

1) comprehensively evaluate the student in all areas of suspected disability, in a timely manner; 2) provide the student an appropriate IEP; 3) provide the student the necessary and prescribed specialized instruction and related services, recommended in his IEP; 4) provide parent sufficient information for a discussion and determination regarding an appropriate placement for the student; 5) issue a Prior to Action Notice, consistent with the IDEA; and 6) provide the student an appropriate placement

The Hearing Officer ordered, inter alia, Respondent to:

- a. Fund an independent speech and language, occupational therapy, social history, neurological, and physical therapy evaluation; and an evaluation to determine whether the student is a student with ADD/ADHD;
- b. Within ten (10) calendar days of receiving the results of the independent evaluations, DCPS shall convene a MDT meeting to: review all current evaluations; review and revise the student's IEP, as appropriate; determine appropriate placement; and
- c. If it is determined that the student was denied special education and/or related services he was entitled to receive under the IDEA, Petitioner may request a hearing to determine compensatory education services.

On January 8, 2009, an IEP team meeting convened with the guardian. The team reviewed the evaluations and determined that there was a denial of special education and related services; and the student was entitled to compensatory education services. The education advocate requested 200 hours of specialized instruction (tutoring), 75 hours of occupational therapy, 75 hours of behavioral support services, and 75 hours of speech language services. The DCPS representative advised the guardian and advocate that the request for compensatory education services would be forwarded to the DCPS compensatory education office.

On February 5, 2009, a Hearing Officers' Decision was issued in a prior complaint involving this student, wherein the Hearing Officer granted Petitioner's Motion for Summary Judgment, based on Respondent's concession that it failed to comply with the June 6, 2008 HOD; and failed to provide the student a placement for the 2008/09 school years; which were the issues in the complaint.

The Hearing Officer ordered, inter alia, Respondent to convene a Multidisciplinary Team Meeting (MDT) by February 20, 2009, for the purpose of:

- (i) Reviewing all student evaluations;
- (ii) Reviewing and revising the student's IEP, as appropriate; and
- (iii) Discuss and determine compensatory education in accordance with the June 6, 2008 Hearing Officers' Decision, and the February 5, 2009 decision.

On February 10, 2009, Respondent convened a MDT meeting, wherein the team determined that a tri-annual evaluation was necessary to acquire an accurate estimate of the student's level of intellectual, as well as, social emotional functioning.

According to the MDT meeting notes the advocate requested a Lindamood-Bell evaluation to determine whether the student requires services; which would provide the student services *on weekends and after the school days*. DCPS agreed to fund the Lindamood-Bell evaluation and conduct a meeting to discuss compensatory education services for the student. The advocate's notes indicate that DCPS agrees that a Lindamood-Bell evaluation is appropriate to determine the form and fashion of compensatory education. The February 10, 2009 Student Evaluation Plan (SEP) developed for the student, recommends an independent Comprehensive Psychological Evaluation; and a Comprehensive Linda Mood Bell evaluation, for the purpose of determining compensatory education services for the student.

On March 18, 2010, an IEP team meeting was held. The MDT meeting notes reflect that it was reported that the Lindamood-Bell evaluation was completed, with recommendations for services 3-4 times per week; and according to the DCPS Placement Specialist and LEA Representative advised the team that the services recommended in the evaluation would be included as compensatory education services. The notes also indicate that the Lindamood-Bell evaluation and compensatory education would be reviewed with Mr. Roche, at the DCPS compensatory education office.

The team agreed to reconvene at a later date to review the Lindamood-Bell evaluation; however, a date was not identified at the meeting. The bottom of the last page of the MDT meeting notes include a notation made by the DCPS Placement Specialist and LEA Representative, that outstanding issues included, inter alia, compensatory education/Lindamood-Bell evaluation. According to the advocate's notes, the Lindamood-Bell was not reviewed at the meeting because it relates to compensatory education; and according to DCPS Mr. Roche must review the evaluation and develop a compensatory education plan.

