

DC Office of the State Superintendent of Education  
Office of Compliance & Review

State Enforcement & Investigation Division

STUDENT HEARING OFFICE

Van Ness Elementary School

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Virginia A. Dietrich, Esq.  
Impartial Due Process Hearing Officer

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STUDENT HEARING OFFICE  
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<b>In Re the Matter of:</b>	*	
	*	<b>CASE NO.</b>
<b>Parent on behalf of Student*</b>	*	
	*	
<b>Petitioner,</b>	*	<b>Complaint Filed: 02/12/09</b>
	*	<b>Hearing Dates: 03/18/09, 04/01/09</b>
<b>vs.</b>	*	
	*	<b>Hearing Site:</b>
	*	<b>Van Ness Elementary School</b>
<b>The District of Columbia Public Schools</b>	*	<b>1150 5<sup>th</sup> Street, S.E., 1<sup>st</sup> Floor</b>
	*	<b>Washington, D.C. 20003</b>
<b>Respondent.</b>	*	

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**HEARING OFFICER DETERMINATION**

Petitioner's Attorney: Fatmata Barrie, Esq.  
Law Offices, Christopher N. Anwah, PLLC  
10 R Street, N.E.  
Washington, D.C. 20002

Respondent's Attorney: Tiffany Puckett, Esq.  
Assistant Attorney General  
Office of the Attorney General as Counsel  
for D.C. Public Schools  
Office of the General Counsel  
825 North Capitol Street, N.E., 9<sup>th</sup> Floor  
Washington, D.C. 20002

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\*Personally identifiable information is attached as an Index to this document and must be removed prior to public distribution.

## Hearing Officer Determination & Order

### **JURISDICTION**

The Due Process Hearing was convened and this Hearing Officer Determination ("HOD") and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 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.").

### **INTRODUCTION**

On 02/12/09, a Due Process Complaint Notice ("Complaint") was filed by the parent ("Parent or Petitioner") on behalf of the year old student ("Student"), alleging that District of Columbia Public Schools ("DCPS") denied Student a Free Appropriate Public Education ("FAPE") in violation of IDEIA when DCPS failed comply with an HOD, failed to complete a triennial evaluation, and failed to provide Student with an appropriate Individualized Education Program ("IEP"), with each failure resulting in the denial of a FAPE. Petitioner asserts entitlement to compensatory education as a result of the denial of a FAPE.

### **PRE-HEARING CONFERENCE**

A pre-hearing teleconference convened on 03/09/09. Attorney Fatmata Barrie represented Petitioner and Attorney Tiffany Puckett represented DCPS. The substance of the pre-hearing conference was memorialized in a Pre-Hearing Conference Order issued on 03/10/09.

### **DUE PROCESS HEARING**

The due process hearing convened on 03/18/09 at the Van Ness Elementary School located at 1150 5<sup>th</sup> Street, S.E., 1<sup>st</sup> Floor, Washington, D.C. 20003, but did not conclude due to an insufficient amount of time allotted for the hearing. The due process hearing resumed and concluded on 04/01/09.

Petitioner was represented by Fatmata Barrie, Esq. ("Petitioner's Attorney") and DCPS was represented by Tiffany Puckett, Esq. ("DCPS' Attorney"). Petitioner was present for the due process hearing. The parties were not amenable to settlement discussions.

### **Disclosures:**

Petitioner's Disclosure of Witnesses and Documents letter dated 03/10/09 contained Exhibits #1-16. Petitioner's Exhibits #1-16 were admitted into evidence without objection. Petitioner's Supplemental Disclosure of Witnesses and Documents letter dated 03/10/09 contained Exhibit #17. Petitioner's Exhibit #17 was admitted into evidence without objection.

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DCPS' Disclosure Statement/Response dated 03/09/09 contained Exhibits #1-6. Exhibits #1-6 were admitted into evidence without objection. DCPS' Amended Disclosure letter dated 03/25/09 and filed 03/26/09 contained Exhibit #7. DCPS' Exhibit #7 was admitted into evidence without objection.

