

**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 an _____ grade student at _____ School, hereinafter referred to as _____ a public school located in the District of Columbia. The student was retained in the _____ and _____ grades. The student is a resident of the District of Columbia; and is not identified as disabled, and eligible to receive special education services, pursuant to "The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

On February 12, 2009, Petitioner filed a "Due Process Complaint Notice" with the D.C. Public Schools, hereinafter referred to as 'DCPS', or "Respondent", alleging that "DCPS" denied the student a free appropriate public education (FAPE); by failing to: (1) comply with the March 17, 2008 Hearing Officers' Decision; (2) failing to review the student's clinical and cognitive evaluation/assessment; (3) provide the student an appropriate Individualized Education Program (IEP); (4) provide the student an appropriate placement; and (5) evaluate the student in all areas of suspected disability.

The due process hearing initially convened on March 16, 2009, at 10:00 a.m.; at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003; however, pursuant to Respondent's Motion to Compel Petitioner's appearance, the hearing was continued to March 26, 2009. The due process hearing reconvened on March 26, 2009, at 9:00 a.m., at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

II. JURISDICTION

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

III. DUE PROCESS RIGHTS

Counsel, on behalf of Petitioner, waived a formal reading of parents' due process rights.

IV. ISSUES

The following issues are identified in the *February 12, 2009* due process complaint:

- (1) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to comply with the March 17, 2008 Hearing Officers' Decision?
- (2) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to review the student's clinical and cognitive evaluation/assessment?
- (3) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate Individualized Education Program (IEP)?
- (4) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to provide the student an appropriate placement?
- (5) Whether DCPS denied the student a free appropriate public education (FAPE); by failing to evaluate the student in all areas of suspected disability?

V. RELIEF REQUESTED

- (1) A finding that DCPS failed to comply with the March 17, 2008 Hearing Officers' Decision.
- (2) A finding that DCPS failed to review the student's independent clinical and cognitive evaluation.
- (3) A finding that DCPS denied the student a free appropriate public education by failing to develop an appropriate IEP for the student.
- (4) A finding that DCPS denied the student a free appropriate public education by failing to provide the student an appropriate placement.
- (5) A finding that DCPS denied the student a free appropriate public education by failing to evaluate the student in all areas of suspected disability.
- (6) DCPS, on an interim basis, shall fund the student's and parent's placement of their choosing, with transportation services to be in effect.

Note: Petitioner withdrew Issues 3, 4, and 5 of the due process complaint, and Issues 1 and 2 of the complaint are consolidated, because the issues are related.

- (7) DCPS shall develop an IEP on behalf of the student at her new placement calling for the student to receive no less than 25 hours of specialized instruction in math, reading, writing, and written expression, family therapy, as well as individual therapy. This IEP shall serve as an interim IEP.
- (8) DCPS shall fund a vocational level II evaluation, a Lind Mood Bell Assessment, as well as an Adaptive Vineland Assessment on the student, as well as any additional evaluation recommended on behalf of the student.
- (9) DCPS, within ten (10) school days upon receipt of the last of the evaluations, shall reconvene the student's MDT/IEP meeting to review the evaluations and revise and update the student's IEP as appropriate and to discuss and determine the amount of compensatory education services the student is owed and to develop her plan.
- (10) All meetings shall be scheduled through counsel for the student and parent, Domiento C.R. Hill, Esq., in writing, via facsimile, at 202-742-2098 or 202-742-2097.
- (11) DCPS shall provide counsel for parent with copies pursuant to 5 DCMR 3021.8 of all evaluation reports and all educational records on the student no later than sixteen (16) business hours prior to the convening of any meeting.
- (12) DCPS shall ensure that this student has available a free appropriate public education including special education, transportation (5 DCMR 300.3), and Other related services as are defined at 34 C.F.R. 300.24, designed to meet this student's unique needs and preparation for employment and independent living.

VI. DISCLOSURES

The Hearing Officer inquired of the parties whether the disclosures from the opposing party were received, and whether there were any objections to the disclosures. Receiving no objections to the disclosures, the disclosures identified herein, were admitted into the record as evidence.

VII. DISCLOSURES ADMITTED INTO THE RECORD AS EVIDENCE ON BEHALF OF PETITIONER

Petitioner's Exhibits 01 through Petitioner's Exhibits 27, and a witness list dated March 19, 2009.

