

STUDENT¹, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S
DETERMINATION

November 13, 2009, Room 1

Representatives:

Petitioner – Domiento Hill
DCPS – Tanya Chor

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 [REDACTED] old child who has a history of severe behavioral problems during the over three years she has been at [REDACTED]. There are three previous HODs concerning this student, in all of which Petitioner was the prevailing party. The student was first found eligible for special education on March 13, 2008, under the classification of Other Health Impaired (OHI) as a result of her ADHD. On July 24, 2008, an IEP was developed which provided the student with .5 hours of counseling and 5 hours of specialized instruction per week. On June 12, 2009, an IEP meeting was convened to review independent psycho-educational and psychological evaluations completed in January 2008. At the meeting the student's IEP was revised to reflect 15 hours of specialized instruction in an out of general education setting and .5 hours of counseling per week, and ESY for the summer of 2009.

On June 22, 2009, a due process complaint was filed alleging *inter alia*, that the student's June 12, 2009 IEP contained insufficient hours of specialized instruction and counseling and that Patterson ES was an inappropriate placement because the student required a full-time, structured, therapeutic setting with small classes. A hearing was held on August 14, 2009, at which the student's January 2008 evaluations and extensive documentation and testimony concerning her behavioral problems was introduced. An HOD was issued on August 14, 2009. The Hearing Officer (HO) found that Petitioner had failed to meet her burden of proof that the student required additional specialized instruction beyond the 15 hours in her IEP and further found that the student had made educational progress. However, the HO found that because of the student's behavioral problems her specialized instruction was to be provided in an out of general education, structured, small class setting. The HO concluded that DCPS had denied the student FAPE by failing to provide sufficient behavioral supports for the student. The HOD ordered in relevant part that DCPS "revise the student's IEP to provide 1.5 hours of counseling per week in two 45 minute sessions" to commence no later than September 8, 2009, and that "If Patterson ES cannot provide the student with 15 hours of specialized instruction in an out of general education, small class setting, and 1.5 hours of counseling per week, DCPS shall convene a placement meeting no later than September 1, 2009, and shall change the student's placement to a location where she can obtain the services in her IEP."

On September 1, 2009, Petitioner filed a due process complaint alleging that DCPS had failed to comply with the August 23, 2009 HOD because the student was receiving her specialized education in a general education setting and DCPS had failed to convene a placement meeting by September 1, 2009 in order to change the student's placement to a school that could provide the ordered services. On September 17, 2009, a second due process complaint was filed alleging that DCPS had failed to comply with the August 23, 2009 HOD because it had failed to revise the student's IEP to provide 1.5 hours of

counseling per week, and was not in fact providing 1.5 hours of counseling per week. On September 19, 2009, the HO consolidated the two complaints, issuing an Order of Consolidation. Petitioner requests as relief that DCPS place the student in a full time private therapeutic ED program and update the student's IEP to reflect a full time IEP, including 1.5 hours of counseling.

On October 6, 2009, a pre-hearing conference was held and on October 7, 2009, a Pre-Hearing Conference Order was issued.

A Resolution Meeting was held on October 2, 2009, and a Due Process Complaint Disposition indicating that no agreement had been reached was signed on the same date.

Petitioner's attorney planned to call the student's mother and a representative of [REDACTED] as part of his case in chief. Because of witness schedules, DCPS was allowed to put on its witnesses before these petitioner witnesses were called. Following DCPS' witnesses, the Hearing Officer ruled that there was no need to call Petitioner's remaining witnesses. The evidence clearly established that DCPS had violated the August 23, 2009 HOD as alleged by Petitioner. The student was now receiving the services ordered by the August 23, 2009 HOD. The Hearing Officer ruled that in order to place the student in a full time therapeutic setting, Petitioner would have to show significant changed circumstances since the August 23, 2009 HOD when the Hearing Officer denied such relief. The Hearing Officer ruled that there was no evidence of significant changed circumstances.

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 provide the student with 15 hours of specialized instruction in an out of general education setting and failing to convene an IEP meeting by September 1, 2009, to determine a placement that can provide the required specialized instruction, in violation of the August 23, 2009 HOD?
2. Failing to revise the student's IEP to provide 1.5 hours of counseling in two 45 minute sessions, in violation of the August 23, 2009 HOD?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated October 26, 2009, containing a list of witnesses with attachments P 1-32. The disclosure was admitted in its entirety. Petitioner called as witnesses the student's educational advocate.