### Witnesses:

For Petitioner:

- (1) Brandi Reynolds, Psychologist Associate at Interdynamics, Inc. (via telephone), and
- (2) Petitioner.

For DCPS:

- (1) James Barnes, DCPS compliance case manager, and
- (2) Moses Roberts, DCPS placement specialist (via telephone).

### Admissions:

DCPS' Admission #1 – The psychiatric evaluation and speech/language evaluation to be completed by DCPS pursuant to the 02/05/08 Student Evaluation Plan (“SEP”) have not been provided to Petitioner.

### Relief Requested by Petitioner

- (1) A finding of a denial of a FAPE on Issues #1 - #3 identified herein;
- (2) DCPS to fund compensatory education for the past 2 years in the form of one-on-one tutoring three times per week;
- (3) DCPS to fund an independent speech/language evaluation, and an independent psychiatric evaluation; and
- (4) DCPS to convene a MDT meeting within 10 days of receipt of the last independent evaluation, to update Student's IEP as appropriate, determine placement and discuss additional compensatory education.

Petitioner's original request for an independent comprehensive psychological evaluation (as stated in the Complaint) was withdrawn by Petitioner because on 03/13/09, DCPS provided to Petitioner a copy of a current comprehensive psychological evaluation dated 10/01/08. This evaluation was not offered into evidence by either party.

## **FINDINGS OF FACT**

#1. A HOD issued on 12/05/05 ordered one school year of compensatory education and for the Multidisciplinary Team (“MDT”) to convene to develop a compensatory education plan on the type and delivery of compensatory education. A 06/01/07 HOD ordered DCPS to convene a MDT meeting within ten (10) school days of issuance of the HOD to develop a compensatory education plan implementing the one school year of compensatory education awarded in the 12/05/05 HOD. (*Petitioner's*

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*Exhibit #2, HOD dated 06/01/07). As of 04/01/09, Student had not been provided with the compensatory education ordered in the 06/01/07 HOD. (Testimony of James Barnes, DCPS Compliance Case Manager).*

#2. On 03/13/09, the DCPS Compliance Case Manager convened a meeting with the MDT and Petitioner to discuss and offer compensatory education in the form of tutoring for one year or software and a computer, so that the 06/01/07 HOD could be closed out. At that time, Petitioner did not want to move forward on the issue of compensatory education. *(Testimony of James Barnes, DCPS Compliance Case Manager; DCPS' Exhibit #7, Meeting notes dated 03/13/09).*

#3. Student is      years old, attends                      Academy, has a disability classification of Learning Disabled ("LD"), and as of 02/05/08, received 25.0 hours/week of specialized instruction, 1.5 hours/week of psychological counseling, .5 hours/week of speech/language therapy, and .5 hours/week of occupational therapy consultation, for a total of 27.5 hours/week of special education services, with 100% of services to be provided in an out of regular education setting. *(DCPS' Exhibit #6, IEP dated 02/05/08).* For the 2008-2009 school year, Student was doing an excellent job on all classwork, Student's behavior in class had improved, and as of 10/29/08, Student's grade report consisted of an "A" in Reading, Writing and Mathematics, a "B" in science, a "Passing Effort" in Health, Portuguese, and Drama, and a "Satisfactory" in Transition and Multimedia. *(DCPS' Exhibit #5, Student Scholastic Record dated 10/29/09).*

#4. Pursuant to a 05/24/05 IEP, Student received 25.5 hours/week of specialized instruction, 1.0 hour/week of psychological counseling, .5 hours/week of speech/language therapy, and .5 hours/week of occupational therapy consultation, for a total of 27.5 hours/week of special education services, with 100% of services to be provided in an out of regular education setting. *(Petitioner's Exhibit #7, IEP dated 05/24/05).* At the time the 05/24/05 IEP was developed, there was no current speech/language evaluation available. *(Petitioner's Exhibit #6, MDT Meeting Notes dated 05/24/05).*