The Hearing Officer also admitted into the record the revised last page of the due process complaint, which includes the student's signature. The document is included as an appendage to Petitioner's Exhibit 3.

VIII. DISCLOSURES ADMITTED INTO THE RECORD AS EVIDENCE ON BEHALF OF RESPONDENT

Respondent's Exhibit 01 through Respondent's Exhibit 2, and a witness list dated March 9, 2009. Respondent's supplemental disclosures include Exhibits 1 and 2 which were included in the initial submittal, and an additional exhibit identified as Respondent's Exhibit 3; and a witness list is dated March 19, 2009.

IX. PROCEDURAL POSTURE

On February 12, 2009, Petitioner filed a "Due Process Complaint Notice" with the D.C. Public Schools ("DCPS"), Student Hearing Office, alleging that DCPS denied the student a free appropriate public education (FAPE); by failing to: (1) comply with the March 17, 2008 Hearing Officers' Decision; (2) provide the student an appropriate Individualized Education Program (IEP); (3) provide the student an appropriate placement; and (4) evaluate the student in all areas of suspected disability.

On February 18, 2009, the Hearing Officer issued a Notice of Pre-hearing Conference scheduling the pre-hearing conference for March 2, 2009 at 3:00 p.m... The pre-hearing conference failed to proceed as scheduled, due to Petitioner's unavailability. On March 4, 2009, the Hearing Officer issued a Pre-Hearing Conference Order confirming the due process hearing for March 16, 2009, at 10:00 a.m.; and consolidating Issues 1 and 2 of the due process complaint.

On March 3, 2009, Respondent filed "DCPS' Response to Parent's Administrative Due Process Complaint Notice, Notice of Insufficiency, and Motion to Compel Parent's Attendance at the Due Process Hearing". On March 5, 2009, Petitioner filed "Petitioner's Opposition to the Respondent's Notice of Insufficiency".

On March 9, 2009, Respondent filed a "Disclosure Statement", and a witness list. On March 19, 2009, Respondent filed a "Supplemental Disclosure Statement"; and Petitioner filed "Five Day Disclosures for [REDACTED]", and a witness list.

The due process hearing initially convened on March 16, 2009, at 10:00 a.m.. Respondent filed a Motion to Compel parent's appearance, however, at the hearing it was determined that the student had reached the age of majority, and student's appearance was necessary. Respondent requested that the court require student's appearance instead of parent. In response to Respondent's Motion to Compel, Petitioner agreed to facilitate the student's appearance at the hearing, entering on the record a Motion for Continuance, providing student an opportunity to appear for the hearing. Petitioner's Motion to Continue was unopposed, and having determined that good cause exist for the continuance, the court granted Petitioner's motion to continue the hearing to March 26, 2009, at 9:00 a.m..

On March 16, 2009, the Hearing Officer issued an Interim Order of Continuance Motion, granting Petitioner's motion and the due process hearing was rescheduled to March 26, 2009, at 9:00 a.m. The due process hearing convened on March 26, 2009, at 9:00 a.m., as scheduled.

X. PRELIMINARY MATTERS

The Hearing Officer inquired whether there were any preliminary matters, prior to proceeding with the hearing on the merits. As a preliminary matter, Petitioner advised the court that in response to Respondent's Notice of Insufficiency, the student signed the due process complaint, and copies were provided to the court and Respondent. The due process hearing proceeded as scheduled.

At the due process hearing, "DCPS" stipulated that an independent Psychological Evaluation was completed on March 19, 2009; and was not completed by "DCPS", prior to such date. The parties also discussed April 3, 2009 and April 10, 2009, as potential dates to convene the MDT meeting to review the student's evaluations.

XI. STATEMENT OF THE CASE

1. The student is _____ years of age, and an _____ grade student at _____ School, hereinafter referred to as _____ a public school located in the District of Columbia. The student was retained in the _____ and _____ grades.

2. The student is a resident of the District of Columbia; and is not identified as disabled, and eligible to receive special education services, pursuant to "The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)".

3. On February 6, 2008, Petitioner filed an administrative due process complaint alleging that the D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to determine the student eligible for special education services as a student with a disability of emotionally disturbed ("ED"); and/or other health impairment ("OHI").

