

**DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
OFFICE OF COMPLIANCE & REVIEW
STATE ENFORCEMENT & INVESTIGATION DIVISION
STUDENT HEARING OFFICE**

CONFIDENTIAL

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STUDENT HEARING OFFICE
2009 SEP 18 PM 3:35

HEARING OFFICER'S DETERMINATION

IN THE MATTER OF:)

DOB)

I.D.)

Petitioner,)

V.)

The District of Columbia)

Public Schools,)

Respondent)

DATE OF HEARING

September 10, 2009

DATE OF COMPLAINT

July 31, 2009

ATTENDING SCHOOL:

COUNSEL FOR PARENT/STUDENT:

**Domiento Hill
James E. Brown & Assoc.
1220 L Street, N.W.
Ste. 700
Washington, D.C. 20005**

COUNSEL FOR DCPS:

**Blair Matsumoto
Office of the General Counsel
825 North Capitol Street, N.E., 9th Fl.
Washington, D.C. 20002-4232**

STUDENT¹, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S
DETERMINATION

September 17, 2009

Representatives:

Petitioner – Domiento Hill
DCPS – Blair Matsumoto

Hearing Officer:

Jane Dolkart

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This is a year old student eligible for special education under the classification of Other Health Impaired (OHI). The student suffers from Mucopolysaccharidosis, a disease which places significant physical limitations on the student. Amongst other things, he uses a wheelchair. At a December 4, 2008 IEP meeting, it was agreed that the student needed triennial evaluations. DCPS agreed to complete the evaluations in 60 days. DCPS issued an IEE letter authorizing Occupational Therapy (OT), Speech and Language (S/L), Comprehensive Psychological, and Adaptive Physical Education (APE) evaluations. In an April 20, 2009 HOD, DCPS was ordered to hold an MDT meeting within 15 days of the receipt of the last of the ordered evaluations in order to review the evaluations. The last of the evaluations was sent to DCPS on July 13, 2009. The evaluations further recommended that a vocational assessment, audiological and assistive technology evaluation be conducted.

On July 31, 2009, a due process complaint was filed alleging that DCPS violated the April 20, 2009 HOD by failing to convene a timely meeting to review the evaluations, failing to evaluate the student in all needed areas, failing to provide the student with a placement, and failing to provide an appropriate IEP since the evaluations had not been reviewed.

A pre-hearing conference was held on August 21, 2009, and a pre-hearing order was issued on August 27, 2009.

Subsequent to the pre-hearing conference, and prior to the hearing date, an IEP meeting was held on August 28, 2009 to review the evaluations and revise the student's IEP. Placement at was offered, and an IEE letter for a vocational assessment and assistive technology evaluation was sent by DCPS.

There are no factual issues in dispute requiring a hearing. The decision in this matter will be made based on the written record.

II. JURISDICTION

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.*, 34 CFR Part 300 *et seq.*, and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

III. ISSUES

Has DCPS denied the student FAPE by

1. Failing to convene a meeting within 15 days of receipt of the last of the ordered evaluations, in order to review the evaluations and revise the student's IEP, if warranted?
2. Failing to evaluate the student in all areas of disability by failing to conduct a vocational assessment and an assistive technology evaluation?
3. Failing to provide an appropriate IEP?
4. Failing to provide the student with a placement?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated September 2, 2009, containing a list of witnesses with attachments P 1-18. The disclosure was admitted in its entirety. No witnesses were called

DCPS submitted a five day disclosure letter dated September 3, 2009, containing a list of witnesses with attachments DCPS 1-8. A supplemental disclosure was submitted on September 8, 2009, containing DCPS 9. The disclosures were admitted in their entirety. No witnesses were called.