#5. Pursuant to a 02/08/07 IEP, Student received 25.5 hours/week of specialized instruction, 1.0 hour/week of psychological counseling, .5 hours/week of speech/language therapy, and .5 hours/week of occupational therapy consultation, for a total of 27.5 hours/week of special education services, with 100% of services to be provided in an out of regular education setting. *(Petitioner's Exhibit #5, IEP dated 02/08/07).* At the time the 02/08/07 IEP was developed, Student was doing well in speech/language therapy and had no behavior problems other than talking back and moaning, which were behaviors typical of Student's age. *(Petitioner's Exhibit #4, MDT Meeting Notes dated 02/08/07).*

#6. The most recent speech/language evaluation report for Student is dated 08/15/05. This evaluation established that Student had severe receptive and expressive language impairment and recommended 60 minutes/week of speech and language therapy. *(Petitioner's Exhibit #15, Speech and Language Report dated 08/15/05).*

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Student had overall language deficits in sentence formulation, familiar sequences, in the ability to interpret spoken directions of increasing length and complexity, in the ability to recall sentences, vocabulary development, word definitions, and understanding spoken paragraphs, all of which negatively impacted Student's educational progress.

Intervention services were recommended that focused on improving articulation and receptive and expressive language skills. (*Petitioner's Exhibit #9, Speech-Language Evaluation Report dated 07/17/05*).

#7. The most recent psychiatric evaluation for Student is dated 07/06/05 and contains no Axis I diagnosis, establishes an Axis II diagnosis of speech and language deficits, and has no other diagnoses that are relevant for educational purposes. This evaluation recommended individual and group counseling to address emotional immaturity and developing self regulatory capacities in a social context. (*Petitioner's Exhibit #8, Psychiatric Evaluation dated 07/06/05*).

#8. On 02/05/08, DCPS agreed to complete a comprehensive psychological (psycho-educational and clinical) evaluation, a speech/language evaluation, and a psychiatric evaluation, and these triennial evaluations as well as a triennial eligibility decision were due on 05/24/08. The MDT agreed that after the evaluations were received, the MDT would reconvene to review the evaluations, develop an IEP, and discuss compensatory education, Extended School Year services, and placement. (*Petitioner's Exhibit #3, MDT Meeting Notes dated 02/05/08*).

#9. The psychiatric evaluation and the speech/language evaluation to be completed by DCPS pursuant to the 02/05/08 Student Evaluation Plan ("SEP") have not been provided to Petitioner. (*DCPS' Admission #1*). It is not clear when and which evaluations have been ordered for Student. (*Testimony of Moses Roberts, DCPS placement specialist*).

## DISCUSSION AND CONCLUSIONS OF LAW

"The burden of proof shall be the responsibility of the party seeking relief. Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. 3030.3.

### **Issue #1 – Whether DCPS failed to comply with a HOD, thereby denying Student a FAPE?**

Petitioner alleges that DCPS failed to develop a compensatory education plan and provide compensatory education services pursuant to a 06/01/07 HOD that ordered the MDT to convene to develop a compensatory education plan for the one year of compensatory education services awarded in the 12/05/05 HOD.

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As of 04/01/09, Student had still not received the one year of compensatory education as ordered by a 12/05/05 HOD, and re-ordered in a subsequent 06/01/07 HOD (*Finding of Fact #1*); however, DCPS did try to offer one year of compensatory education to Petitioner on 03/13/09 (*Finding of Fact #2*). It has been almost two years since the 06/01/07 HOD Order to provide compensatory education. Therefore, DCPS has failed to comply with the implementation of a HOD, and a rebuttable presumption of harm attaches under the Blackman/Jones Consent Decree. See *Mikeisha Blackman, et al., Plaintiffs, v. District of Columbia, et al., Defendants, Civil Action No. 97-1629 (PLF) Consolidated with Civil Action No. 97-2402 (PLF) Consent Decree dated June 30, 2006, page 41*, "this Consent Decree establishes a *rebuttable presumption of harm* for students denied timely hearings or HOD and for students who failed to receive timely implementation of HODs and SAs."