4. On March 4, 2008, Petitioner's counsel forwarded to "DCPS" a written request for an independent comprehensive psycho-educational evaluation, allegedly based on discrepancies in DCPS' comprehensive and educational evaluations, and parent's disagreement with the evaluations.

On March 17, 2008, a Hearing Officer's Decision was issued ordering, in part, the following relief:

- "(1) Petitioner's February 6, 2008 Complaint is hereby Dismissed with Prejudice.
- (2) Within 15 school days of the issuance of this Order, DCPS shall administer the Vineland Adaptive Behavior Scales to Student to measure her level of adaptive functioning.
- (3) Within 15 school days of the completion of Student's Vineland assessment, DCPS shall convene an MDT/Eligibility meeting to review the results of the Vineland and determine whether additional evaluations are indicated. If additional evaluations are indicated, those shall be promptly conducted and another MDT meeting subsequently held. If additional evaluations are not indicated, the MDT shall discuss and determine whether Student is qualified for special education and related services as a mentally retarded student and, if warranted, take all steps necessary to provide her with appropriate special education and related services..."

5. On April 2, 2008, DCPS responded to parent's request for independent educational assessment, agreeing to fund an independent comprehensive psychological evaluation.

6. On May 21, 2008 and May 27, 2008, Di Con, LLC completed a "Confidential Clinical and Cognitive Evaluation". According to the evaluation, the student was referred for a psychological evaluation to assess her current level of emotional and cognitive functioning to assist with educational planning.

According to the evaluation, the student has a remarkable history of Bipolar Disorder, two inpatient psychiatric hospitalizations, and outpatient treatment; and was diagnosed with Depressive Disorder Not Otherwise Specified, Bipolar Disorder (by history); and Borderline Intellectual Functioning; .

Results of the Wechsler Abbreviated Scale of Intelligence (WASI, the student's overall cognitive ability is between the borderline and low average range; and according to the evaluator such results are fairly consistent with previous assessments, suggesting that the student will experience difficulty keeping up with her peers in a wide variety of situations that require age-appropriate thinking a reasoning abilities (she is in fact struggling academically and openly acknowledge that she has difficulty learning and understanding her school material).

The evaluator determined that the student's feelings of inadequacy are intermittently punctuated by impulsive and angry outbursts directed toward family and peers; and personality data further suggests that the student is extremely vulnerable to serious emotional difficulties; and delinquent activities.

The evaluator recommended increased support, honed by much emotional nurturance, guidance, and structure. The evaluator also strongly recommended the student continue to receive Long-term weekly individual therapy to address the correlate of her depression as well as target her behavioral dyscontrol. The evaluator reasoned that focus on individual therapy should also include improving the student's self-esteem, problem-solving skills, coping skills, and managing her anger. The evaluator also determined that because of the student's depressive symptomatology, continued psychiatric consultation is recommended. Family therapy and a mentoring program were also recommended.

The evaluator concluded by recommending that the MDT consider the test results from this evaluation and other evaluations and recommend an educational program that is appropriate to her particular needs; indicating that the student is clearly in need of academic support to successfully complete her educational career. The evaluator also concluded that the student may benefit from specialized instruction in a small environment with individualized assistant to build up her skills; extra time to complete her school work; vocational evaluation; counseling; and services were recommended.

7. On November 24, 2008, Petitioner's counsel forwarded to the D.C. Public Schools, Office of Special Education-Legal Unit a copy of the independent clinical and cognitive evaluation. The letter also included request to convene an MDT/IEP meeting to review the independent evaluation and determine eligibility.

8. On February 12, 2009, Petitioner filed a "Due Process Complaint Notice" with the D.C. Public Schools ("DCPS"), alleging that DCPS denied the student a free appropriate public education (FAPE); by failing to: (1) comply with the March 17, 2008 Hearing Officers' Decision; (2) review the student's clinical and cognitive evaluation/assessment; (3) provide the student an appropriate Individualized Education Program (IEP); (4) provide the student an appropriate placement; and (5) evaluate the student in all areas of suspected disability.

9. On March 19, 2009, "DCPS" completed "Confidential Report of Psychological Evaluation". The evaluator determined that based on results of the Adaptive Behavior Assessment System II, the scores do not fall within the Mentally Defective/Extremely Low range of ability and do not indicate a diagnosis of mental retardation. The parent rating summary reflects that the student's conceptual, social, and practical skills are below average; there are weaknesses in functional academics, and strengths in self-direction. The teacher rating summary reflects the student's conceptual ability is borderline, social skills is average, and practical skills are below average.