On April 2, 2009, the Lindamood -Bell Evaluation was completed. The evaluator determined that the student's sensory-cognitive functions underlie basic language processing; and may contribute to the student's overall academic success. The evaluator recommended instruction to develop his language and literacy skills; intensive instruction for 4 hours a day, 5 days a week, for an initial period of 10 to 12 weeks; and several programs as a focus of the instruction. The evaluator also recommended administering interim diagnostic testing midway through the instruction period to determine the student's instructional focus and progress. Petitioner forwarded the Lindamood-Bell evaluation to DCPS on September 11, 2009.

On May 18, 2009, the Compliance Case Manager forwarded an email to the Education Advocate indicating that per their telephone discussion the email codifies their agreement that the appropriate compensatory education services for the student is 30 hours of independent speech and language tutoring. The email also indicates that the compensatory education proposal when suggested was also approved by the MDT at _____ in the original MDT meeting on February 10, 2009; and the official Compensatory Education Plan has been faxed to her, upon the parent's signature and return to DCPS for signature it will be implemented.

On May 22, 2010, the education advocate forwarded an email to the Compliance Case Manager indicating "the plan is fine. I will try to get parent signature ASAP/comp ed provider who was totally inappropriate and did not come back after two sessions, so now she has an independent provider, is Foster Joseph from Wilkerson ES".

On October 12, 2009 and October 14, 2009, Petitioner forwarded letters to the Special Education Coordinator; and Office of Special Education Resolution Team, requesting compliance with the February 5, 2009 HOD.

On May 5, 2009, Respondent developed a Compensatory Education Plan proposing 30 hours of speech and language tutoring for the student, to be provided by an independent provider.

On May 6, 2010, Petitioner, filed a due process complaint alleging that District of Columbia Public Schools ("DCPS"), denied the student a Free Appropriate Public Education ("FAPE"), by failing to comply with the February 5, 2009 Hearing Officers' Decision (HOD); timely review evaluations; and timely review and revise the student's IEP.

On May 6, 2010, the complaint was assigned to this Hearing Officer; and on May 13, 2010, the Hearing Officer issued to the parties a "Notice of Prehearing Conference", scheduling the prehearing conference for June 7, 2010, at 3:30 p.m... On May 17, 2010, Respondent filed "District of Columbia Public Schools' Response to Petitioner's Due Process Complaint". On June 1, 2010, DCPS filed the "Due Process Complaint Disposition", indicating that a resolution meeting was held on May 24, 2010, and the parties were unable to resolve the issues in the complaint.

The prehearing conference was rescheduled to accommodate the parties' schedules, and on June 15, 2010, at approximately 3:40 p.m., the prehearing conference was held. On June 16, 2010, the Hearing Officer issued to the parties the prehearing conference order.

II. ²ISSUES

The issues identified in the May 6, 2010 due process complaint, are as follows:

- (1) Whether DCPS denied the student a free appropriate public education by failing to comply with the February 5, 2009 Hearing Officers' Decision (i.e. by February 20, 2009, review all student evaluations, review and revise the student's January 8, 2009, as appropriate; and discuss and determine compensatory education in accordance with the June 6, 2008 HOD and the February 5, 2009 decision)?
- (2) Whether DCPS denied the student a free appropriate public education by failing to review student evaluations (i.e. independent Comprehensive Psychological Evaluation), in a timely manner?
- (3) Whether DCPS denied the student a free appropriate public education by failing to review and revise the student's January 8, 2009 IEP, in a timely manner?

² At the due process hearing, prior to proceeding with a hearing on the merits, Petitioner withdrew Issues 2 and 3 of the complaint; and the following issue remains for the court to decide: Whether DCPS denied the student a free appropriate public education by failing to comply with the February 5, 2009 Hearing Officers' Decision; by failing to discuss and determine compensatory education services for the student, in accordance with the June 6, 2008 HOD and the February 5, 2009 decisions?

III. DISCLOSURES

The Hearing Officer inquired of the parties whether all disclosures were submitted by the parties; and whether there were any objections to the disclosures. After considering objections, the following disclosures were admitted into the record as evidence:

DISCLOSURES ADMITTED INTO THE RECORD AS EVIDENCE, ON BEHALF OF PETITIONER

- Petitioner's Exhibits 1 through Petitioner's Exhibits 10; and a witness lists dated June 11, 2010.

