# 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 MAR 18 PM 3:31


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| **In Re the Matter of :** | ) | |
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| **Student,**[1] | ) | |
| | ) | |
| **Petitioner,** | ) | |
| | ) | |
| | ) | **Date of Complaint:** February 2, 2009 |
| **v.** | ) | **Hearing Date:** March 6, 2009 |
| | ) | |
| | ) | |
| | ) | |
| **The District of Columbia Public Schools** | ) | **Attending School:** School |
| **825 North Capitol Street, N.W.** | ) | |
| **Washington, D.C. 20002** | ) | |
| **(DCPS" or "District")** | ) | |
| | ) | |
| **Respondent.** | ) | |
| | ) | |

## HEARING OFFICERS' DECISION

**Hearing Officer:** Attorney Ramona M. Justice

**Counsel for Parent:** Attorney Shahidah N. Hamlett
Law Offices of Christopher N. Anwah, PLLC
10 R Street, N.E.
Washington, D.C. 20002

**Counsel for DCPS:** Harsharen Bhuller, 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**

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## I. INTRODUCTION

The student is years of age, and attends School, a public school located in the District of Columbia. Prior to attending School, the student attended and School, public schools in the District of Columbia.

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

On February 2, 2009, Counsel, on behalf of 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 failing to: (1) conduct triennial evaluations; (2) provide the student an updated Individualized Education Program (IEP) for the 2007/08 and 2008/09 school years; (3) provide the student an appropriate IEP for the 2006/07, 2007/08 and 2008/09 school years; and (4) convene a Multidisciplinary Development Team (MDT)/IEP team manifestation meeting to determine whether the student's behavior is a manifestation of his disability.

The due process hearing convened on March 6, 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 the student's due process rights.

## IV. ISSUE(S)

(1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to conduct triennial evaluations?

(2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an updated IEP for the 2007/08 and 2008/09 school years?

(3) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate IEP for the 2006/07, 2007/08, and 2008/09 school years?

(4) Whether DCPS denied the student a free appropriate public education by failing to convene an MDT/IEP manifestation meeting to determine whether the students' behavior is a manifestation of his disability.

(5) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide compensatory education for its past and present denial of FAPE?

**Relief Requested:**

(1) DCPS shall fund independent triennial evaluations, such as a Comprehensive Psychological Evaluation, Speech and Language Evaluation, Psychiatric Evaluation, Vineland Evaluation, Functional Behavior Assessment, Occupational Therapy Evaluation, Occupational Therapy Evaluation, and Social History Assessment, as well as any other evaluations recommended by those evaluations;
(2) DCPS to convene an MDT/IEP team meeting within fifteen (15) days of receipt of the independent evaluations to review the evaluations, develop an updated and appropriate IEP with all appropriate related services, and develop a compensatory education plan for the student;
(3) DCPS to fund an independent tutor to implement the students' compensatory education plan;
(4) DCPS to fund a private placement of the parent's choice, and issue a Prior Notice of Placement;
(5) DCPS to pay reasonable attorney fees.

## V. DISCLOSURES

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

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*Note: During the pre-hearing conference, Petitioner withdrew Issue 5 of the complaint pertaining to compensatory education services. At the due process hearing, Issues 2 and 3 of the complaint were consolidated, as they both pertain to the student's IEP.*

## VI. DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF PETITIONER

Petitioner's Exhibits 01 through Petitioner's Exhibits 12; and a witness list dated February 27, 2009.

## VII. DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT

Respondent's Exhibits 01 through Respondent's Exhibits 04; and a witness list dated February 26, 2009.

## VIII. PRELIMINARY MATTERS

The due process complaint was filed on February 2, 2009, and on February 3, 2009, the Hearing Officer issued a Pre-hearing Conference Order, scheduling the pre-hearing conference for February 19, 2009, at 4:30 p.m.. On February 18, 2009, DCPS filed "District of Columbia Public School's Response to Parent's Administrative Due Process Complaint Notice". The pre-hearing conference convened on February 19, 2009 at 4:30 p.m., as scheduled, and on February 22, 2009, the Hearing Officer issued a Pre-hearing Conference Order, confirming the hearing for March 6, 2009, at 1:00 p.m..

The due process hearing convened on March 6, 2009, at 1:00 p.m., as scheduled. During closing arguments, Petitioner entered on the record a Motion for Directed Verdict on Issues 1 representing that DCPS failed to complete triennial evaluations; and failed to provide the student the recommended speech and language and counseling services included in the evaluations. Petitioner also entered on the record a Motion for Directed Verdict on Issue 3 representing that DCPS failed to provide the student speech and language and counseling services; notify parent of the November, 2008 IEP team meeting; and denied parent the opportunity to participate in said meeting. Petitioner also represented that the student was suspended while attending Hart Middle School during the 2007/08 school years, and DCPS failed to convene a manifestation determination meeting, pursuant to parent's January 5, 2008 request for a meeting.

In response, DCPS objected to Petitioner's Motion for Directed Verdict, and entered on the record Motion to Dismiss Petitioner's due process complaint, "with" prejudice, representing that on February 18, 2009, DCPS issued an Independent Educational Evaluation (IEE) letter, authorizing parent to obtain an independent comprehensive psychological evaluation (which includes clinical, educational, and cognitive components as well as a social history), a speech and language evaluation, a Vineland Assessment, and a Functional Behavioral Assessment, at DCPS expense.

DCPS also represented that it stipulated that a manifestation determination meeting was not held, because it is not required unless the student was suspended for 10 or more days, which failed to occur in this instance. DCPS represented that Petitioner presented no evidence of the student exhibiting behavioral problems at School or School; and the DCPS witness testified that the student failed to exhibit behavior problems; and was not suspended during the 2008/09 school years.

