

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

State Enforcement & Investigation Division

STUDENT HEARING OFFICE

Van Ness Elementary School

1150 5<sup>th</sup> Street, S.E., 1<sup>st</sup> Floor, Washington, D.C. 20003

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

CONFIDENTIAL

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STUDENT HEARING OFFICE  
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In Re the Matter of:

Parent on behalf of Student \*

Petitioner,

vs.

The District of Columbia Public Schools

Respondent.

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CASE NO.

Complaint Date: 02/13/09

Hearing Date: 03/17/09

Hearing Site:

Van Ness Elementary School

1150 5<sup>th</sup> Street, S.E., 1<sup>st</sup> Floor

Washington, D.C. 20003

**HEARING OFFICER DETERMINATION**

Petitioner's Attorney:

Roberta Gambale, Esq.  
James E. Brown & Associates, PLLC  
1220 L Street, N.W., Suite 700  
Washington, D.C. 20005

Respondent's Attorney:

Daniel McCall, Esq.  
Assistant Attorney General  
Office of the Attorney General as Counsel  
for D.C. Public Schools  
825 North Capitol Street, N.E., 9<sup>th</sup> Floor  
Washington, D.C. 20002

\*Personally identifiable information is attached as an Index to this decision 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 02/13/09, a Due Process Complaint Notice (“Complaint”) was filed by the parent (“Parent” or “Petitioner”) on behalf of the 16 year old student (“Student”) alleging that the District of Columbia Public Schools (“DCPS”) denied Student a Free Appropriate Public Education (“FAPE”) in violation of IDEIA when DCPS failed to comply with a HOD by failing to conduct a vocational assessment and by failing to convene a Multidisciplinary Team (“MDT”) meeting. Petitioner requested relief in the form of a finding of a denial of a FAPE, an Order for DCPS to conduct a vocational assessment and convene a MDT meeting, and an award of compensatory education based on the denial of a FAPE.

The parties did not engage in mediation or the resolution process prior to the due process hearing.

### **THE PRE-HEARING CONFERENCE**

A Pre-Hearing Conference took place immediately prior to the convening of the due process hearing. Roberta Gambale, Esq. participated on behalf of Petitioner and Daniel McCall, Esq. participated on behalf of DCPS. The Pre-Hearing Conference resulted in a Pre-Hearing Conference Order which reflected that Petitioner withdrew from litigation, without prejudice, the request for compensatory education as a form of relief. The basis of the withdrawal was that an adequate compensatory education plan could not be developed until the vocational assessment was completed. Also withdrawn from litigation was Petitioner’s request for an Order for DCPS to conduct a vocational assessment because on 03/06/09, DCPS provided Petitioner with a letter authorizing funding for an independent vocational assessment.

The parties agreed to the following stipulation: (1) On 03/06/09, DCPS provided Petitioner with a letter authorizing funding for an independent vocational assessment.

### **THE DUE PROCESS HEARING**

The due process hearing convened on 03/17/09 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.

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Petitioner was represented by Roberta Gambale, Esq. ("Petitioner's Attorney"). DCPS was represented by Daniel McCall, Esq. ("DCPS' Attorney"). Petitioner attended the due process hearing.

The parties discussed settlement but were unable to reach a settlement agreement.

#### Stipulations:

#1 - On 03/06/09, DCPS provided Petitioner with a letter authorizing funding for an independent vocational assessment.

#### Disclosures:

Petitioner's Five-Day Disclosure letter dated 03/09/09, contained Exhibits #1-16. Petitioner's Exhibit #16 was withdrawn by Petitioner. Petitioner's Exhibits #1-7 were admitted into evidence without objection. Petitioner's Exhibits #8-15 were admitted into evidence over DCPS' objection that the exhibits pre-dated the date of the relevant 10/26/08 HOD.

DCPS' Disclosure Statement dated 03/10/09, contained Exhibits #1-5. Exhibits #1-5 were admitted into evidence without objection.

#### Witnesses:

For Petitioner:

(1) Petitioner.