The evaluator concluded that according to results of the Wechsler Adult Intelligence Scale-Third Edition, the student's overall functioning was within the Borderline range; her performance on verbal subtests was comparable to her performance on Performance subtests suggesting that her verbal and nonverbal reasoning abilities are equally developed.

XII. WITNESSES

Petitioner's Witness

Student

Respondent's Witnesses

No witnesses were introduced by Respondent.

WITNESS TESTIMONY

Petitioner's Witness

Student

Student testified that she has attended _____ School the 2007/08 and 2008/09 school years; was retained in the _____ and _____ grades; and performs "o.k." in school, receiving grades of "C's" and "D's". Student also testified that she comprehends half of the academic curriculum.

Student also testified that she was hospitalized twice during the Summer of 2008, because of an altercation at school. Student concluded by testifying that during this school year, she failed to participate in a meeting to review evaluations.

XIII. DISCUSSION AND CONCLUSIONS OF LAW

ISSUE

Whether DCPS denied the student a free appropriate public education (FAPE), by failing to comply with the *March 17, 2008* Hearing Officers' Decision (HOD)?

Petitioner represents that according to the March 17, 2008 HOD, among others, "DCPS" was required to conduct an Adaptive Vineland Behavior Scales Assessment within fifteen (15) school days, and reconvene the MDT meeting upon completion of said assessment to review the student's evaluations, revise and update the student's IEP as appropriate; and to date "DCPS" failed to comply with the court's order.

Petitioner also represents that according to the Blackman/Jones Consent Decree a rebuttable presumption of harm is created whenever "DCPS" failed to do, inter alia, comply with settlement agreements. See also *Hawkins v. District of Columbia*, Civil Action No. 07-0278 (JDB)(March 7, 2008)(In *Hawkins* the Court found that the hearing officer's determination was in error when he failed to find that "DCPS" had violated the order of a previous hearing officer determination absent the findings of any efforts by the parent or anyone working on behalf of the student to hamper "DCPS" attempts at compliance).

Petitioner also represents that according to IDEA if the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency...in any decision made with respect to the provision of FAPE to the child. Parent further represents that an independent evaluation was completed and provided to "DCPS"; and "DCPS" failed to initiate efforts to review any of the student's evaluations as the IDEIA requires.

Petitioner concluded that "DCPS" failed to comply with the March 17, 2008 HOD; evaluations are complete, however, a meeting has not been held. Petitioner also concludes that evaluation data suggests that a MDT meeting convene to review evaluation data, and make an appropriate determination; and although the student receives grades of "C's" and "D's", the student was retained twice, and hospitalized.

"DCPS" represents that the student was previously determined ineligible for special education services, parent challenged the determination by filing a due process complaint, and failed to prevail. "DCPS" further represents that Petitioner requested an independent evaluation, which "DCPS" agreed to fund, and Petitioner filed a second complaint requesting the independent evaluation and a meeting; and the complaint was dismissed with prejudice.

"DCPS" represents that neither parent nor the student appeared for either hearing, or contacted by telephone to testify or participate in the hearing; and in late 2008 Petitioner provided DCPS with the independent evaluation, completed in June, 2008. "DCPS" further represents that since receipt of the evaluation, several attempts were made to convene a meeting, through parent's counsel, to review the evaluation. "DCPS" represents that a Letter of-

Invitation was forwarded on December 17, 2008, scheduling the meeting for January 5, 2009; and parent's counsel failed to appear for the scheduled meeting.

"DCPS" represents that three (3) additional dates were proposed at the meeting, however, parent's counsel failed to respond; "DCPS" followed up with a call to parent's counsel on January 7, 2009; a Letter of Invitation was also mailed; and a reminder email was forwarded to parent's counsel on January 13, 2009, however neither the parent nor parent's counsel appeared.

"DCPS" further represents that the parent is required for the writing of an IEP; after another email was forwarded to parent's counsel on January 29, 2009, "DCPS" received a response indicating that parent's counsel was having trouble contacting the parent; and that she placed several phone calls and mailed a letter, however, parent failed to respond.