DCPS also entered on the record a Motion for Directed Verdict on Issue 1 of the complaint, pertaining to triennial evaluations, representing that there is no automatic denial of a FAPE because of a delay in completing evaluations. DCPS also represented that under the statute, if there is an allegation of a procedural violation, there must be evidence of substantive harm to the student, resulting from the delay; DCPS witness and the student testified that the student is progressing behaviorally and academically; and Petitioner failed to present evidence that the student was harmed as a result of the delay in completing the triennial evaluations.

DCPS also represented that Petitioner references an evaluation completed in the year 2004 which recommended speech and language services; however, there is no requirement for speech and language services on the student's former IEP, or demonstration that the student requires speech and language services. DCPS represented that according to the student's teacher, he does not require speech and language or counseling services; and there is no request for services, or updated evaluations recommending the services.

DCPS concluded that there was a technical error in addressing the Letter of Invitation for a meeting to update the student's IEP, to the student's grandmother, however sending the letter represents a good faith effort by DCPS to invite parent to the November, 2008 IEP team meeting.

The Hearing Officer delayed a ruling on the Motions pending a review of the evidence, and final determination on the issues in the complaint.

## IX. STATEMENT OF THE CASE

1. The student is years of age, and attends School, a public school located in the District of Columbia. The student is a resident of the District of Columbia, and identified as disabled and eligible to receive special education and related services, pursuant to "The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)". The student's disability classification is Mental Retardation (MR).

2. On September 29, 2003, D.C. Public Schools, Department of Special Education completed a Confidential Psycho-educational Reevaluation. The Woodcock Johnson III Tests of Achievement results reflect a grade equivalency of 1.2 and an age equivalency of 6-7 in Broad Reading; and in areas of Letter-Word Identification, Reading Fluency, Calculation, Writing Fluency, Passage Comprehension, and Applied Problems, a grade equivalency ranging from <k.8-3.5, and an age equivalency ranging from <5-10-9-0.

3. On December 10, 2003, AGC Assist completed a Vineland Adaptive Behavior Scales evaluation. At the time of the evaluation, the student was [redacted] years of age and in the [redacted] grade, attending [redacted] Elementary School.

The Domain Score Summary reflects that the student's adaptive level in Communication was low, and the age equivalency was 4-6 years. In the areas of Daily Living Skills and Socialization, the student's adaptive level was moderately low, and his age equivalency in Daily Living Skills was 7-8, and Socialization was 6-8.

The Subdomain Score Summary reflects an adaptive level of moderately low and an age equivalency of 3-11 in receptive communication, 4-8 in expressive communication, and 4-8 in written communication. The summary also reflects an adaptive level of adequate, and an age equivalency of 8-2 in personal daily living skills, moderately low, and an age equivalency of 7-2 in domestic daily living skills, and moderately low, and an age equivalency of 7-8 in community daily living skills.

The student also received an adaptive level of adequate, and an age equivalency of 7-0 in interpersonal relationships socialization, adequate and an age equivalency of 7-3 in play and leisure time socialization, and low and an age equivalency of 5-0 in coping skills socialization. The evaluation failed to include findings or recommendations.

4. On October 6, 2004, The District of Columbia Public Schools, Office of Special Education completed a Functional Behavioral Assessment (FBA), pursuant to a prior Hearing Officer's Decision. At the time of the evaluation the student was 10 years of age and in the 5th grade. The FBA indicates that the student was suspended for bringing a weapon to school and urinating on another student; and exhibited occasional fighting and name calling.

5. On November 19, 2004, Interdynamics, Inc. completed a Clinical Evaluation, to provide clinical data to determine social/emotional and behavioral functioning. The student was diagnosed with Dysthymic Disorder, Early Onset, Oppositional Defiant Disorder, and Academic Problems.

The evaluator recommended individual counseling due to social and emotional concerns; group counseling to assist with interpersonal skill development, involvement in a behavior management contract plan, close staff supervision in order to curtail his negative aggressive acting behaviors, and involvement in a mentoring program.

6. On June 23, 2005, Interdynamics, Inc. completed a Speech and Language Evaluation. The evaluation determined that all the student's oral-motor, articulation, voice, fluency, and hearing appeared to be within normal limits with no major deficits noted.

The evaluator also noted that the student's receptive and expressive vocabulary abilities were below average or mildly delayed when compared to other students his age; his core language score indicates a severe language delay; he presents specific difficulties with receptive and expressive language, language content, and language memory. According to the evaluator these language delays have direct impact on communication functioning as well as academic performance.

The evaluator concluded by recommending speech and language therapy two times per week to address the student's receptive and expressive language delays; and addressing speech and language therapy in specific areas.

7. On May 3, 2006, an MDT meeting was held and an IEP developed for the student. The MDT meeting notes reflect that parent's rights included in the packet were sent to parent's residence; the student is still eligible for special education services, with a disability classification of mental retardation; and DCPS agreed to increase the student's hours of specialized instruction to 20 hours per week. The MDT notes also indicate that the "student is not a persistent behavior problem, but have his issues".

8. On November 14, 2007, an Educational Evaluation was completed, finding that the student's academic skills are within the very low range compared to others at his grade level; and when compared to others at his grade level, his performance is very low in broad reading and math calculation skills.

Test results reflect a grade equivalency of 1.7 in Broad Reading, 3.2 in Mathematics Calculation Skills, 2.1 in Academic Skills, 1.8 in Letter-Word Identification, 1.6 in Reading Fluency, 3.2 in Calculation, 3.0 in Math Fluency, 1.8 in Spelling, and 1.5 in Passage Comprehension. At the time of the evaluation, the student was in grade 8.2, and 13 years of age.

