

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

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Confidential

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STUDENT HEARING OFFICE

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>March 28, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Domiento Hill, Esq.</p> <p>Counsel for DCPS: Daniel McCall, Esq.</p> <p><u>Hearing Officer:</u> Kimm H. Massey, Esq.</p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. §§ 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

II. PROCEDURAL BACKGROUND

On February 17, 2009, counsel for Parent and Student (“Petitioner’s counsel”) filed a Due Process Complaint Notice (“Complaint”) against the District of Columbia Public Schools (“DCPS”), alleging that DCPS denied Student a free appropriate public education (“FAPE”) by failing to comply with a November 20, 2008 Hearing Officer’s Decision and Order (“11/20/08 HOD”), which ordered DCPS to formalize a compensatory education plan for Student that consisted of seven specified elements for a total cost of

The Student Hearing Office (“SHO”) set March 3, 2009 as the prehearing conference date and provisionally scheduled the due process hearing for March 18, 2009 at 11:00 a.m. However, after consultation with the parties, the hearing officer reset the prehearing conference to March 6, 2009 at 10:00 a.m.

The hearing officer convened the prehearing conference on February 6, 2009, as scheduled, and led the parties through a discussion of the issues, defenses, relief sought, and related matters. Petitioner’s counsel indicated that settlement discussions had begun, in that a DCPS employee had sent counsel an email inquiring whether Parent would accept a check for in lieu of the equipment listed in the 11/20/08 HOD, and counsel had sent an email inquiring the same of Parent but had not yet received a response. Petitioner’s counsel further represented that, as of the date of the prehearing conference, DCPS had failed to provide Student with any of the seven items listed in the 11/20/08 HOD. Counsel for DCPS was of the opinion that Petitioner’s counsel and/or Parent could have taken the 11/20/08 HOD directly to Lindamood Bell to obtain one of the services listed in the HOD without any further action from DCPS. Petitioner’s counsel was unaware of that possibility but promised to look into same. On March 12, 2009, the hearing officer issued a Pre-Hearing Order that summarized the proceedings at the prehearing conference.

In the body of an email sent shortly after close of business on March 11, 2009, DCPS submitted District of Columbia Public School’s Response, Notice of Insufficiency, and Motion to Dismiss Petitioner’s Administrative Due Process Complaint Notice. The document contained no argument or citations concerning insufficiency but sought a dismissal on grounds that the hearing officer lacked jurisdiction over the claims, the hearing officer lacked jurisdiction to enforce an HOD, the consent Decree provided a forum for Petitioner to seek relief, and *res judicata*.

By disclosure statement dated March 11, 2009, Petitioner disclosed six potential witnesses and seven documents (hereinafter Petitioner’s Exhibits 1 through 7). DCPS failed to file a Five-Day disclosure.

On March 12, 2009, Petitioner filed Petitioner's Opposition to the Respondent's Notice of Insufficiency and Opposition to the Respondent's Supplemental Motion to the [sic] Petitioner's Due Process Complaint Notice, in which Petitioner asserted, *inter alia*, that the Notice of Insufficiency was untimely, that hearing officers have jurisdiction to determine denials of FAPE for failure to comply with a Settlement Agreement, and that *res judicata* was inapplicable.

On March 13, 2009, the hearing officer issued an Interim Order Denying DCPS's Notice of Insufficiency and Motion to Dismiss, which denied the Notice of Insufficiency because it was untimely and no arguments or citations were made in support thereof, and denied the Motion to Dismiss on grounds that the hearing officer had authority to enforce HODs and *res judicata* was clearly inapplicable under the facts of the case. The hearing officer declined to determine whether or not the Consent Decree provided an alternative forum because the existence of an alternative forum would not deprive the hearing officer of jurisdiction.

By email dated March 17, 2009, counsel for DCPS advised the hearing officer, opposing counsel, and the SHO that DCPS had filed on that same date a Supplemental Motion to Dismiss with attachments. In reality, however, DCPS had merely attached two documents to its March 11, 2009 Response, Notice and Motion. As a result, although Petitioner submitted an Opposition and Motion to Strike the "renewed" Notice of Insufficiency and Motion to Dismiss, the hearing officer declined to issue another ruling absent a new and updated pleading from DCPS.

The hearing officer convened the due process hearing on March 18, 2009, as scheduled, and Petitioner's documents were admitted into the record without objection. Although DCPS failed to submit a Five-Day disclosure, DCPS sought to admit as DCPS-1 and DCPS-2 the two exhibits it had attached to its March 17th "renewed" Notice and Motion. Upon Petitioner's objection on the ground that the documents were not timely disclosed, the hearing officer excluded the documents pursuant to 34 C.F.R. § 300.512(a)(3). Counsel for DCPS represented that the documents were needed to show that all or most of the items specified in the 11/20/08 HOD had been ordered for Student by or on the day of the hearing. The hearing officer stated that although the untimely documents would not be admitted into evidence, DCPS should feel free to call disclosed witnesses to testify about the items ordered and when they were ordered. Ultimately, however, DCPS did not present testimony from any witness who had direct knowledge of what had been ordered and when the order had been placed.

