the District Court held that an appropriate IEP must result in more than de minimis benefits to satisfy *Rowley's* "some educational benefit" standard.

For the benefit to be sufficiently meaningful, the IDEA was enacted to assure that all children with disabilities have available to them a (FAPE), which emphasizes special education and related services designed to meet their unique needs, supported by such services, as are necessary to permit the child to benefit from the instruction. The court also held that a plan for a disabled student will satisfy the IDEA only if it is "likely to produce progress, not regression or trivial educational advancement."

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

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

The Hearing Officer finds that in conducting initial evaluations, to determine the students' eligibility for special education services, the MDT failed to complete evaluations sufficiently comprehensive to identify the students' needs in all areas of suspected disability.

The Hearting Officer also finds that although the DCPS Psychologist completed a "Confidential Report of Psychological Reevaluation", the evaluation was not sufficiently comprehensive to identify all of the child's special education and related services needs, as contemplated by IDEA. A review of the September 31, 2008 independent Educational, Cognitive, Psychological, & Adaptive Evaluation represents a comprehensive evaluation, as contemplated by IDEA; and the MDT failed in its obligation to adequately consider its findings and recommendations in developing the student's December 10, 2008 IEP.

The DCPS Psychological Evaluation included findings and recommendations based on a review of the students' records, behavioral observations, The Scale for Assessing Emotional Disturbance (SAED); Wechsler Individual Achievement Test; and Test of Non-verbal Intelligence. The evaluation failed to include an assessment of the students' cognitive functioning, and is not comprehensive.

In comparison, the independent Psychological Evaluation rendered findings and recommendations based on the following: Record review, Stanford Binet 5th Edition, Student Clinical Interview, Parent Interview, Teacher Interview, BASC-2 Self Report Rating Scales Adolescent, BASC-2 Parent Report Rating Scales Adolescent, Adaptive Behavior Assessment System-II Parent Form, Adaptive Behavior Assessment System-II Teacher Firm, Classroom Observations (2), Kinetic Family Projective Drawings, Social Skills Rating Scale-Self Report and Teacher, and Woodcock Johnson Test of Achievement III.

The Hearing Officer concludes that the independent Psychological Evaluation is comprehensive; the findings and recommendations were based upon an extensive battery of tests; the test results prove more reliable; and the testimony of the witnesses more credible.

Second, although the MDT determined in 2005, that the student could benefit from another placement; and indicated that available data supported a finding that the student would benefit from an alternative placement, since 2005, DCPS maintained the students' placement at In addition, the MDTs developed IEPs that were not reasonably calculated to provide the student educational benefit, in his placement at the

Third, results of the independent comprehensive Psychological Evaluation indicate that the student presents as a student with a specific learning disability in reading and mathematics; and an emotional disability; and not mental retardation. The evaluation also provides that the student exhibits the "slow learner profile", and although he demonstrates significant academic deficits, his current cognitive functioning and adaptive ability does not provide sufficient evidence of a disability classification of mild mental retardation.

According to IDEA, 34 C.F.R. Section 300.8(c)(6) ***mental retardation*** means significantly sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance.

A ***slow learner*** is generally slow in all areas. A slow learner has cognitive problems regardless of presentation method, and that if given thru the child's modality strength that a learning disabled child does not have such cognitive problems (generally), but then again a NLVD child will necessarily have difficulty with nonverbal modes of cognition.

In the United States and Canada, the terms ***learning disability, learning disabilities, and learning disorders (LD)*** refer to a group of disorders that affect a broad range of academic and functional skills including the ability to speak, listen, read, write, spell, reason, and organize information.

A person with a ***learning disability*** is defined as having at least ***average*** (often above average) intelligence, and weaknesses in one or a few specific areas. A ***learning disability*** is not indicative of low intelligence. Indeed, research indicates that some people with learning disabilities may have average or above-average intelligence. Causes of learning disabilities include a deficit in the brain that affects the processing of information.

According to IDEA, 34 C.F.R. Section 300.8(c)(10), ***specific learning disability*** means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia

Reading disability (ICD-10 and DSM-IV codes:F81.0/315.00). A reading disability can affect any part of the reading process, including difficulty with accurate and/or fluent word recognition, word decoding, reading rate, prosody (oral reading with expression), and reading comprehension.

Math disability (ICD-10 and DSM-IV codes F81.2-3/315.1)
A math disability can cause such difficulties such s learning math concepts (such as quantity, place value, and time), difficulty memorizing math facts, difficulty organizing numbers, and understanding how problems are organized on the page.

Based on the above, the SECs testimony that the independent Psychologist erred in utilizing the DSM-IV testing instrument to determine whether the student presents with a specific learning disability, is inaccurate.

The Hearing Officer finds that the MDT erred by failing to adequately consider the results of the independent comprehensive Psychological Evaluation, and relying solely upon the findings and recommendations in the evaluation completed by the DCPS Psychologist.

IDEA at 34 C.F.R. Section 300.306(c)(1)(i), provides that in making determinations regarding eligibility the MDT must consider information from various sources, including results of recent evaluations; which failed to occur in this matter. In addition, scientific research provides that a FSIQ is only factor to consider in determining a students' disability, and is not conclusive.

Fourth, the March 3, 2008 MDT meeting notes reflect that the student requires specialized instruction in reading, Math, cognitive/adaptive and social/emotional behavior; and according to the evidence of record and witness testimony has a reading deficit, and participates in a Reading program. This supports the independent evaluators' findings that the student has a specific learning disability in reading and mathematics, and an emotional disability, and not mental retardation; and is consistent with IDEAs definition of specific learning disability and emotional disability.