9. On November 28, 2007, DCPS convened an IEP team meeting. The team discussed the results of the Woodcock Johnson III achievement evaluation; indicating that while the student tested considerably low in all areas, he basically functions at a second grade level in the areas of Basic Reading, Writing, and Comprehension.

The team indicated that the student tested at the third grade level in Mathematics; the student will remain in special education as a child with mental retardation receiving 20 hours per week of specialized instruction to address his academic needs. An IEP and incomplete DCPS Transition Services Plan were developed for the student. The student's IEP includes goals for Mathematics, Reading, and Written Expression.

The team issued a Prior to Action Notice indicating that the student remained eligible to receive special education services as a student with mental retardation; and his placement would remain at in a combination setting, receiving 20 hours of specialized instruction per week.

10. On November 29, 2007, an IEP team meeting convened for the purpose of reviewing assessments and develop an IEP for the student. The team decided that there was a need to review assessments to reconvene another meeting to discuss a Student Evaluation Plan (SEP); DCPS and the parent and advocate will reconvene to complete the SEP Plan.

The MDT meeting notes reflect that DCPS agreed to review the Clinical and Speech evaluation, and Functional Behavioral Assessment (FBA); and that the Educational evaluation is complete and was provided to parent and the advocate.

11. On January 15, 2008, the Education Advocate forwarded to the Special Education Coordinator at School a written request for copies of suspension notices, incident reports, and teacher referrals, indicating that "a student facing suspension of ten (10) days or less are entitled to notice and hearing." The advocate also requested a manifestation determination meeting.

12. On January 16, 2008, School faxed to the Education Advocate a message indicating that the student had not been suspended all year, except for eating in an assembly; and had no intention of convening a manifestation determination meeting. The school indicated that the student had a 3 day suspension and was expected to return that Monday.

13. On November 6, 2008, the Case Manager at sent by certified mail a Letter of Invitation to at parent's address, requesting a meeting to discuss the educational needs of the student; develop initial or revise existing IEP, discuss post secondary-transition, discuss placement, discuss extended school year services, and discuss compensatory education services. The meeting location was provided and the letter indicated that the meeting would be held on November 20, 2008 at 9:30 a.m..

14. On November 20, 2008, DCPS developed an IEP for the student, increasing the hours of specialized instruction from 20 to 27.5 hours per week. The IEP includes several accommodations, a Post Secondary Transition Plan.

15. On February 2, 2009, Counsel, on behalf of 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 failing to: (1) conduct triennial evaluations; (2) provide the student an updated Individualized Education Program (IEP) for the 2007/08 and 2008/09 school years; (3) provide the student an appropriate IEP for the 2006/07, 2007/08 and 2008/09 school years; and (4) convene a Multidisciplinary Development Team (MDT)/IEOP team manifestation meeting to determine whether the student's behavior is a manifestation of his disability.

16. On February 18, 2009, DCPS issued an Independent Educational Evaluation IEE letter, authorizing parent to obtain an independent comprehensive psychological evaluation (which includes clinical, educational, and cognitive components as well as a social history), a speech and language evaluation, a Vineland Assessment, and a Functional Behavioral Assessment, at DCPS expense.

## X. WITNESSES

**Witnesses for Petitioner**

Parent
Student

**Witnesses for Respondent**

Special Education Coordinator, School

## XI. WITNESS TESTIMONY

### Petitioner's Witnesses

**Parent**

Parent testified that the student fails to receive speech and language and counseling services at and failed to receive the services while attending Parent also testified the student received no recent evaluations; and although she attended an IEP team meeting last year at she failed to receive notification of IEP team meetings since the student began attending the 2008/09 school year.

Parent testified that the student was suspended once while attending , for approximately 3-5 days, in January, 2008; and has not been suspended since attending Parent testified that the student has no difficulty with his speech; however, she requested speech and language and counseling services, while the student attended Parent also testified that since the student began attending she is unable to recall requesting speech and language and counseling services for the student.

Parent also testified that she met with the student's teachers during the 2008/08 school year to discuss the student's grades; behavior in class; and school work. Parent concluded by testifying that during discussion with the student's special education teacher, the teacher failed to indicate that the student requires speech and language and counseling services.

Parent testified that Susie Peace is her mother who resides in Northwest, D.C., and not at her residence, as indicated in the Letter of Invitation mailed by DCPS, for the November, 2008 IEP team meeting. Parent also testified that she failed to receive notice of the November, 2008 IEP meeting; and that her mother is the emergency contact for student.

**Student**

The student testified that classes at include Mathematics, Reading, Social Studies, and Gymnastics. The student also testified that he failed to receive speech and language or counseling services during the 2007/08 and 2008/09 school years; he is performing well in school; and although he fail to consistently receive assistance, he receives teacher assistance upon request.

The student also testified that he is progressing academically, compared to the grades received last year; he is more aggressive towards his studies, and is pleased with his teachers.

## Respondent's Witness

**Special Education Coordinator (SEC),**

The SEC testified that she previously served as the student's Case Manager and Reading Resource Teacher, she reviewed the student's file, and prior IEP; and as the SEC is responsible for ensuring that the student's IEP and accommodations are implemented.

The SEC testified that the student's Mathematics and English classes are self contained; and she collaborates with the student's teachers to ensure that the IEP is implemented. The SEC also testified that the student could improve academically; fail to complete work, however with prompts he tends to improve; and is making progress.

The SEC testified that she reviewed the student's file from and his last IEP dated November, 2007. The SEC testified that she forwarded a Letter of Invitation, by certified mail, for a meeting to update the student's IEP to "Susie Peace", the student's legal guardian, at the address in the student's file from and failing to receive a response, initiated several telephone calls to the telephone number in the student's file, to no avail.