For DCPS:

(1) Paris Adon, DCPS placement specialist (via telephone).

#### Relief Requested by Petitioner:

- (1) A finding of a denial of a FAPE for failing to comply with the HOD;
- (2) DCPS to convene a MDT meeting within 15 days to review Student's progress, revise the IEP as appropriate, and discuss graduation requirements; and
- (3) DCPS to convene a MDT meeting within 10 calendar days of receipt of the independent vocational assessment to review the assessment, review and revise Student's IEP as appropriate, develop a transition plan, and discuss graduation requirements and compensatory education.

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**FINDINGS OF FACT**

#1. Student is        years old, has disability classifications of Emotional Disturbance (“ED”) and Other Health Impairment (“OHI”), and requires a full time special education program consisting of 32.5 hours/week of specialized instruction and 1 hour/week of psychological counseling. (*Petitioner’s Exhibit #10, IEP dated 09/09/08*). Student began attending        School on or about October 26, 2008. (*Testimony of Petitioner*). Prior to attending        School, Student attended        School        a school placement that a 12/17/07 HOD determined to be inappropriate. (*Petitioner’s Exhibit #5, HOD issued 10/26/08*).

#2. A 10/26/08 HOD ordered DCPS to conduct a vocational assessment within 45 calendar days, or issue a letter authorizing funding for an independent vocational assessment within 45 calendar days plus 5 business days. The HOD also contained a provision that “any delay caused by the Student, parent, advocate, counsel or other representative of the parent or the Student, as it pertains to compliance with the terms of this Order shall toll any deadlines herein by one day for each day of delay.” (*Petitioner’s Exhibit #5, HOD issued 10/26/08*).

#3. A 10/26/08 HOD ordered DCPS to convene a MDT meeting within 30 calendar days of Student’s placement at        School to review and revise Student’s IEP as appropriate, address compensatory education for Student, and address the matters of a vocational assessment and Functional Behavior Assessment (“FBA”) or Behavior Intervention Plan (“BIP”). The HOD also contained a provision that “any delay caused by the Student, parent, advocate, counsel or other representative of the parent or the Student, as it pertains to compliance with the terms of this Order shall toll any deadlines herein by one day for each day of delay.” (*Petitioner’s Exhibit #5, HOD issued 10/26/08*).

#4. On 12/02/08, DCPS compliance case manager Wayne Holmes sent email correspondence to        School indicating an intent to convene a 30 day review to review and revise Student’s IEP, address Student’s vocational needs, and review a FBA and BIP; and inquiring about the status of the assessments. (*DCPS’ Exhibit #4, DCPS Compliance Case Manager email dated 02/02/08*).

#5. On 12/03/08, DCPS compliance case manager Wayne Holmes sent email correspondence to Petitioner’s Attorney indicating that DCPS had the necessary assessments except for the FBA. (*DCPS’ Exhibit #3 and Petitioner’s Exhibit #7, DCPS Compliance Case Manager Wayne Holmes’ email dated 12/03/08*).

#6. On 12/05/08, Petitioner’s Attorney sent email correspondence to the DCPS Compliance Case Manager Wayne Holmes asking for a copy of the vocational assessment; and indicating assent to convening a meeting during the first two weeks following the Christmas break. (*Petitioner’s Exhibit #7, email correspondence from Petitioner’s Attorney to the DCPS Compliance Case Manager Wayne Holmes*).

## Hearing Officer Determination &amp; Order

#7. In late January 2009, DCPS compliance case manager Paris Adon began monitoring \_\_\_\_\_ School and first became aware of the 10/26/08 HOD at that time. Mr. Adon was unaware of any prior DCPS efforts to comply with the HOD. (*Testimony of Paris Adon*).

#8. On 02/13/09, Petitioner filed a Due Process Complaint Notice alleging that DCPS had failed to comply with the terms of the 10/26/08 HOD. (*Petitioner's Exhibit #2, Due Process Complaint Notice dated 02/13/09*).