DCPS submitted a five day disclosure letter dated October 26, 2009, containing a list of witnesses with attachments DCPS 1-10 and a Supplemental Disclosure dated October 30, 2009, containing documents 12-13. The disclosures were admitted in their entirety. DCPS called as witnesses the SEC at [REDACTED] worker at [REDACTED]

V. FINDINGS OF FACT

1. This is a [REDACTED] year old child who has a history of severe behavioral problems during the over three years she has been at [REDACTED] ES. There are three previous HODs concerning this student, in all of which Petitioner was the prevailing party. The student was first found eligible for special education on March 13, 2008, under the classification of Other Health Impaired (OHI) as a result of her ADHD. On July 24, 2008, an IEP was developed which provided the student with .5 hours of counseling and 5 hours of specialized instruction per week. On June 12, 2009, an IEP meeting was convened to review independent psycho-educational and psychological evaluations completed in January 2008. At the meeting the student's IEP was revised to reflect 15 hours of specialized instruction in an out of general education setting and .5 hours of counseling per week, and ESY for the summer of 2009. (P 8, 9, 10)

2. On June 22, 2009, a due process complaint was filed alleging *inter alia*, that the student's June 12, 2009 IEP contained insufficient hours of specialized instruction and counseling and that Patterson ES was an inappropriate placement because the student required a full-time structured therapeutic setting with small classes. A hearing was held on August 14, 2009, at which the student's January 2008 evaluations and extensive documentation and testimony concerning her behavioral problems was introduced. An HOD was issued on August 14, 2009. The Hearing Officer (HO) found that Petitioner had failed to meet her burden of proof that the student required additional specialized instruction beyond the 15 hours in her IEP and further found that the student had made educational progress. However, the HO found that because of the student's behavioral problems her specialized instruction was to be provided in an out of general education, structured, small class setting. The HO concluded that DCPS had denied the student FAPE by failing to provide sufficient behavioral supports for the student. The HOD ordered in relevant part that DCPS "revise the student's IEP to provide 1.5 hours of counseling per week in two 45 minute sessions" to commence no later than September 8, 2009, and that "If Patterson ES cannot provide the student with 15 hours of specialized instruction in an out of general education, small class setting, and 1.5 hours of counseling per week, DCPS shall convene a placement meeting no later than September 1, 2009, and shall change the student's placement to a location where she can obtain the services in her IEP." (P 8)

3. The student received 1 hour of counseling per week during the month of September. (DCPS 13, Testimony of social worker)
4. Commencing on October 2, 2009, the student began receiving 1.5 hours per week of counseling in two 45 minute sessions, in an out of general education setting. (Testimony of social worker, [REDACTED])
5. On September 18, 2009, the student's IEP was revised to reflect 1.5 hours per week of counseling. No IEP meeting was held and the parent was not notified of the change. (DCPS 12, [REDACTED])
6. Commencing at the beginning of the 2009-2010 school year, the student received 15 hours of specialized instruction in a general education setting. Some time around the middle of October the student began receiving her specialized instruction in an out of general education setting. Neither the parents nor the educational advocate were informed of this change until the day of the hearing. (Testimony of Mr. [REDACTED])
7. On October 2, 2009, a Resolution Meeting was held. At the meeting it was represented that Patterson ES could not provide the pull out services required in the student's IEP and in the August 23, 2009 HOD. DCPS offered [REDACTED] as a placement that could provide the pull out services. The SEC at [REDACTED] participated in the meeting by telephone. The parents and advocate agreed to visit [REDACTED] (P 23)
8. On October 5, 2009, DCPS issued a Prior to Action Notice changing the student's placement from [REDACTED] 18)
9. On October 6, 2009, Petitioner's attorney sent a letter to Richard Nyankori, Deputy Chancellor for Special Education, invoking the stay put provision of the IDEA. (P 19)
10. The student's educational advocate and parent visited [REDACTED] within several days of the resolution meeting. They met with the principal and visited the fourth grade classroom and the resource room. [REDACTED] is an open space school. The third and fourth grades share a large space with partitions between the two classes. The fourth grade class consists of 26 students and one teacher. The student would make the 9th person in the special education classroom. There is one social worker for all the special education students in the school and one social worker for the remainder of the students. (Testimony of educational advocate, SEC at [REDACTED])
11. From the beginning of the 2009-2010 school year to the date of this hearing, the student had received three in school suspensions, each for less than a day. Two involved verbal altercations and one involved a physical altercation. The anecdotal notes of the confrontations suggest that they all involved situations that have been on-going for several years. (P 25-28)
12. [REDACTED] is the social worker who provides the student with counseling. She was also her counselor during the 2008-2009 school year. Ms. [REDACTED] was a credible

witness who evidenced knowledge of the student and her behavioral problems. Ms. [REDACTED] indicated that the student has demonstrated behavioral growth this school year and does not exhibit the level of out of control behavior she previously exhibited. (Testimony of [REDACTED])

VI. DISCUSSION AND CONCLUSIONS OF LAW

DCPS has failed to timely implement the August 23, 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 August 23, 2009 HOD. The consent decree establishes a rebuttable presumption of harm for students who failed to receive timely implementation of their HODS. *Id.* at 2456413, 46-47, §§ 74, 78. DCPS was ordered to revise the student's IEP to provide 1.5 hours of counseling per week to be delivered in two 45 minute sessions and to commence no later than September 8, 2009. DCPS admits that it provided the student with only 1 hour of counseling until October 2, 2009. DCPS was also ordered to provide the student with 15 hours of specialized instruction per week in an out of general education setting. If this instruction could not be provided at [REDACTED], DCPS was to convene a placement meeting no later than September 1, 2009 in order to place the student at a school that could provide the ordered services. DCPS admits that [REDACTED] S did not provide pull out services until some time in the middle of October, and that the student received all her specialized instruction in a general education setting. The student was offered a placement at [REDACTED] ES on October 5, 2009. While [REDACTED] does provide pull out services, it is also an open classroom school which is a problematic placement for a student with serious behavioral problems. DCPS has failed to rebut the presumption of harm to the student. Therefore, the failure to implement the August 23, 2009 HOD is 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, 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 for the failure to provide counseling commences on September 8, 2009 and ends on October 2, 2009. The student's award calculation for the failure to provide specialized instruction in an out of general education setting commences on September 1, 2009 and ends on October 15, 2009.