The SEC testified that the student registration form from identified Susie Peace as the student's legal guardian, and as a result, the Letter of Invitation was addressed to Susie Peace and mailed to address in the file, which is parent's residence. The SEC also testified that she was unaware that parent was represented by counsel, therefore, notice of the meeting was not forwarded to Petitioner's counsel.

The SEC testified that on November 20, 2008, the IEP team proceeded with the meeting, increased the student's specialized instruction hours from 20 to 27.5 hours, and included new goals, based on the scores from the Woodcock Johnson III, classroom performance, and test results from The SEC also testified that the team completed an interest inventory.

The SEC testified that the student requested additional assistance; he works with the teachers on a one on one basis, attends class, and is trying. The SEC also testified that the student exhibits no behavior problems, and she received no reports of behavioral problems from other teachers. The SEC also testified that the student has not been referred to the office or suspended for behavior problems, and there is no FBA or BIP in student's prior IEP from

The SEC testified that there are no recommendations for counseling or speech and language services, the student's prior IEP failed to include counseling or speech and language services, and parent failed to request counseling or speech and language services. The SEC also testified that since the November, 20, 2008 IEP team meeting, she failed to receive the student's independent evaluations, she failed to contact parent, and parent failed to contact the school to request a meeting. The SEC concluded by testifying that upon receipt of the evaluations, a meeting will be scheduled with parent to review the evaluations.

## XII. DISCUSSION AND CONCLUSIONS OF LAW

### ISSUE 1

**Whether DCPS denied the student a free appropriate public education (FAPE); by failing to conduct triennial evaluations?**

Petitioner represents that DCPS failed to provide updated triennial evaluations and assessments, such as a Clinical Evaluation, completed on November 22, 2004; a Speech and Language Evaluation, completed on June 23, 2005; a Vineland, completed on-December 10, 2003; a Functional Behavioral Assessment, completed on October 6, 2004; and Psycho-Educational Evaluation, completed on September 29, 2003.

Petitioner further represents that without the evaluations, parent is unaware of the student's current level of functioning; and the student has shown no improvement behaviorally or academically. Petitioner also represents that DCPS' failure to complete the triennial evaluations denied the student a FAPE.

DCPS represents that an Educational Evaluation was completed on November 14, 2007; and an IEE letter was provided to parent on February 18, 2009 authorizing independent Vineland, Clinical, Functional Behavior Assessment, and Speech and Language evaluation, at DCPS expense.

### ANALYSIS

According to IDEA, 34 C.F.R. §300.303(b)(2) a reevaluation conducted under paragraph (a) of this section ***must*** occur at least once every ***three (3) years***, unless the parent and public agency agree that a reevaluation is unnecessary. There is no evidence that parent and DCPS agreed that a reevaluation was unnecessary, therefore, DCPS must reevaluate the student at least once every three (3) years, pursuant to IDEA.

The record reflects that on September 29, 2003, D.C. Public Schools completed a Confidential Psycho-educational Reevaluation. Therefore, according to 34 C.F.R. §300.303(b)(2), DCPS was required to reevaluate the student by September 29, 2006; which failed to occur in this matter.

The record reflects that on December 10, 2003, AGC Assist completed a Vineland Adaptive Behavior Scales evaluation. Therefore, according to 34 C.F.R. §300.303(b)(2), DCPS was required to reevaluate the student by December 10, 2006; which failed to occur in this matter.

The record reflects that on October 6, 2004, D.C. Public Schools completed a Functional Behavioral Assessment. Therefore, according to 34 C.F.R. §300.303(b)(2), DCPS was required to reevaluate the student by October 6, 2007; which failed to occur in this matter.

The record reflects that on November 22, 2004, Interdynamics, Inc. completed a Clinical Evaluation. According to 34 C.F.R. §300.303(b)(2), DCPS was required to reevaluate the student by November 22, 2007; which failed to occur in this matter.

The record reflects that a Speech and Language Evaluation was completed on June 23, 2005. Therefore, according to 34 C.F.R. §300.303(b)(2), DCPS was required to reevaluate the student by June 23, 2008; which failed to occur in this matter.

The Hearing Officer finds that failure to conduct triennial evaluations at least once every three (3) years is contrary to the intent of IDEA and language in §300.303 (b)(2), which provides that a reevaluation conducted under paragraph (a) of this section ***must*** occur at least once every ***three (3) years***, unless the parent and public agency agree that a reevaluation is unnecessary.

Based on the aforementioned, it is the Hearing Officers' decision that Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to conduct triennial evaluations of the student, at least once every three (3) years; in violation of the procedural requirements of IDEA, 34 C.F.R. §300.303(b)(2).

Having determined that DCPS failed to comply with the procedural requirements of IDEA, by failing to conduct triennial evaluations, the court must determine whether the procedural violation results in denial of a FAPE.

The 2004 amendments of 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.

The Hearing Officer finds that the procedural violation in this matter impedes the student's right to a FAPE and deprives the student educational benefit, because it deprives an eligible student of an individualized education program sufficiently tailored to address his unique special education and related service needs. *See, Babb v. Knox County Sch. Sys., 965 F.2d 104, 109 (6th Cir. 1992); W.G., 960 F.2d at 1484.*

The Vineland, FBA, Speech and Language, Clinical, Psycho-education evaluations are significantly outdated, and require revision. DCPS' issuance of the IEE letter after filing of the complaint, does not obviate its statutory obligation to reevaluate the student at least once every three (3) years, and revise the student's IEP as appropriate, to ensure that the student has an IEP reasonably calculated to provide the student educational benefit, and designed to address his unique needs. Failure to conduct triennial evaluations, results in development of an IEP without the benefit of current evaluations; and an IEP that may not be specifically designed to address the student's unique needs, or provide the student educational benefit.