"DCPS" concluded that the record demonstrates that on March 19, 2009, a "Confidential Report of Psychological Evaluation" was completed, and although a meeting was not held to review the evaluations, it is not opposed to convening a meeting.

"DCPS" concluded that although the Blackman/Jones Consent Decree shifts the burden to "DCPS", the record reflects that the student has not been harmed, receives passing grades; and evaluations do not indicate that the student is mentally retarded. "DCPS" also concluded that although it presented no witnesses, with the production of documents, it overcame the presumption of harm to the student.

ANALYSIS

Although IDEA does not provide Hearing Officer's enforcement authority when there is a failure to comply with a HOD or SA; it is clear that IDEA, at 34 C.F. R Section 300.507(a) and 300.503(a); and 20 U.S.C. Section 1400 et seq., grants Hearing Officers the specific authority to hear complaints and decide *any* matter relating to the identification, evaluation, or educational placement of the child, *or the provision of a free and appropriate public education to such child.*

The Hearing Officer finds that issues which are the subject of a due process complaint and a Hearing Officer's Decision are matters relating to the identification, evaluation, or educational placement of a child. Therefore, a public agency's *failure to comply* with an Hearing Officer's Decision, would fall within the category of "*any matter*" relating to the identification, evaluation, or educational placement of the child, *or the provision of a free and appropriate public education to such child,*" and according to IDEA, a Hearing Officers has the specific authority to decide such matters. *See, IDEA, 34 C.F.R. Sections 300.507(a) and 300.503(a); and 20 U.S.C. Section 1400 et seq..*

Accordingly, there exists a recognized legal theory under the IDEIA, upon which relief can be granted through the administrative process; and the issue regarding DCPS' alleged failure to implement the January 6, 2009 Hearing Officer's Decision, is a matter properly before this court.

On March 17, 2008, a Hearing Officers' Decision (HOD) was issued, requiring in part, that within 15 school days of the issuance of the Order, DCPS shall administer the Vineland Adaptive Behavior Scales to Student to measure her level of adaptive functioning. The Order also provided that within 15 school days of the completion of Student's Vineland assessment, DCPS shall convene an MDT/Eligibility meeting to review the results of the Vineland and determine whether additional evaluations are indicated.

The Order provided further that if additional evaluations were indicated, those shall be promptly conducted and another MDT meeting subsequently held; and if additional evaluations are not indicated, the MDT shall discuss and determine whether the student is qualified for special education and related services as a mentally retarded student and, if warranted, take all steps necessary to provide her with appropriate special education and related services..."

The record reflects that the Hearing Officer's Decision was issued on March 17, 2008. Therefore, compliance with the HOD required DCPS to administer the Vineland Adaptive Behavior Scales to the student not later than April 7, 2008. "DCPS" completed the "Confidential Report of Psychological Evaluation", which included the Vineland Adaptive Behavior Scales on March 19, 2009, more than one (1) year after issuance of the March 13, 2008 HOD. The Hearing Officer finds that "DCPS" failed to complete the Vineland Assessment by April 7, 2008, within fifteen (15) school days of issuance of the March 17, 2008 HOD.

In addition, the HOD required "DCPS" to convene a MDT/Eligibility meeting within 15 school days of completion of the Vineland Assessment. It is clear that the Hearing Officer intended DCPS to complete the Vineland Adaptive Behavior Scales by April 7, 2008, within fifteen (15) school days of the issuance of the March 17, 2008 HOD; and convene a MDT/Eligibility meeting by April 28, 2008, within fifteen (15) school days after completion of the Vineland Adaptive Behavior Scales, to review the results of the Vineland and determine whether additional evaluations were indicated. The record reflects that "DCPS" completed the "Confidential Report of Psychological Evaluation", which included the Vineland Adaptive Behavior Scales on March 19, 2009, more than one (1) year later.

The Hearing Officer finds that "DCPS" failed to complete the Vineland Assessment by April 7, 2008; and as a result, failed to convene the MDT/Eligibility meeting by April 28, 2008, within fifteen (15) school days of completion of the Vineland Assessment.