#9. On 03/06/09, DCPS compliance case manager Paris Adon provided Petitioner with a letter authorizing funding for an independent vocational assessment because the 10/26/08 HOD said to do so. (*Stipulation #1; DCPS' Exhibit #1; Testimony of Paris Adon*).

#10. From the date that Student was placed at \_\_\_\_\_ School until the date of the due process hearing, DCPS had not contacted Petitioner regarding the convening of a meeting to review and revise Student's IEP and discuss the vocational assessment and compensatory education. (*Testimony of Petitioner*).

#11. Petitioner attended meetings at \_\_\_\_\_ School regarding Student's behavior; however, these meetings did not involve DCPS. Since attending \_\_\_\_\_ School, Student has been suspended once, and Student will not comply with wearing the school uniform. Student has also made inappropriate comments about the current President of the United States, thus demonstrating Student's inability to display appropriate emotional and social behavior at school. Student currently has passing grades, but Student's grades are declining. Petitioner is having a difficult time keeping Student in school. (*Testimony of Petitioner*).

#12. Petitioner has been waiting for the vocational assessment to be completed so that realistic career options commensurate with Student's vocational abilities can be identified. Petitioner wants to be able to determine whether Student will be able to graduate at age 18 or have to continue in special education until the age of 22. Petitioner also would like assessment information on whether Student is likely to be a dependent adult or an independent adult. (*Testimony of Petitioner*).

#13. Student's 09/09/08 IEP, developed at \_\_\_\_\_ contained a BIP. (*Petitioner's Exhibit #5, HOD issued 10/26/08*).

#14. A FBA dated 11/07/06 was developed when Student attended \_\_\_\_\_ School. (*Petitioner's Exhibit #14, FBA dated 11/07/06*).

**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

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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. "The burden of proof in an administrative hearing...is properly placed upon the party seeking relief." *Schaffer v. Weast*, 44 IDELR 150 (2005).

**Issue #1 - Whether DCPS failed to comply with a HOD, thereby resulting in the denial of a FAPE?**

Petitioner argues that DCPS has not complied with the requirements established in a 10/26/08 HOD in two respects; that pursuant to the Blackman/Jones Consent Decree there is a rebuttable presumption of harm simply for failing to fully and timely comply with the HOD; and that DCPS has not successfully rebutted the presumption of harm. Petitioner argues that Petitioner therefore is entitled to a finding of a denial of a FAPE and the relief requested.

DCPS argues that it made sufficient attempts to convene a meeting in compliance with the HOD; that DCPS ameliorated its failure to conduct a vocational assessment within the timeframe specified in the HOD by providing Petitioner with a letter dated 03/06/09 that authorizes funding of an independent vocational assessment; and that even if DCPS did fail to comply with the requirements as ordered in the 10/26/08 HOD, there has been no harm to Student. Consequently, DCPS argues, there has not been a denial of a FAPE.

The Blackman/Jones Consent Decree is applicable in this case. The "Jones class" of the Blackman/Jones Consent Decree is defined as: "All children, now (as of January 1, 1995) and in the future, who are entitled to have DCPS provide them with a free appropriate public education (FAPE) and who have been denied same because DCPS either (a) has failed to fully and timely implement the determinations of hearing officers, or (b) failed to fully and timely implement agreements concerning a child's identification, evaluation, educational placement, or provisions of FAPE that DCPS has negotiated with child's parent or education advocate." *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 ("Blackman/Jones") at page 11. Blackman/Jones also creates 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." *Id. at page 41.**

According to the terms of the 10/26/08 HOD, DCPS should have convened a MDT meeting within 30 days of Student's placement at School. (*Finding of Fact #3*). Student began attending School on or about 10/26/08 (*Finding of Fact #1*); therefore, the MDT meeting should have occurred no later than 11/25/08. The first evidence in the record of DCPS' intent to convene the MDT meeting was email correspondence from DCPS to School on 12/02/08. (*Finding of Fact # 4*). However, there is also evidence in the record of Petitioner's Attorney's assent to convene a meeting during the first two weeks of January 2009. (*Finding of Fact #6*). There is no