According to the testimony of the SEC the student's most recent IEP, developed on November 16, 2008 IEP was based on scores from the student's November 14, 2007, Woodcock Johnson III academic achievement test results, classroom performance, and results of evaluations completed at The IEP was not developed based on updated evaluations in all areas of suspected disability.

Any argument made by DCPS that Petitioner failed to satisfy its burden of proof, because it failed to present evidence of harm to the student because of delay on completing the triennial evaluations, without merit. Furthermore, the fact that student and his teacher indicate that the student is progressing academically and behavior, is not in and of itself indicative that the student is not harmed as a result of the LEA's failure to complete triennial evaluations. According to IDEA, harm to the student may be presumed if there is a finding that the LEA failed to comply with the procedural requirements of IDEA; which occurred in this matter.

The Hearing Officer also finds that the procedural violation significantly impedes the parent's opportunity to participate in the decision making process regarding the provision of a FAPE, and development of an IEP specifically designed to address the student's unique special education and related services needs; thereby, depriving the student educational benefit.

Witness testimony revealed that on November 6, 2008, the SEC at School mailed a Letter of Invitation, by certified mail, to parent's residence, however, the letter was addressed to the student's grandmother. According to parent's testimony, she failed to receive a Letter of Invitation, and it appears that because the letter was sent by certified mail, and addressed to who does not reside at parent's residence, the letter was refused and returned to the sender.

The SEC also testified that was identified as the student's legal guardian in his educational records from and the only available address was the address where the letter was send, which is parent's address. The SEC also testified that several telephone calls were made to a telephone number in the file, to no avail; and no other attempts were made to invite parent to the meeting. The IEP team convened the meeting on November 20, 2008, at 9:30 a.m., without parent in attendance.

DCPS represents that addressing the Letter of Invitation to the grandmother and not the parent, was a technical error, however, it represents that DCPS made a good faith attempt to invite parent to the November, 2008 IEP team meeting.

The Hearing Officer finds that although DCPS' issuance of the Letter of Invitation for the November, 2008 IEP team meeting, may have been made in good faith, it was insufficient to satisfy the requirements of IDEA.

IDEA, 34 C.F.R. §300.322, provides that each public agency *must* initiate *efforts* necessary to ensure that one or both of the parents of the child were present at each IEP team meeting, or were afforded the opportunity to participate. The record reflects that DCPS made only one attempt to contact parent by mail, which was by certified mail, which it is well known, does not always result in a response. DCPS failed to initiate additional attempts to communicate with parent by regular mail, or verify parent's name, address, or telephone number.

In addition, the SEC testified that she initiated several telephone calls subsequent to the Letter of Invitation, however, was uncertain whether the telephone number was that of parent; and has had no communication with parent since the November, 2008 meeting.

Finally, DCPS presented no documented evidence of attempts to arrange a mutually agreed on time and place, or use of other methods to ensure parent participation; as required by IDEA.

Based on the aforementioned, it is the Hearing Officer's Decision that Petitioner satisfied its burden of proof, by presenting evidence that DCPS failed to comply with the procedural requirements of IDEA, and the procedural violation results in denial of a FAPE.

## ISSUE 2

**Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student a current and appropriate IEP?**

Petitioner represents that DCPS failed to provide the student an updated IEP; and that his last IEP was completed on May 3, 2006; and has expired. Petitioner also represents that an IEP team meeting convened on November 29, 2008 to update the student's IEP, however, the team failed to update the student's IEP. Petitioner also represents that consequently, to date, the students' IEP is almost two years overdue. Petitioner asserts that without an updated IEP, new goals cannot be formulated, or a determination made regarding the student's current level of functioning. Petitioner also asserts that DCPS' failure to provide the student an updated IEP for the 2007/08 SY and 2008/09 SY, denied the student a FAPE.

Petitioner also represents that DCPS failed to provide the student appropriate services; that the student's most recent Clinical evaluation recommended individual, school-based counseling to address his fears and negative view of himself. Petitioner also represents that the student's most recent IEP does not address counseling as part of his specialized services; and the student continues to have a negative self image, and about the school.

Petitioner also represents that DCPS has denied the student a FAPE because his Speech and Language evaluation recommend Speech and Language services two times per week to address his receptive and expressive language delays; and the most recent IEP fail to include Speech and Language services. Petitioner concludes that DCPS' failure to provide the student the services recommended in the Clinical evaluation and Speech and Language Evaluation, it has denied the student a FAPE.

DCPS represents that the last IEP was reviewed and updated on November 20, 2008, approximately three (3) months ago; therefore, the student's IEP is in fact, updated. DCPS also represents that Petitioner refers to a 2004 evaluation, however, there is no evidence that speech and language services is required or included in the student's prior IEP from DCPS also represents that Petitioner failed to demonstrate that the student requires counseling and speech and language services, except the 2004 evaluation; and the student's teacher testified that the student fail to require speech and language or counseling services.

## ANALYSIS

*First*, the Hearing Officer will address Petitioner's allegation that DCPS failed to provide the student an updated IEP for the 2007/08 and 2008/09 school years.

IDEA, Section 300.324 (b); provides that an IEP team ***must*** review a student's IEP ***periodically, but not less than annually***, to determine whether the annual goals for the child are being achieved; and revising the IEP, as appropriate, to address any lack of expected progress toward the annual goals described in Sections 300.320(a) (2), and in the general education curriculum, if appropriate; ***and the results of any reevaluation***.

The record reflects that on May 3, 2006, DCPS developed an IEP for the student, and the IEP expired on May 3, 2007. The record reflects that an IEP was developed on November 28, 2007; approximately six and a half months after the May 3, 2007 IEP expired.