V. FINDINGS OF FACT

1. This is a year old student eligible for special education under the classification of Other Health Impaired (OHI). The student suffers from Mucopolysaccharidosis, a disease which places significant physical limitations on the student. Amongst other things, he uses a wheelchair. At a December 4, 2008 IEP meeting, it was agreed that the student needed triennial evaluations. DCPS agreed to complete the evaluations in 60 days. (P 5, 10, 11)
2. DCPS failed to complete the evaluations in the required time period and issued an IEE letter authorizing Occupational Therapy (OT), Speech and Language (S/L), Comprehensive Psychological, and Adaptive Physical Education (APE) evaluations. In an April 20, 2009 HOD, DCPS was ordered to hold an MDT meeting within 15 days of the receipt of the last of the ordered evaluations in order to review the evaluations. (P 5)
3. The last of the evaluations was sent to DCPS on July 13, 2009. The evaluations further recommended that a vocational assessment, audiological and assistive technology evaluation be conducted. At the time the evaluations were submitted the student had not received a placement for the 2009-2010sy. (P 10, 11, 12, 13)
4. At the August 21, 2009 pre-hearing conference, Petitioner was informed that the student would be placed at . The student has begun the school year at Phelps and Petitioner is not contesting the appropriateness of this placement. (P 16, 17)

5. On August 21, 2009, DCPS provided Petitioner with an IEE letter authorizing a vocational assessment and an assistive technology assessment. (DCPS)

6. Following the filing of this due process complaint, a letter of invitation to an MDT/IEP meeting was sent to Petitioner on August 17, 2009. A meeting was held at Phelps on August 28, 2008. Some of the evaluations were reviewed and the student's IEP was revised. The team did not review the APE evaluation because the DCPS adaptive physical education provider was not at the meeting. The S/L evaluation was reviewed but DCPS and Petitioner disagreed about the need for S/L services and it was agreed that further testing would take place. The comprehensive psychological was also not reviewed at the meeting.

Petitioner has not submitted the vocational assessment or assistive technology assessment authorized by the August 21, 2009 IEE letter. Petitioner's mother indicated that she had obtained an audiological assessment.

It was agreed that the student would receive 1 hour of OT, 1 hour of PT, .5 hours of APE, and 7.5 hours of specialized instruction in reading per week. Further it was agreed that the student needed a voice amplifier, a computer and certain software, and other forms of assistive technology. Petitioner requested an assistive technology plan.

(P 16, 17)

7. On September 8, 2009, DCPS sent a LOI to Petitioner to reconvene the IEP meeting on September 25, 29, or 30, 2009. (DCPS 9)

VI. DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.*, guarantees "all children with disabilities" "a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. ¶ 1400 (d)(1)(A). The IDEA defines FAPE as

Special education and related services that – (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the State educational agency..., (c) Are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 – 300.324.

Central to the IDEA's guarantee of FAPE "is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The educational agency must provide a "basic floor of opportunity" for students with disabilities. It need not provide the best education possible, but the educational

benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16*, 331 IDELR 10 (3rd Cir. 1988).

As a condition of receiving funds under the Act, IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See*, 20 U.S.C. ¶ 1413. In addition, school districts must develop comprehensive plans for meeting the special education needs of disabled students. *See*, 20 U.S.C. ¶ 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include “a statement of the child’s present levels of educational performance, ... a statement of measurable annual goals, [and] a statement of the special education and related services ... to be provided to the child....” 20 U.S.C. ¶ 1414(d)(1)(A).

Pursuant to IDEA § 1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEA § 1415 (f)(3)(E)(ii), in matters alleging a procedural violation a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Petitioner has the burden of proof in this case. *Schaffer et al. v. Weast*, 546 U.S. 49 (2005).

A. Violation of April 20, 2009 HOD

On August 24, 2006, United States District Judge Paul L. Friedman issued an order approving a consent decree in the decade old Blackman/Jones class action law suit, filed against DCPS for its failure to meet its statutory obligations to special education students under the IDEA. *Blackman et al. v. District of Columbia*, 2006 WL 2456413 (D.D.C. 2006). The Jones (previously Curtis) subclass was defined as:

All children, now and in the future, who are entitled to have DCPS provide them with a free appropriate education [FAPE] and who have been denied same because DCPS ... (a) has failed to fully and timely implement the determination of hearing officers

Id. at 2456415 § 6.