"DCPS" represents that efforts were initiated to convene a MDT/Eligibility team meeting; and that Petitioner and/or Petitioner's counsel failed to respond to letters of invitation, or appear for scheduled meetings. However, "DCPS" presented no evidence of Letters of Invitation, emails, or telephone calls to Petitioner's counsel. Instead, "DCPS" included in its disclosures a letter from Petitioner's counsel dated January 5, 2009, acknowledging receipt of a Letter of Invitation from "DCPS"; and a letter dated January 15, 2009, acknowledging letters of invitation. "DCPS" presented no other evidence of efforts to convene an MDT/Eligibility team meeting, within fifteen (15) school days of completion of the Vineland Assessment.

The Blackman/Jones Consent Decree requires timely implementation of a HOD to ensure the provision of a FAPE to a student, and that the student receives the services he is entitled to receive under the IDEA; and any delay in implementing a HOD compromises that entitlement, and harms the student.

The Blackman/Jones Consent Decree also creates a *rebuttable presumption of harm to the student*; therefore, harm to the student is presumed, and a showing of harm to the student by Petitioner at the hearing, is not required. The rebuttable presumption of harm is created when there is an untimely HOD or untimely implementation of an HOD or SA; and the burden is then placed upon "DCPS" to present evidence rebutting the presumption of harm to the student.

In establishing a rebuttable presumption of harm to the student, as a result of any delay or failure to timely implement an HOD, the courts not only consider the period of time associated with the delay or failure to timely implement the HOD, however, courts also consider the total amount of time involved since the initial violation; and the services the student is entitled to receive under the IDEA, however failed to receive during this period.

According to paragraph 78 of the Blackman/Jones Consent Decree, in order to rebut the presumption of harm; at the hearing, DCPS *will* have the *burden of proving* one of the following situations:

- (1) DCPS has already provided or agreed to provide compensatory education to the class member for Blackman/Jones delays;
- (2) the issue of compensatory education has already been determined by a Hearing Officer and the Hearing Officer has either ordered compensatory education or has determined that the child is not entitled to compensatory education for Blackman/Jones delays;
- (3) the class member has been found ineligible for special education services;
- (4) the student graduated with a regular diploma;
- (5) the student no longer is a resident of the District of Columbia;
- (6) the student graduated with a certificate of IEP completion;
- (7) the student has been in general education on a full-time basis for at least one academic year because the student met his/her IEP goals;
- (8) the student has been in a non-public general education school for at least three consecutive grading periods or (27) weeks, whichever is greater; or
- (9) the sole unimplemented HOD or SA provision pertained to reimbursement for services the parent obtained privately.

The Hearing Officer finds that DCPS failed to introduce evidence that any of the criteria identified above apply in this matter, which is necessary to rebut a presumption of harm to the student. Paragraph 78 of the Consent Decree further provides that *"if the defendants introduce evidence at a hearing to rebut the presumption, the student shall have the opportunity, at the same hearing, to present evidence to show that he/she has been harmed.*

According to the Consent Decree, parent is not required to present evidence that the student has been harmed, until after DCPS introduces evidence at the hearing to rebut the presumption of harm to the student. In such case, DCPS may then present evidence, at the same hearing, to defend against the claim of harm.”

The Hearing Officer finds that DCPS failed to introduce evidence to rebut the presumption of harm to the student, created under the Blackman/Jones Consent Decree; as a result of DCPS’ failure to comply with the March 17, 2008 HOD, therefore harm to the student is presumed. See, paragraph 78, of the Blackman/Jones Consent Decree.

Based on the aforementioned, DCPS’ argument that although the Blackman/Jones Consent Decree shifts the burden to “DCPS”, the record reflects that the student has not been harmed, receives passing grades; and evaluations do not indicate that the student is mentally retarded fails, because harm is presumed.

In addition, DCPS’ argument that although it presented no witnesses, with the production of documents, it overcame the presumption of harm to the student, also fails; because the Blackman/Jones Consent Decree, not DCPS, establishes the criteria necessary to rebut the presumption of harm to the student; and DCPS failed to present evidence which satisfies the criteria necessary to rebut the presumption of harm to the student.

Based on the aforementioned, it is the Hearing Officers’ decision that Petitioner satisfied its burden of proof by presenting evidence sufficient for a finding that DCPS failed to comply with the March 17, 2008, in violation of IDEA.

Free and Appropriate Public Education (FAPE)

The FAPE requirement under IDEA, is applicable to substantive and procedural violations, which may result in a denial of a FAPE. In alleging substantive violations under IDEA, a party challenges the *substantive* content of the educational services the disabled student is entitled to receive under the IDEA.