The record also reflects that the November 28, 2007 IEP expired on November 28, 2008; and on November 16, 2008, DCPS developed an IEP for the student. Based upon the results of the WJ III, tests completed at the student's prior school, and classroom performance, the IEP team revised the student's IEP, increasing the hours of specialized instruction from 20 to 27.5, and revised the goals in the IEP. The November 16, 2008 IEP will expire on November 16, 2009.

The Hearing Officer finds that except for approximately one month prior to expiration of the 2007/08 school year, and three (3) months at the beginning of the 2008/09 school year, DCPS complied with §300.324 (b) of IDEA; by reviewing the student's IEP periodically; and ensuring that the student had an IEP in effect for the 2007/08 and 2008/09 school years.

Petitioner presented no evidence that the student was harmed as a result of the delay in developing an IEP for the student, during the last month of the 2007/08 school year, and the first three (3) months of the 2008/09 school years. The Hearing Officer finds that any harm the student may have suffered as a result of the delay in developing the student's IEP for the 2008/09 school year, is no more than de minimis.

*Second*, the Hearing Officer addresses Petitioner's allegation that DCPS failed to provide the student an updated IEP for the 2007/08 and 2008/09 school years; and an appropriate IEP for the 2006/07, 2007/08, and 2008/09 school years, because the IEPs failed to include speech and language and counseling services, recommended in the student's June 23, 2005 Speech and Language Evaluation, and November 22, 2004 Clinical Evaluation.

The record reflects that on November 22, 2004, Interdynamics, Inc. completed a Clinical Evaluation, to provide clinical data to determine social/emotional and behavioral functioning. The student was diagnosed with Dysthymic Disorder, Early Onset, Oppositional Defiant Disorder, and Academic Problems.

The evaluator recommended *individual counseling due to social and emotional concerns; group counseling to assist with interpersonal skill development, involvement in a behavior management contract plan, close staff supervision in order to curtail his negative aggressive acting behaviors, and involvement in a mentoring program.*

The record also reflects that on June 23, 2005, Interdynamics, Inc. completed a Speech and Language Evaluation. The evaluation determined that all the student's oral-motor, articulation, voice, fluency, and hearing appeared to be within normal limits with no major deficits noted; however, indicated that the student's receptive and expressive vocabulary abilities were below average or mildly delayed when compared to other students his age; his core language score indicates a severe language delay; he presents specific difficulties with receptive and expressive language, language content, and language memory. According to the evaluator *these language delays have direct impact on communication functioning as well as academic performance.*

The evaluator concluded by *recommending speech and language therapy two times per week to address the student's receptive and expressive language delays*; and addressing speech and language therapy in specific areas.

IDEA, Section 300.324 (b)(i); provides that in ***reviewing and revising*** a student's IEP, each public agency must ensure that, subject to paragraphs (b)(2) an (b)(3) of this section, the IEP team not only *reviews* a student's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; however ***must*** *revise* the student's 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***; information about the child provided to, or by, the parents; ***the student's anticipated needs***; or other matters.

The record reflects that on ***May 3, 2006***, while the student attended Hart MS, the MDT convened, and developed an IEP for the student. According to the ***May 3, 2006*** MDT meeting notes parent's rights were sent to the parent's residence; the student remained eligible for special education services, with a disability classification of mental retardation; and DCPS agreed to increase the student's hours of specialized instruction to 20 hours per week. The MDT notes also indicate that the "student is not a persistent behavior problem, but have his issues".

According to the MDT meeting notes, the team failed to include as part of its annual review of the student's IEP, a discussion of the results of the Speech and Language and Clinical Evaluation; or the recommendations included in the evaluations, which address the student's anticipated needs. The team developed the student's May 3, 2006 IEP, without the benefit of the results of the evaluations; and failed to revise the student's IEP, as appropriate.

The record reflects that on ***November 28, 2007***, while the student attended the MDT convened and developed an IEP for the student. According to the ***November 28, 2007*** MDT meeting notes, the team discussed the results of the Woodcock Johnson academic achievement test.

According to the MDT meeting notes, the team failed to include as part of its annual review of the student's IEP, a discussion of the results of the Speech and Language and Clinical Evaluation; or the recommendations included in the evaluations, which address the student's anticipated needs. The team developed the student's November 28, 2007 IEP, without the benefit of the results of the evaluations; and failed to revise the student's IEP, as appropriate.

The record also includes MDT meeting notes dated ***November 29, 2007***, which indicate that the purpose of the meeting is to review assessments and develop an IEP. The notes also indicate "the team has decided that we need to review assessments to reconvene another meeting to discuss and SEP Plan. DCPS and the parent and advocate will reconvene to complete SEP Plan. DCPS will review Clinical, Speech Eval, FBA. Educational has been completed and turned into parent and Ms. Pressley". There is no evidence that DCPS reviewed the Clinical, Speech and Language Evaluation, and FBA, as agreed by the team.

DCPS presented the November 20, 2008 IEP, however, the IEP fail to include MDT meeting notes, documenting team activity during the meeting; however, the IEP reflects that the team discussed the results of the Woodcock Johnson III academic achievement test; however, failed to discuss the Speech and Language and Clinical evaluations.

According to the MDT meeting notes, the team failed to include as part of its annual review of the student's IEP, a discussion of the results of the Speech and Language and Clinical Evaluation; or the recommendations included in the evaluations, which address the student's anticipated needs. The team developed the student's November 20, 2008 IEP, without the benefit of the results of the evaluations; and failed to revise the student's IEP, as appropriate.

The Hearing Officer finds that DCPS developed the May 3, 2006, November 28, 2007, and November 20, 2008 IEPs, without reviewing the results of the Speech and Language and Clinical evaluations, and revising the student's IEP, as appropriate, in violation of IDEA, Section 300.324 (b)(i).