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further credible evidence in the record as to what transpired with regard to the scheduling of the meeting following Petitioner's Attorney's email dated 12/05/08 indicating assent to a January 2009 meeting. Although there was testimony by the DCPS witness Mr. Adon, that two letters regarding an invitation to meet were sent to Petitioner in January 2009 after he assumed responsibility for the case (*Finding of Fact #7*), the documents were not offered as evidence, and Petitioner testified credibly that Petitioner had not heard from DCPS since Student's placement at \_\_\_\_\_ School. (*Finding of Fact #10*). Mr. Adon testified that he issued the letter authorizing funding for the independent vocational assessment, and that document was admitted into evidence. (*Finding of Fact #9*). It seems unlikely that Mr. Adon would have a copy of the letter for funding, but would not have a copy of a letter of invitation he allegedly sent to Petitioner in January 2009. Rather, it seems that DCPS' progress on compliance with the HOD fell through the cracks, as Mr. Adon testified that he was unaware of any prior efforts by DCPS to convene a meeting. (*Finding of Fact # 7*). Ultimately, it was DCPS' responsibility to convene the MDT meeting; not the responsibility of Petitioner or Petitioner's Attorney.

The Hearing Officer concludes that DCPS did not fully and timely comply with the terms of the 10/26/08 HOD with respect to convening a meeting within 30 days of Student's placement at \_\_\_\_\_ School. This failure resulted in the denial of a FAPE. According to *Blackman/Jones*, Students "who are entitled to have DCPS provide them with a free appropriate public education (FAPE) and who have been denied same because DCPS either has failed to fully and timely implement the determinations of hearing officers..." specifically states that the failure to fully and timely implement a HOD is a denial of a FAPE, and as stated previously, a rebuttable presumption of harm attaches.

DCPS offered testimony that Student was doing well at \_\_\_\_\_ School. However, doing well, according to DCPS, included an incident of suspension. (*Testimony of Paris Adon*). According to Petitioner, Student's behavior was deteriorating and Petitioner was having a hard time keeping Student in school. (*Finding of Fact #11*). One of the tasks assigned to DCPS in the 10/26/08 HOD was to address the matter of a FBA or a BIP at the MDT meeting. There was sufficient evidence in the record to show that Student's behavior at \_\_\_\_\_ School was problematic, deteriorating, and required intervention. The development of a new FBA and a BIP, specifically tailored to address Student's behavior at \_\_\_\_\_ School, would have been appropriate measures of intervention. However, these measures require the MDT/IEP Team to meet and develop them. See 34 C.F.R. 324(a)(2) - "The IEP Team must in the case of a child whose behavior impedes learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." Although Student's current IEP dated 09/09/08 contained a BIP, it was developed while Student attended \_\_\_\_\_ a school previously determined to be an inappropriate placement. (*Finding of Fact #1, #13*). Student also did have a FBA on file, but it was outdated; it was developed on 11/07/06 while Student attended \_\_\_\_\_ School. (*Finding of Fact #14*). Therefore, there was harm to Student by DCPS' failure to convene a meeting within 30 days of Student's matriculation at \_\_\_\_\_ School because the HOD specifically ordered DCPS to address the matter of a FBA or a BIP, the implication being that it was necessary to do so in order to assure Student's successful

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adjustment at the school. There was no action or inaction by Petitioner or Petitioner's representatives that caused DCPS to be unable to conduct a meeting within 30 days of Student's placement at School.

Secondly, the 10/26/08 HOD required DCPS to conduct a vocational assessment within 45 days or authorize funding for an independent vocational assessment within 45 days plus 5 business days. (*Finding of Fact #2*). DCPS took no action to complete the vocational assessment within the required 45 days, and then on 12/03/08 erroneously misled Petitioner's Attorney to believe that it had been completed. (*Finding of Fact #5, #6*). It wasn't until litigation was initiated on 02/13/09 (*Finding of Fact #8*), that DCPS attempted to resolve the problem by authorizing funding for an independent vocational assessment on 03/06/09 (*Finding of Fact #9*), just two weeks prior to the due process hearing.