The student is a member of the Jones subclass because DCPS failed to timely implement the April 20, 2009 HOD as it pertains to reviewing evaluations. The consent decree establishes a rebuttable presumption of harm for students who failed to receive timely implementation of their HOD’s. *Id.* at 2456413, 46-47, §§ 74, 78. DCPS was ordered to hold an MDT meeting within 15 days of receipt of the last of the independent evaluations

ordered in the HOD. The last of the evaluations was submitted to DCPS on July 13, 2009. An MDT/IEP meeting was not held until August 28, 2009, and the comprehensive psychological and adaptive physical education evaluations could not be reviewed at that time. DCPS has proposed reconvening the meeting on September 26, 29, or 30, 2009. DCPS did not attempt to rebut the presumption of harm. The failure to convene a meeting to review the evaluations within 15 days of receipt of the last of the evaluations, as ordered in the April 20, 2009 HOD, constitutes a denial of FAPE.

DCPS is required to provide the student with compensatory education as a member of the Jones subclass. Paragraph 75 of the consent decree requires that class members follow the specific procedures in § 78 of the decree in order to receive compensatory education. *Id.* Paragraph 78 provides two procedures for obtaining compensatory education. Petitioner may elect available products from the Blackman/Jones Compensatory Education Catalog or address compensatory education at an IEP meeting. *Id.* Additionally, § 80 of the decree establishes a procedure for calculating compensatory awards if choosing from the catalogue, defined as the number of days between the date when the HOD was required to be implemented and the date when it was implemented, or if it is still unimplemented, the date of the calculation. *Id.* at 24564122-23. The student's award calculation will begin on July 29, 2009 the date following the end of the 15 day period for holding a meeting to review the evaluations and will end on August 28, 2009 when a meeting was held at which evaluations were reviewed. Although two evaluations have yet to be reviewed, DCPS immediately sent out a LOI to schedule a continuation of the meeting for the purpose of reviewing the outstanding evaluations. Specialized instruction and adaptive physical education were provided for in the revised IEP. Any further violation of the April HOD is de minimus.

B. Other Alleged Violations

The student was provided with a placement at Phelps prior to the start of the 2009-2010sy and Petitioner has not alleged that Phelps is an inappropriate placement. The student has not suffered any harm from the late notification of placement. There is no denial of FAPE.

DCPS provided Petitioner with an IEE letter authorizing Petitioner to obtain the additional recommended evaluations on August 21, 2009. The evaluations can be obtained well within 60 days from the time that the meeting should have been held per the April HOD. There has not been a denial of FAPE.

The student's IEP has been revised. There remains a disagreement concerning whether the student requires S/L services, but DCPS agreed to conduct additional testing and the issue will be revisited at the September meeting. There is no denial of FAPE.

VII. SUMMARY OF RULING

1. DCPS is in violation of Blackman-Jones because it failed to convene a meeting to review evaluations within 15 days of receipt of the last of the evaluations, as ordered by

an April 20, 2009 HOD. The student has been denied FAPE and is entitled to compensatory education under the Blackman-Jones Decree.

2. DCPS has not otherwise denied the student FAPE.

VIII. ORDER

It is hereby **ORDERED** that

1. Petitioner shall receive one month of compensatory education pursuant to the Blackman-Jones Decree. Petitioner shall notify DCPS in writing through its attorney, Daniel Kim, within 5 business days from issuance of this HOD whether she elects to receive goods or services pursuant to the Blackman-Jones catalogue or whether she intends to negotiate compensatory education at the next MDT/IEP meeting presently expected to convene in late September. Mr. Kim shall notify the relevant personnel at DCPS to ensure compliance with the election.

2. 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, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

/s/ Jane Dolkart

Impartial Hearing Officer

Date Filed: September 18, 2009