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 IEP for the 2006/07, 2007/08, and 2008/09 school years; representing a procedural and substantive violation of IDEA.

## ISSUE 3

**Whether DCPS denied the student a free appropriate public education by failing to convene an MDT/IEP manifestation meeting to determine whether the student's behavior is a manifestation of his disability?**

Petitioner represents that DCPS denied the student a FAPE by failing to convene an MDT/IEP team manifestation meeting to discuss his numerous suspensions from school due to his negative social emotional behavior; and that DCPS' failure to convene a manifestation meeting, denied the student a FAPE.

DCPS represents that is complied with the necessary protocol when the student was suspended from his current placement. DCPS also represents that Petitioner failed to present evidence that the student exhibited behavioral problems at and DCPS witness testified that the student presents no behavioral problems, and has not been suspended during the 2008/09 school years.

DCPS concluded by stipulating that a manifestation determination meeting was not convened, because a meeting is only required if the student was suspended for 10 or more days, which failed to occur in this matter. DCPS also entered on the record a Motion for Directed Verdict

### Stipulations of Fact

Prior to proceeding with the hearing on the merits, DCPS entered on the record a Stipulation of Fact, requesting that the court render judgment based, in effect, on a hearing upon the stipulated fact. Specifically, DCPS stipulated that it failed to convene an MDT/IEP manifestation meeting to determine whether the student's behavior is a manifestation of his disability.

### Standard for Decision

Where the parties have entered into stipulations of fact upon which they intend to rely, the court will, absent persuasive reason to the contrary, deem the material facts claimed and adequately supported by the moving party to be established except to the extent that such material facts are controverted by affidavit or other written or oral evidence.

By stipulating to these facts, the parties decided that this issue would be decided by the court, on the basis of the stipulated facts, and the record. The parties agree that it is appropriate for the court to treat the case as a trial on stipulated facts, [this court] of necessity draws – and bases legal conclusions on factual inferences." *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1372 (Fed. Cir. 2006).

## ANALYSIS

### Manifestation Determination Meeting

When a school contemplates disciplinary action of a student with a disability involving a change in the student's placement for more than (10) ten days, the ***schools are required to conduct a manifestation determination*** to review the relationship between the student's disability and the behavior which is subject to the disciplinary action. 20 U.S.C. Section 1415(k)(4)(A)(ii).

According to IDEIA, 34 C.F.R. Section 300.530(e) a manifestation determination is required if the school is considering removing the child with a disability from their educational placement for more than ten (10) school days in a given school year when it is deemed a change in placement.

IDEA, 34 C.F.R. §300.536 provides that for the purposes of removals of a child with a disability from the child's current educational placement under §§300.530 through 300.535, a change of placement occurs if—

a. The removal is for ***more than 10 consecutive school days***; or
b. The ***child is subjected to a series of removals that constitute a pattern***—

(i) because th ey cumulate to more than 10 school days in a school year;
(ii) because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
(iii)because of such additional factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.

A manifestation determination is to be conducted by the student's IEP team and "other qualified personnel." 20 U.S.C. Section 1414(k)(4)(B); 34 C.F.R. Section 300.523(b). The law requires the IEP team, which includes the child's parent, to review all relevant information in the child's file, including information provided by the parent, to determine if the negative behavior was caused by the disability, had a direct and substantial relationship to the disability, or was a result of the school's failure to implement the IEP.

The IDEA also makes it clear that time is of the essence with regard to the manifestation determination. The law states that the manifestation determination meeting must be conducted " ... *immediately, if possible,* but in no case later than ten school days after the date on which the decision to take (the disciplinary) action is made ... " 20 U.S.C. Section 1415(k)(4)(A)(ii); **34 C.F.R. Section 300.523(a)(2** ) (emphasis added). Thus, it is clear that Congress intended that when a school district is contemplating serious discipline of a child with a disability, a manifestation determination is to be conducted quickly to ensure that students are not disciplined for behaviors that are caused by their disabilities.

If the IEP team determines that the child's behavior was a manifestation of the disability, the IEP Team "shall conduct a functional behavioral assessment and implement a behavioral intervention plan." If the child already has a behavior intervention plan, the IEP Team shall modify the plan to address the child's behavior.

Parent testified that the student was suspended once while attending for 3-5 days; and has not been suspended at his current school. The record also includes Petitioner's Exhibit 11, which is a January 16, 2008 faxed message to the Education Advocate indicating that the student was suspended for 3 days, and is not entitled to a manifestation determination meeting. In addition, the SEC testified that the student has not had any behavior problems, or been suspended since attending

Petitioner presented no other evidence of student suspensions, or suspensions cumulating to more than 10 school days in a school year; or supporting a finding that the student exhibited behavior substantially similar to the child's behavior in previous incidents that resulted in the series of removals; warranting a manifestation determination meeting. Therefore, DCPS was not required to convene a manifestation determination meeting.

Based on the aforementioned, it is the Hearing Officers' decision that Petitioner failed to satisfy its burden by of proof, by presenting evidence that DCPS failed to convene a manifestation determination meeting, in violation of IDEA, 34 C.F.R. §§300.530(e) and 300.536.

**Motions for Directed Verdict**

A Motion for Directed Verdict is generally made by the defendant in a civil case, who is asserting that the plaintiff with the burden of proof has failed to prove his/her case as a matter of law (failed to present credible testimony on some key element of the claim or of the defense). A Motion for Directed Verdict is typically made after the plaintiff has presented all of their evidence.

In law, a **directed verdict** is a ruling by a judge presiding over a jury trial typically made after the prosecution or plaintiff has presented all of their evidence but before the defendant puts on their case, that awards judgment to the defendant.