Unfortunately, the record is barren as to the nature of the denial of FAPE that resulted in the 12/05/05 HOD that awarded Student one year of compensatory education. Rather, all that is known is that the 12/05/05 HOD delegated to the MDT the responsibility to determine the type and delivery of compensatory education. Without evidence regarding the specific basis for the denial of a FAPE that the compensatory education was to address, it is impossible to gauge whether the harm that the compensatory education was to address, still exists. The most reliable evidence of Student's adjustment in school are (1) the MDT Meeting Notes of 02/08/07 and 02/05/08, both of which indicate that Student is doing well, and (2) Student's grade report dated 10/29/08 which indicates that as of October 2008, Student had grades of "A's" and one "B" in all core classes, and grades of satisfactory or passing in all non-core classes (*Finding of Fact #3*). Additionally, there is no evidence in the record that Student has any behavior problems that warrant intervention beyond the provision of related psychological services that have been provided to Student on an ongoing basis since 2005. (*Finding of Fact #3, #4, #5*).

Therefore, based on this record, the presumption of harm has been successfully rebutted. DCPS' responsibility to provide a FAPE is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982). The evidence in this record is that Student is achieving academically at this time with excellent grades, and that Student currently receives a full complement of specialized instruction, as well as supplementary psychological and speech/language and occupational therapy services. This Hearing Officer concludes that DCPS' failure to implement the 06/01/07 HOD for the past two years did not result in the denial of a FAPE.

The record is also clear that DCPS intends to follow through with implementing the 06/01/07 HOD by providing Student with one year of compensatory education in the form of tutoring or a computer and software. (*Finding of Fact #2*). This Hearing Officer is not reversing or otherwise altering the 06/01/07 HOD Order to provide compensatory education. Compliance with the 06/01/07 HOD is not the subject of this HOD.

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Petitioner failed to meet its burden of proof on Issue #1.

### **Issue #2 – Whether DCPS failed to complete a triennial reevaluation, thereby denying Student a FAPE?**

The MDT Meeting Notes of 02/05/08 made it clear that Student's triennial evaluations were due on 05/24/08 (*Finding of Fact #8*). The psychiatric evaluation and speech/language evaluation that should have been completed no later than 05/24/08 are still overdue, and DCPS could offer no concrete evidence that these evaluations have ever been ordered. (*Finding of Fact #9*).

5 D.C.M.R. 3005.7 and 34 C.F.R. 300.303(b)(2) state that DCPS shall conduct a reevaluation at least once every three years unless the parent and the public agency agree that a reevaluation is unnecessary. It is clear that DCPS did not comply with the law when DCPS failed to update Student's triennial speech/language evaluation and triennial psychiatric evaluation. The question is whether this violation of IDEIA resulted in the denial of a FAPE? A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

Student's need for speech/language related services due to severe receptive and expressive language impairment dates back to 07/17/05. (*Finding of Fact #6*). Student received .5 hours/week of speech/language therapy pursuant to a 05/24/05 IEP, a 02/08/07 IEP, and a 02/05/08 IEP. This level of service existed both before and after the 07/17/05 and 08/15/05 speech/language evaluations (*Finding of Fact #3, #4, #5, #6*), was consistent over time and did not increase. Nothing in the MDT Meeting Notes dated 02/08/07 or the MDT Meeting Notes dated 02/05/08 indicated that Student was having intensified problems in the area of speech/language. To the contrary, the MDT Meeting Notes dated 02/08/07 indicated that Student was doing well in speech/language therapy. (*Finding of Fact #5*). Without the benefit of a current speech/language evaluation, it is impossible to determine whether Student's current level of services should be increased or decreased. Therefore, Petitioner failed to establish deprivation of educational benefit or educational harm to Student by DCPS' failure to timely update Student's speech/language triennial evaluation or that parent's right to participate in the decision making process was impeded.