In addition to compensatory education, Petitioner is entitled to a remedy that fully implements the August 23, 2009 HOD. As of the date of the hearing, the student was receiving 15 hours of specialized instruction and 1.5 hours of counseling per week in an out of general education setting at ██████ S. Additionally, DCPS has issued a prior notice of intent to place the student at ██████ ES which can also implement the student's IEP. Thus DCPS is finally fully implementing the HOD, no doubt thanks to the filing of this due process complaint.

Petitioner also requests relief that does not flow from the failure to implement the August 2009 HOD. Petitioner alleges that the student's IEP, as revised by the HOD, provides insufficient specialized instruction and an inappropriate placement. These are exactly the same allegations made in the complaint that led to the August 2009 HOD. Following a full hearing in which Petitioner introduced the student's current evaluations and evidence of her behavioral problems, this Hearing Officer found that Petitioner had failed to prove that the student required a full time special education ED program and declined to increase her hours of specialized education or placement in a full time program.

The Hearing Officer is bound by the August 23, 2009 HOD. In order for the Hearing Officer to provide the student with a full time placement in an ED program as a result of the present hearing there must be new evidence sufficient to support such a placement. No new evidence was presented concerning the student's academic performance. The new evidence presented concerning the student's behavior included testimony from her social worker that the student's behavior had improved this school year and documentation of three part day in school suspensions. The Hearing Officer made clear to the parties at the hearing that the evidence did not support a finding that circumstances had so changed since the August 23, 2009 HOD to justify a full time placement in an ED program. The Hearing Officer gave Petitioner until Friday, November 6, 2009, to inform her whether she preferred that the student be placed at ██████ ES or ██████ S. Petitioner declined to indicate a preference and reiterated her desire for the requested relief. Petitioner will be given 3 business days from the date of this HOD to notify DCPS Counsel of her election.

VII. SUMMARY OF RULING

1. DCPS violated the August 23, 2009 HOD by failing to provide the ordered 1.5 hours of specialized instruction until October 2, 2009, and failing to provide 15 hours of specialized instruction in an out of general education setting until October 15, 2009.

2. Petitioner failed to prove that the student was entitled to a full time ED program.

VIII. ORDER

It is hereby **ORDERED** that

1. Petitioner shall have 5 business days from the issuance of this HOD to inform DCPS Counsel whether she chooses to obtain her Blackman-Jones relief by electing to choose products from the Blackman-Jones Catalogue or by obtaining compensatory education at the student's next IEP meeting.
2. Petitioner shall have 5 business days from the issuance of this HOD to inform DCPS Counsel of her election to place the student at [REDACTED]. If Petitioner fails to notify DCPS Counsel of her election within the required 5 business days, the student shall remain at Patterson ES.
3. 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: November 12, 2009

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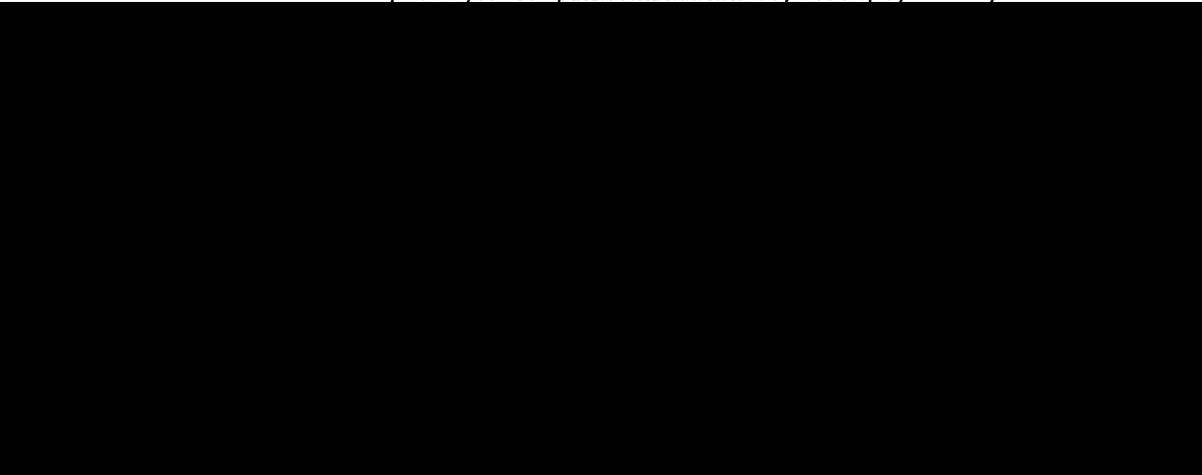
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