DISCLOSURES ADMITTED INTO THE RECORD AS EVIDENCE, ON BEHALF OF RESPONDENT

- Respondent's Exhibits 01 through Respondent's Exhibits 18; and a witness list dated June 11, 2010.

IV. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. The *June 6, 2008 HOD* determined that the student was denied a FAPE, for at least the two (2) school years prior to filing of the complaint; and was entitled to compensatory education services, without any determination regarding the nature and amount of compensatory education services the student should receive because of the unavailability of evaluations.

The Hearing Officer ordered evaluations to determine the nature and amount of services the student was entitled, however failed to receive; and advised the parties that if the evaluations revealed the nature and amount of services the student was entitled, however, failed to receive, Petitioner may request a hearing to determine compensatory education services.

2. The *February 5, 2010 HOD* ordered, inter alia, Respondent to convene a Multidisciplinary Team Meeting (MDT) by February 20, 2009, for the purpose of:
 - (i) *Reviewing all student evaluations;*
 - (ii) *Reviewing and revising the student's IEP, as appropriate; and*
 - (iii) *Discuss and determine compensatory education in accordance with the June 6, 2008 Hearing Officers' Decision, and the February 5, 2009 decision.*

3. On *January 8, 2009*, the IEP team reviewed the evaluations and *determined that there was a denial of special education and related services; and the student was entitled to compensatory education services*. The education advocate requested 200 hours of specialized instruction (tutoring), 75 hours of occupational therapy, 75 hours of behavioral support services, and 75 hours of speech language services. The DCPS representative advised the guardian and advocate that *the request for compensatory education services would be forwarded to the DCPS compensatory education office*.
4. On *February 10, 2009*, at the MDT meeting, the team determined that additional evaluations were necessary to determine the student's level of intellectual, as well as, social emotional functioning; and according to the MDT meeting notes the advocate requested a Lindamood-Bell evaluation to determine whether the student requires services; which would provide the student services *on weekends and after the school days*; which DCPS agreed to fund. DCPS also agreed to reconvene the meeting at a later date and time to discuss compensatory education services for the student. The advocate's notes indicate that DCPS agreed that a Lindamood-Bell evaluation is *appropriate to determine the form and fashion of compensatory education*.

The February 10, 2009 Student Evaluation Plan (SEP) developed for the student, recommends an independent Comprehensive Psychological Evaluation; and a Comprehensive Linda Mood Bell evaluation, *for the purpose of determining compensatory education services for the student*.

The Hearing Officer finds that it is evident that the team agreed that additional information was necessary to determine compensatory education services for the student; for the two (2) year period he failed to receive services; that the Lindamood-Bell Evaluation would assist in this regard; and that the team would reconvene to review the Lindamood-Bell Evaluation, and determine compensatory education services for the student, consistent with the June 6, 2008 and February 5, 2009 HODs, which failed to occur.

5. On *March 18, 2010*, an IEP team meeting was held, wherein it was reported that the Lindamood-Bell evaluation was completed, with recommendations for services 3-4 times per week; and according to the meeting notes the DCPS Placement Specialist and LEA Representative advised the team that the services recommended in the evaluation would be included as compensatory education services. The notes also indicate that *the Lindamood-Bell evaluation and compensatory education would be reviewed with Mr. Roche, at the DCPS compensatory education office*.
6. The Hearing Officer finds that as of this date, DCPS failed to reconvene a meeting to review with the parent findings and recommendations in the Lindamood-Bell evaluation; and discuss and determine compensatory education services for the two (2) school years the student failed to receive services; and in accordance with the June 6, 2008 and February 5, 2009 HOD, as agreed by the MDT.
7. The Hearing Officer finds that as reflected in the May 5, 2009 Compensatory Education Plan proposed by Respondent, the plan is merely a *proposal*, which Petitioner rejects.