Student's psychiatric evaluation dated 07/06/05, established a diagnosis of speech and language deficits, and no other diagnoses relevant for educational purposes. (*Finding of Fact #7*). The MDT Meeting Notes of 02/08/07 and 02/05/08 do not contain any evidence that Student was experiencing any behaviors for which psychiatric intervention might be warranted. At most, Student was exhibiting behavior problems of talking back and moaning (*Finding of Fact #5*), and these behaviors could easily have been addressed

## Hearing Officer Determination & Order

as part of psychological services received by Student. In fact, the number of hours of psychological services that Student received was increased by .5 hours/week beginning on 02/05/08. (*Finding of Fact #3, #5*). As stated in the preceding paragraph, the Hearing Officer concluded that there was no evidence of educational harm to Student by DCPS' failure to complete a triennial speech/language evaluation, and since the only psychiatric evaluation in the record only establishes a diagnosis of speech/language deficits, this Hearing Officer cannot conclude that Student experienced any educational harm or loss of educational benefit from DCPS' failure to complete a triennial psychiatric evaluation or that parent's right to participate in the decision making process was impeded.

Petitioner failed to meet its burden of proof on Issue #2.

### **Issue #3 – Whether DCPS failed to provide Student with an appropriate IEP, thereby denying Student a FAPE?**

Petitioner alleges that DCPS failed to develop and implement an appropriate IEP for the 2008-2009 school year because Student's most recent IEP has been implemented without the benefit of the updated triennial evaluations that should have been completed before the end of the 2007-2008 school year, and without review of the updated evaluations, the IEP Team cannot appropriately determine the level and type of services that Student needs.

This allegation is speculative. The only two evaluations at issue here are the psychiatric evaluation and the speech/language evaluation. Without the benefit of these updated triennial evaluations, it is impossible to determine whether or not Student's services would be the same or different from the services specified in Student's current 02/05/08 IEP.

Petitioner failed to meet its burden of proof on Issue #3.

### **Issue #4 – Whether Student is entitled to compensatory education?**

Petitioner alleges that Student is entitled to compensatory education for the past two years in the form of one-on-one tutoring three times per week i.e., from the time that DCPS failed to implement the 06/01/07 IEP until the present time.

“When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning “appropriate” relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.” The qualitative standard for determining compensatory education is that “compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA.” *Reid v. District of Columbia*, 43 IDELR 32 (2005).

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Petitioner made no showing that Student was deprived of a FAPE, and without a denial of a FAPE, there can be no award of compensatory education. And even if there had been a denial of a FAPE, Petitioner would not be entitled to compensatory education under this set of facts because the compensatory education plan proposed by Petitioner was fatally flawed. The creator of the proposed compensatory education plan stated that the recommendations were based on outdated assessments conducted during 2003-2005, and that the Student's current level of academic functioning and the extent of Student's disabilities are unknown. There is no way to measure the impact or harm of missed services without reference to current evaluations.

Based on this record, the Hearing Officer cannot conclude that Student is entitled to compensatory education for the past two years due to the denial of a FAPE.

Petitioner failed to meet its burden of proof on Issue #4.

### CONCLUSION

Petitioner failed to show by a preponderance of the evidence that Petitioner is entitled to the claims for the relief requested in the Complaint. Despite DCPS' procedural violations of IDEIA with respect to failing to implement a 06/01/07 HOD and DCPS' failure to conduct a triennial psychiatric evaluation and a triennial speech/language evaluation, Petitioner was unsuccessful in the burden of persuasion that DCPS' inactions resulted in the denial of a FAPE.

### ORDER

**WHEREFORE**, this Complaint having been fully litigated and there being no basis in fact to support Petitioner's allegations that Student was denied a FAPE and is entitled to compensatory education, it is

**ORDERED** that this Complaint be and hereby is **DISMISSED** with prejudice.

**IT IS SO ORDERED.**

**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. Section 1415(i)(2).**

04/09/09

Date

*Virginia A. Dietrich /s/*

Virginia A. Dietrich, Esq.  
Impartial Due Process Hearing Officer

Issued: April 09, 2009