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

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:

- (I) impede the child's right to a free and appropriate public education;
- (II) significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or
- (III) caused a deprivation of educational benefit."

First, DCPS' failure to comply with the March 17, 2008 HOD in a timely manner, represents a procedural violation of IDEA. The HOD established a timeframe in which DCPS was to complete a Vineland Assessment; and convene the MDT/Eligibility review the results of the Vineland Assessment, and determine whether additional evaluations were indicated.

In addition, the HOD provided that if additional evaluations were indicated, DCPS was required to promptly conduct the evaluations and subsequently convene another MDT meeting. If additional evaluations were not indicated, the MDT was required to discuss and determine whether the student is qualified for special education and related services as a student with mental- retardation, and if warranted, initiate all steps necessary to provide student with appropriate special education and related services.

Second, DCPS' failure to comply with the March 17, 2008 HOD represents a procedural violation that impedes the child's right to a FAPE; significantly impedes parent's opportunity to participate in all decisions regarding the student's educational program, placement, and the provision of a FAPE to the student; resulting in a deprivation of educational benefit to the student.

Third, the courts have held that substantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process. Courts have also held that procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity also will constitute 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.*

Accordingly, the Hearing Officer finds that DCPS' failure to comply with the March 17, 2008 HOD; also represents a substantive violation of IDEA, because the procedural violation in question seriously infringes upon the parent's opportunity to participate in the IEP process; and deprives an eligible student of an individualized education program specifically designed to address his special education needs, resulting in loss of educational opportunity.

More than one (1) year lapsed from issuance of the March 17, 2008 HOD, and the due process hearing, and as of the date of hearing, although "DCPS" completed the Vineland Assessment, it failed to convene a MDT/Eligibility meeting to review the Vineland Assessment, and determine the student's eligibility'. The more than one (1) year period is a significant-

period of time, during which an eligibility determination has not been rendered, on behalf of the student.

In addition, the student was retained in the fourth grade, and is currently repeating the 11th grade; which is evidence of academic difficulties. The student testified that she only comprehends half of the academic instruction received; which is evidence that the student continue to experience academic difficulty, and is only accessing a portion of the general curriculum because of her limited cognitive ability.

Furthermore, receiving passing grades of “C’s” and “D’s”, does not relieve the LEA of its obligation to review evaluations and determine the student’s eligibility for special education and related services, in a timely manner. In addition, the student is repeating the 11th grade, and reviewing information received the prior year, therefore, grades of “C’s” and “D’s” may not necessarily be considered “passing” grades; and may actually be cause for concern regarding the student’s academic progress.

It is the Hearing Officers’ Decision that DCPS’ failure to comply with the March 17, 2008 HOD, represents a procedural and substantive violation of IDEA; and a continued denial of a FAPE to the student; in violation of “The Individuals with Disabilities Education Act (“IDEA”)”, Public Law 101-476, reauthorized as “The Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”)”.

XIV. ORDER

Based on the aforementioned it is on this 29th day of March, 2009, hereby:

1. **ORDERED**, that DCPS shall convene an MDT/Eligibility team meeting with Petitioner and/or Petitioner’s representative, not later than April 10, 2009, to review the results of the Vineland Assessment, and determine whether additional evaluations are indicated.

If additional evaluations are indicated, those shall be promptly conducted and another MDT meeting subsequently held. If additional evaluations are not indicated, the MDT shall discuss and determine whether Student is qualified for special education and related services as a mentally retarded student and, if warranted, take all steps necessary to provide her with appropriate special education and related services; and it is further

2. **ORDERED**, that should the MDT/Eligibility team determine that the student requires an alternate placement, DCPS shall issue a Prior Notice of Placement to the parent, within five (5) school days, if the placement is a public school, and thirty (30) calendar days, if the placement is a non-public or private school; and it is further

3. **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
4. **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 representative. DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives; and it is further
5. **ORDERED**, that all meetings shall be scheduled through counsel for the parent, Domiento C.R. Hill, Esquire, in writing via facsimile at 202-742-2098; and it is further
6. **ORDERED**, that 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

3-29-09

Date Filed: _____

Attorney Ramona M. Justice
Hearing Officer

cc: Attorney Laura George, Office of the Attorney General
Attorney Domiento C.R. Hill: Fax: 202-265-4264