The Hearing Officer also finds that the DCPS Compliance Case Manager failed to exercise "good faith", in its discussions and negotiations with the education advocate regarding the nature and amount of compensatory education services the student was entitled, however, failed to receive; proposing a compensatory education plan which merely addresses the student's speech language needs, and fail to place the student in the position he would have been had the violations not occurred

Additionally, the DCPS Compliance Case Manager developed the May 5, 2009 compensatory education proposal unilaterally, without the benefit of a review of the Lindamood-Bell Evaluation, or input from the MDT, as agreed at the February 10, 2009 MDT; and was not made in accordance with the June 6, 2008 and February 5, 2009 HODs.

8. The Hearing Officer finds that DCPS failed to comply with the February 5, 2009 Hearing Officers' Decision, by failing to discuss and determine compensatory education services for the student, in accordance with the June 6, 2008 HOD and the February 5, 2009 decisions.
9. The Hearing Officer finds that based on the evidence presented; the recommendations in the Lindamood-Bell Evaluation; the fact that it was determined in the prior HODs that the student was denied a FAPE for at least two (2) prior school years, and the denial of a FAPE continues; 300 hours of specialized instruction, as compensatory education services, and a laptop computer to address the students' occupational therapy needs; is equitable and reasonable, to place the student in the position he would have been, had the violations not occurred.

V. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The Blackman/Jones Consent Decree consists of two subclasses. The first subclass referred to as the "Blackman class" refers to that part of the class addressing a public agency's failure to timely conduct due process hearings; and the "Jones" subclass refers to that portion of the class addressing the public agency's failure to timely implement Hearing Officer Determinations and Settlement Agreements. The "Jones" portion of the consent decree applies in this matter.

The Blackman/Jones Consent Decree requires full and timely implementation of Hearing Officer Determinations; and agreements concerning a child's identification, evaluation, educational placement, or provision of a FAPE; which is significant in ensuring the provision of a FAPE to a student; and that the student receives the services he/she is entitled to receive under the IDEA; and any delay in full and timely implementation of a HOD compromises that entitlement, and harms the student.

The Blackman/Jones Consent Decree 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, the 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.

In addition, 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 Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to comply with the February 5, 2009 Hearing Officers' Decision, by failing to discuss and determine compensatory education services for the student, in accordance with the June 6, 2008 HOD and the February 5, 2009 decisions.

The Hearing Officer also finds that DCPS failed to introduce evidence that any of the criteria set forth in paragraph 78 of the Consent Decree, which is necessary to rebut the presumption of harm to the student, apply in this matter, therefore, the presumption of harm to the student remains.

It is also the Hearing Officer's Decision that DCPS' failure to comply with the February 5, 2009 HOD, represents a procedural and substantive violation of the IDEA; and a continuing 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")".

VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby:

1. **ORDERED**, that within fourteen (14) calendar days from the date of this decision, DCPS shall convene an MDT meeting with the parent, at _____ to review the findings and recommendations in all student evaluations, including however not limited to, the Lindamood-Bell Evaluation; and it is further
2. **ORDERED**, that DCPS shall review and revise the student's IEP, as appropriate; including, among others, intervention to develop the student's language and literacy skills, and intensive instruction (4 hours a day, 5 days a week), for an initial period of 10-12 weeks instruction, consistent with the Lindamood-Bell programs outlined in the recommendations section of the evaluation; and a plan for reevaluation to assess the student's progress; and it is further
3. **ORDERED**, that DCPS shall fund three hundred (300) hours of specialized instruction, as compensatory education services for the student, to be administered consistent with the recommendations in the Lindamood-Bell Evaluation; and fund a laptop computer with Microsoft Office Suite, not to exceed the cost of \$2,000.00; and it is further
4. **ORDERED**, that DCPS shall schedule all meetings through the parent's counsel, Attorney Douglas Tyrka and Attorney Nic Ostrem, in writing, via facsimile at (202) 332-0039; and it is further

5. **ORDERED**, that in the event of DCPS' failure to comply with the terms of this Decision and Order, Petitioner's Counsel will contact the Special Education Coordinator at _____ 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
6. **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
7. **ORDERED**, that this decision and order are effective immediately.

VII. NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

June 27, 2010

Date: _____

Attorney Ramona M. Justice

Hearing Officer