In addition, the DCPS Psychological Evaluation completed on June 12, 2008, indicated that the student earned a raw score of 27 and an IQ of 103; and the students' non-verbal intellectual abilities fall within the ***average*** range of intelligence and that of a 15 year old. Therefore, according to IDEAs definition of mental retardation, the student would not qualify as a student with a disability of mental retardation. The scores were subsequently changed by the-Psychologist, however, the initial findings were consistent with the findings rendered in the independent Psychological evaluation; which is that the student failed to present as a student with a disability classification of mental retardation.

Fifth, the Hearing Officer finds that since 2005, the MDT developed IEPs for the student, without the benefit of comprehensive evaluations; and the September 31, 2008 independent Psychological Evaluation represents the first comprehensive Educational, Cognitive, Psychological, & Adaptive Behavior Evaluation completed on behalf of the student; providing an accurate assessment of the students' academic functioning.

The Hearing Officer also finds that DCPS' representation that the student has been as mentally retarded for most of his life, has a family history of mental retardation, and has an FSIQ that falls within the range of mental retardation, is not in and of itself determinative of whether the student is mentally retarded. In addition, the SECs testimony that the students' developmental history, and family history, demonstrate that the student is MR, is a factor to consider, however, is not conclusive evidence that the student presents with MR.

Sixth, the students' March 3, 2008 IEP fail to include information regarding the manner in which the student's disability affects his involvement and progress in the general education curriculum; a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet the child's other educational needs that result from the child's disability; and a description of how the child's progress toward meeting the annual goals will be measured.

Seventh, IDEA, 34 C.F.R. §300.324 (a) provides that in developing each child's IEP the IEP Team must consider—

(i) The strengths of the child;
(ii) The concerns of the parents for enhancing the education of their 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.

The Hearing Officer finds that the IEP team failed to consider the results of the most recent and independent Comprehensive Psychological Evaluation in developing the student's December 10, 2008 IEP. The team also failed to consider the student's academic, developmental, and functional needs; in developing the students' IEP, and determining an appropriate placement.

Eighth, the March 3, 2008 IEP fail to include modifications/accommodations to address the student's reading deficits; and fail to describe the supplemental aids and services, to be provided the student in the classroom. The accommodations/modifications included in the student's IEP include "the school will provide opportunities for xxx to participate in community-based activities with exposure to non-disabled peers. Instruction will be designed to access grade level academic standards." The accommodations and modifications recommended in the student's IEPs are inadequate to address the student's disabilities.

It is the Hearing Officer's decision that Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to comply with the substantive requirements of IDEA, by ensuring that the individualized education program ("IEP"), offered by the LEA, is reasonably calculated to enable the child to receive some educational benefit; in violation of IDEA, representing denial of a FAPE.

ISSUE 3

Compensatory Education Services

Whether the student is entitled to compensatory education services?

The purpose of compensatory education is to help the child make the progress that he/she would have made if an appropriate program had been available. The specific services provided must be tailored to the child's needs. Compensatory education can mean extra instruction or related services (such as therapies) provided during the school year or summer.

A child with disabilities may be able to obtain "compensatory education" – makeup services – if he/she went without an appropriate program for some period of time. In this matter, the Hearing Officer determined that the student failed to receive an appropriate IEP and placement; and as a result, was denied a FAPE.

Compensatory education might also be available if there was an illegal delay in evaluating the child for special education and if, as a result, the child did not receive needed service. In this matter, the Hearing Officer determined that DCPS failed to comply with the procedural requirements of IDEA, in developing, reviewing, and revising the student's IEP, including reevaluation of the student.

Sometimes special materials or other special services tailored to the child's needs are appropriate. The amount of compensatory services provided should reflect the student's specific learning needs, and should relate to the amount of services the student has missed, and therefore, a day for each day of services missed, may not be appropriate.

Based on the evidence and testimony presented, it is the Hearing Officer's decision that Petitioner satisfied its burden by presenting evidence sufficient for a finding that DCPS failed to provide the student an appropriate IEP and placement, resulting in denial of a FAPE, and entitling the student to compensatory education services.

XIV. ORDER

Based on the aforementioned, it is hereby:

1. **ORDERED,** that no later than February 19, 2009, DCPS shall issue a Prior Notice of Placement, authorizing funding of the student's placement at the . with transportation; and it is further

2. **ORDERED,** that DCPS shall convene an MDT meeting within 30 days of the student's enrollment at the to review and revise the student's IEP, to reflect a disability classification of a specific learning disability in reading and mathematics, and emotionally disturbed, and determine compensatory education services; and it is further

3. **ORDERED,** that DCPS shall incur the cost of compensatory education services; and it is further

4. **ORDERED,** that in the event of DCPS' failure to comply with the terms of this Order, Petitioner's Counsel will contact the Special Education Coordinator at the and the DCPS Office of Mediation & Compliance to attempt to obtain compliance prior to filing a complaint, alleging DCPS' failure to comply with this decision and order; and it is further

5. **ORDERED**, that any delay in meeting 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 DCPS shall send all notices and schedule all meetings through parent's counsel Christopher West, Esq., in writing, via facsimile, at 202-742-2097 or 202-742-2098.

7. **ORDERED**, this decision and order are effective immediately

XV. APPEAL RIGHTS

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

Ramona M. Justice /s/

Attorney Ramona M. Justice
Hearing Officer

Date Filed: *2-12-09*

cc: Attorney Laura George, Office of the Attorney General
Attorney Christopher West: Fax: 202-724-2098