A directed verdict is usually made because the judge concludes the plaintiff has failed to offer the minimum amount of evidence to prove their case even if there were no opposition. Typically, the judge orders a directed verdict after finding that no reasonable jury could reach a decision to the contrary. After a directed verdict, there is no longer any need for the jury to decide the case. In other words, the judge rules that, as a matter of law, no reasonable jury could decide in the plaintiff's favor. In a criminal case, a directed verdict is a judgment of acquittal for the defendant.

A judge may order a directed verdict as to an entire case or only to certain issues. While the motion is not often granted, it is routinely made as a means of preserving appeal rights later.

## DISPOSITION

In applying the standards for a Motion for Directed Verdict to Petitioner's motion, the Hearing Officer finds that Petitioner failed to meet the standards for a Motion for Directed Verdict.

As indicated supra, a Motion for Directed Verdict is generally made by the defendant in a civil case, who is asserting that the plaintiff with the burden of proof has failed to prove his/her case as a matter of law (failed to present credible testimony on some key element of the claim or of the defense). In this matter, it is Petitioner who has the burden of proof, therefore, a Motion for Directed Verdict by Petitioner, is misplaced, and therefore, is denied.

In applying the standards for a Motion for Directed Verdict to Respondent's motion, the Hearing Officer finds that Petitioner having the burden of proof, failed to prove its case as a matter of law (failed to present credible testimony on some key element of the claim or of the defense). Petitioner also failed to offer the minimum amount of evidence to prove its case with regard to Issues 2 and 3 of the complaint, and even if there was no opposition. no reasonable court could reach a decision to the contrary.

Based on the aforementioned, DCPS' Motion for Directed Verdict on Issue 3 of the complaint is granted.

**Motion to Dismiss**

A motion to dismiss has to have a legal basis. The possible bases of the motion are laid out in Rule 12(b) of the Federal Rules of Civil Procedure, which govern how U.S. federal courts function. As of 2004, Rule 12(b) lists seven possibilities:

1. **Lack of subject matter jurisdiction**
2. **Lack of jurisdiction over the person**
3. **Improper venue**
4. **Insufficiency of process**
5. **Insufficiency of service of process**
6. **Failure to state a claim upon which relief can be granted**
7. **Failure to join a party**

Respondent represents that Petitioner failed to state a claim upon which relief can be granted and the facts set out in the plaintiff's complaint are not enough to warrant any remedy under the law, because the relief requested by Petitioner has been granted, since DCPS authorized parent to obtain independent evaluations.

To grant this motion, the judge must conclude that no reasonable judge or jury could possibly rule for the plaintiff based on the facts in the complaint. Often, the defendant uses an affirmative defense, such as immunity, laches, or statute of limitations, as the basis for the motion. Once a 12(b)(6) motion is granted, the case is over and the plaintiff has to either appeal or give up. This type of motion was originally called a "demurrer," and still carries that name in many jurisdictions.

The Hearing Officer finds that Respondent's Motion to Dismiss failed to meet the standards for a Motion to Dismiss because Respondent failed to demonstrate that Petitioner failed to state a claim upon which relief can be granted and the facts set out in the complaint are not enough to warrant any remedy under the law because the relief requested by Petitioner has been granted, and in essence the issue is "moot", and no longer ripe for review.

The Hearing Officer also finds that exceptions to the doctrine of "mootness" are applicable in this matter, particularly, voluntary cessation; and capable of repetition, yet evading review. It remains undisputed that on February 18, 2009, DCPS issued an Independent Educational Evaluation (IEE) letter authorizing parent to obtain independent evaluations. However, the court will not deem this correction of providing Petitioner an IEE letter after the complaint was filed, to moot the case. Obviously, DCPS could authorize the independent evaluations, just long enough for the case to be dismissed and then fail to convene a MDT meeting to review the evaluation; resulting in filing of a subsequent complaint.

The court also allowed the hearing to proceed, because the issue is the type for which Petitioner may frequently be faced with a situation where the student will require evaluations, but will likely cease to be in a position where the court can provide a remedy for them in the time that it takes for the justice system to address the situation.

The court also finds that the issue in the complaint is not "moot", because although DCPS may have issued the IEE letter, the issue remaining for the court to decide is whether the student was denied a FAPE, as a result of DCPS' delay in completing the evaluation. The motion is also denied as untimely, because it was initiated less than five (5) business days prior to the hearing. Based on the aforementioned, the court denies DCPS' motion to dismiss the complaint is denied.

## XIII. ORDER

Based on the aforementioned, it is hereby:

1. **ORDERED**, DCPS' Motion for Directed Verdict is granted with regard to Issue 3, and denied with regard to Issue 1 and 2 of the complaint; and it is further

2. **ORDERED**, that DCPS shall fund the following independent evaluations and assessments: comprehensive psychological (which includes cognitive, educational, and clinical components as well as a social history), Speech/Language Evaluation,-

Functional Behavioral Assessment, Psychiatric Evaluation, Vineland Adaptive Behavior Assessment, Functional Behavior Assessment, Psycho-educational Evaluation, as well as any other evaluations recommended in the independent evaluations; and it is further

3. **ORDERED**, that DCPS shall convene an MDT/IEP team meeting within fifteen (15) days of receipt of the final independent evaluation/assessment to review the evaluations/assessments, implement evaluations recommendations, and update the student's IEP, based on the evaluation findings and recommendations; discuss and determine 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 School, 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 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 DCPS shall send all notices and schedule all meetings through parents' counsel in writing, via facsimile, with copies to the parent in writing by first class mail; and it is further

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

## XIV. APPEAL PROCESS

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: *3-14-09*

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