The development of a transition plan for Student, age ■■■, is required by IDEIA (34 C.F.R. 320(b)), and the development of an appropriate transition plan in this case is dependent on the completion of a vocational assessment. The fact that DCPS provided a letter authorizing funding for an independent assessment almost 3 months later than when it should have been provided (*Finding of Fact #2, #9*), does not make everything all right. DCPS cannot continue to flout its responsibilities under IDEIA, jump up with a BandAid approach at the last minute, claim that everything it has failed to do makes absolutely no difference in the life of a disabled child, and be condoned for its transgression. To agree with DCPS' position that no harm has accrued to the child would be to absolve DCPS of all responsibility and accountability, and that would be counterintuitive to the general philosophy and mandates of IDEIA on a federal and state regulatory level, i.e., to provide a free appropriate education to children with disabilities (34 C.F.R. 300.1; 5 D.C.M.R. 3002.1(a)), and the philosophy and mandates of *Blackman/Jones* on a local judicial level.

The application of the *Blackman/Jones* rebuttable presumption of harm to the facts in this case yields a finding of a denial of a FAPE. Petitioner has established new harm from the time of the failure, i.e., from 12/17/08 when the authorization for funding for an independent vocational assessment should have been issued, until 03/06/09 when the letter authorizing funding was issued. In this case, Student's substantive right to a FAPE, i.e., to have appropriate measurable postsecondary goals based upon age appropriate assessments related to training, education, employment, and, where appropriate, independent living skills; and the transition services (including courses of study) needed to assist Student in reaching those goals, was affected. *See 34 C.F.R. 300.320(b)*. The testimony of Petitioner reveals that Petitioner is having a difficult time keeping Student in school due to Student's inability to display appropriate emotional and social behavior at school (*Finding of Fact #11; Testimony of Petitioner*), and that Petitioner needs a realistic transition plan for Student's future (*Finding of Fact #12*). It is becoming readily apparent that Student will have extreme difficulty succeeding in a full time special education school setting, and Petitioner must start preparing for the next fork in the educational road.

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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 substantive right to have a vocational assessment completed in order to provide Student with a realistic transition plan has been thwarted by DCPS' failure to comply with the 10/26/08 HOD. DCPS offered no credible or relevant evidence to rebut the presumption of harm, and this Hearing Officer cannot conclude that DCPS' failure to conduct the vocational assessment or issue a letter authorizing funding was delayed by any action or inaction on the part of Petitioner or Petitioner's representatives.

Petitioner met its burden of proof on Issue #1, i.e., that DCPS' failure to comply with the 10/16/08 HOD resulted in the denial of a FAPE.

### CONCLUSION

DCPS failed to fully and timely comply with a HOD dated 10/26/08. *Blackman/Jones* provides Petitioner with a rebuttable presumption of harm on this issue. DCPS did not rebut the presumption of harm, and therefore there has been a denial of a FAPE. Student's substantive right to a FAPE has been affected by DCPS' failure to comply with the HOD.

### ORDER

(1) DCPS shall convene a MDT meeting within 20 business days to review Student's progress, revise the IEP as appropriate, and discuss graduation requirements; and

(2) DCPS shall convene a MDT meeting within 20 business days of receipt of the independent vocational assessment to review the assessment, review and revise Student's IEP as appropriate, develop a transition plan, and discuss graduation requirements and compensatory education; and

(3) All notices and correspondence shall be sent to Petitioner by first class mail and to Petitioner's Attorney, Roberta Gambale, Esq., in writing, via facsimile, at (202) 742-2097 or (202) 742-2098; and

(4) Any delay caused by Petitioner, Petitioner's Attorney, or any other representative of Petitioner, as it pertains to DCPS' compliance with the terms of this Order, shall toll any deadlines herein by one day for each day of delay.

**IT IS SO ORDERED.**

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**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).**

*Virginia A. Dietrich /s/*

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

03/27/09

Date

Issued: March 27, 2009