After Petitioner presented its case through documents and the testimony of Parent, DCPS moved for a directed finding on the issue of whether there had been a denial of FAPE or harm to Student, arguing that a *de minimis* procedural violation was at issue. Petitioner opposed the motion, arguing that *Blackman-Jones* establishes a rebuttable presumption of harm when an HOD is not implemented, so harm is presumed unless DCPS proves otherwise. Petitioner also maintained that Parent's testimony was sufficient to demonstrate harm. Upon consideration of the parties' arguments, the hearing denied DCPS's motion for a directed finding on the ground that Petitioner's allegations and evidence gave rise to a rebuttable presumption of harm under the Consent Decree,² which DCPS was required to rebut by the presentation of evidence. After the

² See *Blackman v. District of Columbia*, Civil Action No. 97-1629 (D.D.C. Aug. 24, 2006), Consent Decree at ¶ 74 (establishing a rebuttable presumption of harm for DCPS students who fail to receive timely HO Decision/Case #

hearing officer's ruling, DCPS presented the testimony of its sole witness and the hearing officer brought the hearing to a close.

III. ISSUE(S)

1. Did DCPS deny Student a FAPE by failing to comply with the 11/20/08 HOD?

IV. FINDINGS OF FACT

1. Student is _____ years old, and he attends a private special education placement that he has been attending since April 2008.³
2. Student's current IEP is dated June 13, 2008. The IEP classifies Student as speech and language impaired, and it requires him to receive 27 hours per week of specialized instruction, 90 minutes per week of speech and language therapy, and 90 minutes per week of occupational therapy, for a total of 30 hours per week of special education and related services.⁴
3. Student is supposed to be in the second grade according to his age, but he is performing at the pre-K level in reading and at the kindergarten level in math.⁵
4. On November 20, 2008, this hearing officer issued an HOD that ordered DCPS to formalize a compensatory education plan for Student at a cost of _____ that consists of the following seven elements: (1) A full Lindamood-Bell evaluation for a total cost of _____ (2) A Lindamood-Bell diagnostic evaluation report for a total cost of _____ (3) thirty sessions of 1:1 clinical instruction at Lindamood-Bell Learning Center for a total cost of _____ (4) Therapro Huggy Vest for an estimated cost of _____ (5) Noise canceling headphones for a cost not to exceed _____ (6) Lakeshore Classroom CD & Single Cassette Player for a cost of _____ and (7) Listening Library for Fluency for a total cost of _____
5. At a January 2009 parent-teacher meeting at Student's private placement, Parent asked Student's teacher whether the teacher had heard anything about Student's compensatory education plan. Parent did this because DCPS had indicated that it might have Student's private school order his compensatory education items. When the teacher told Parent that she had not heard anything about the compensatory education plan, Parent contacted Petitioner's counsel. Parent never contacted DCPS to inquire about the implementation

implementation of HODs).

³ See Complaint.

⁴ Petitioner's Exhibit 3.

⁵ Testimony of Parent.

⁶ Petitioner's Exhibit 5.

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of the 11/20/08 HOD.⁷

6. As of the date of the due process hearing in this case, Student had not yet received any of the items specified in the 11/20/08 HOD. However, at the end of the week prior to the due processing hearing, someone from DCPS called parent and asked what size Huggy Vest Student needed because it was going to be ordered. Moreover, on the day of the hearing, Parent received a copy of order forms indicating that other items had also been ordered for Student.⁸
7. The administrative record for this case includes a March 10, 2009 email string between DCPS's Compliance Case Manager and Petitioner's counsel. In the first email, the Case Manager asked counsel whether Parent would be willing to accept a check in the amount of _____ in lieu of implementation of the 11/20/08 HOD. After counsel indicated that Parent would accept a check so long as it was provided prior to the due process hearing, DCPS stated that it would forward a check directly to Lindamood Bell to cover the cost of the evaluation, diagnostic evaluation report and clinical instruction. In response, Petitioner's counsel indicated that he would need something in writing from Lindamood Bell indicating that payment had been received. Counsel also stated that DCPS should have provided Student with the remaining items "some time ago" instead of ordering them on March 10th, and that Parent intended to proceed with the due process hearing if all items were not in place.⁹
8. DCPS's Placement Specialist for Student's private school saw the 11/20/08 HOD for the first time at the due process hearing for this case. The Placement Specialist had never taken any steps to order the items listed in the 11/20/08 HOD prior to the hearing. On the other hand, the Placement Specialist was never contacted by Petitioner's counsel concerning implementation of the 11/20/08 HOD.¹⁰
9. To the Placement Specialist's knowledge, no steps had been taken by anyone in DCPS to order the items listed in the 11/20/08 HOD prior to the week preceding the due process hearing. During the week preceding the due process hearing, the Placement Specialist spoke with a DCPS Home Care Staff member, who indicated that a Huggy Vest, headphones, and computer software had been ordered for Student. However, the Placement Specialist was not aware of the order dates, the anticipated delivery dates, or the person to whom the items would be delivered.¹¹
10. Parent is pleased with the services Student is receiving at his private placement. However, in Parent's opinion, Student has made inconsistent progress at the private placement, meaning that he has made progress in some areas but no progress in other

⁷ Testimony of Parent.

⁸ Testimony of Parent.

⁹ Petitioner's Exhibit 7.

¹⁰ Testimony of Placement Specialist.

¹¹ Testimony of Placement Specialist.

areas.¹²

11. In the wake of DCPS's failure to implement the 11/20/08 HOD, Parent enrolled Student in Sylvan Learning Centers so that he could receive additional help because Parent felt that Student was ready and eager to learn and she did not want to let that window of opportunity pass.¹³
12. DCPS's Placement Specialist observed Student in his private placement two weeks before the due process hearing and on the day before the due process hearing. The Placement Specialist was of the opinion that Student is very sociable and motivated to be in class. Student went to the board and followed instructions. Student struggled in reading with certain words, but the teacher and other students helped him. Student is very good with sight words, but he has problems blending words and identifying numbers over 20. The Placement Specialist also spoke with the Principal of the school, Student's IEP coordinator, and Student's classroom teacher. Everyone was pleased with Student's progress in the last couple of months, but there was no discussion of the period before the last few months.¹⁴

V. CONCLUSIONS OF LAW

Petitioner has alleged that DCPS denied Student a FAPE by failing to comply with the 11/20/08 HOD. As the party seeking relief, Petitioner bears the burden of proof. See 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

The evidence in this case clearly establishes that DCPS did not begin ordering the items specified in the 11/20/08 HOD until approximately one week prior to the March 18, 2009 administrative due process hearing. As the 11/20/08 HOD did not establish a due date for the formalization of Student's compensatory education plan, the question at issue is whether DCPS's implementation of the HOD approximately four months after it was issued constituted implementation of the HOD within a reasonable period of time.

At the due process hearing in this case, DCPS asserted that it started working on implementation of the 11/20/08 HOD as soon as it received the Complaint in this matter. DCPS argued that the only issue to be decided is whether its delay in implementing the HOD resulted in a denial of FAPE to Student, and that Petitioner would have to prove harm to Student as a result of the delay to establish a denial of FAPE.

On the other hand, Petitioner argued that DCPS's failure to act on the 11/20/08 HOD until it received the Complaint was inappropriate, and that the more than 3-month delay in implementing the HOD could not be considered implementation within a reasonable time. Petitioner also pointed out that, even as late as the date of the due process hearing, Student still

¹² Testimony of Parent.

¹³ Testimony of Parent.

¹⁴ Testimony of Placement Specialist.

had not been provided with the items specified in the HOD, and DCPS was unable to indicate exactly when Student could be expected to receive the items.

Upon consideration of the evidence and the parties' arguments the hearing officer concludes that, under the facts of this case, where DCPS did not even attempt to implement the HOD until it received Petitioner's Complaint 3 months after the HOD was issued, and DCPS failed to accomplish full implementation by getting all items at issue into Student's hands by the date of the due process hearing approximately four months after issuance of the HOD, DCPS failed to implement the HOD within a reasonable time period. As a result, DCPS failed to timely implement the HOD, and under the Consent Decree, such failure on DCPS's part gives rise to a rebuttable presumption of harm. *See* Footnote 2, *supra*.

DCPS's evidence in this case reveals that when its Placement Specialist observed Student in class, Student's teacher and fellow classmates had to help him with certain words when he was reading. DCPS's evidence further establishes that although Student's IEP coordinator and teacher are pleased with the progress he has made over the last couple of months, Student nevertheless has problems blending words and identifying numbers over 20. The hearing officer finds that this evidence is insufficient to rebut the presumption that Student has suffered harm as a result of DCPS's failure to timely implement the 11/20/08 HOD, especially in light of Student's ongoing difficulties in reading and math. Under these circumstances, the hearing officer concludes that DCPS's failure to timely implement the 11/20/08 HOD constituted a denial of FAPE to Student. *See* Consent Decree at 11 (defining one subclass of Plaintiff students as those who were denied a FAPE because DCPS failed to fully and timely implement the determinations of hearing officers or settlement agreements).

Although Petitioner has met its burden of establishing a denial of FAPE in this case, the hearing officer finds that it would be inappropriate to order DCPS to provide Student with the items listed in the 11/20/08 HOD, because the evidence in this case tends to establish that all items at issue have already been ordered even if they have not yet been delivered into Student's possession. As a result, the hearing officer will limit the relief to be awarded to a finding of a denial of FAPE.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner met its burden of proving a denial of FAPE.

VII. ORDER

1. Petitioner is hereby awarded a finding that DCPS denied Student a FAPE by failing to timely implement the 11/20/08 HOD, which ordered DCPS to formalize a seven-item compensatory education plan for Student.

/s/ Kimm H. Massey, Esq.

Kimm H. Massey, Esq.
Impartial Due Process Hearing Officer

Dated this 28th day of March, 2009.

NOTICE OF APPEAL RIGHTS

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).