

DC Office of the State Superintendent of Education
 Office of Review & Compliance
 Student Hearing Office
 1150 5th Street, S.E.
 Washington, D.C. 20003
 CONFIDENTIAL

OSSE
 STUDENT HEARING OFFICE
 2009 MAR -4 AM 8:38

<p>[Parent], on behalf of [Student],</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools,</p> <p style="text-align: center;">Respondent.</p>	<p>Case</p> <p style="text-align: center;">HEARING OFFICER'S DETERMINATION</p> <p>March 4, 2009</p> <p><u>Representatives:</u></p> <p>Amee Vanderpool, Petitioner</p> <p>Laura George, Respondent</p> <p><u>Independent Hearing Officer:</u></p> <p>Jim Mortenson</p>
--	---

I. PROCEDURAL BACKGROUND

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 1:00 p.m. on February 18, 2009. The hearing concluded on February 23, 2009, upon the filing of post-hearing briefs. The due date for the Hearing Officer's Determination (HOD) is March 5, 2009, in accordance with the Blackman/Jones Consent Decree. This HOD is issued on March 4, 2009.

This hearing in this matter was conducted and this decision is written pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30.

Present at the due process hearing were:

Petitioner's Counsel, Ameer Vanderpool, Esq.

Respondent's Counsel, Laura George, Esq.

Petitioner, Student's Mother

Petitioner's Education Advocate, Carolyn Miskel

Six witnesses testified at the hearing. The Petitioner presented five witnesses and the Respondent presented one. The witnesses were:

Petitioner's witnesses:

Petitioner (P)

Carolyn Miskal, Educational Advocate (C.M.)

Academy (A.W.)

Dr. Ida Jean Holman, Educational Advocate/Expert concerning compensatory education (I.J.H.)

Inc.

Respondent's witness:

Special Education Coordinator,

Academy

The current due process complaint is the third since September 2008. The first complaint was filed in September and resulted in an HOD dated November 12, 2008. The issues were whether Respondent failed to implement the IEP and whether Respondent failed to provide an appropriate placement. The IHO determined the IEP was being implemented with the exception of the BIP. The IHO ordered that the IEP team meet to discuss the Petitioner's concerns about the Student's sexual behaviors. When the IEP team failed to timely meet, pursuant to the November HOD, a second complaint was filed in December 2008. That complaint alleged the November HOD had not been complied

with. This IHO found that the November 2008 HOD had not been complied with and the Respondent had failed to present any evidence to rebut the presumption that the Student suffered harm as a result of the delay in complying with the HOD. The result was an order for compensatory education consisting, at a minimum, of one hour per week of psychological counseling for a year in order to deal with the Student's behavioral issues. This complaint was subsequently filed by the Petitioner, through counsel, on January 27, 2009.

A prehearing conference was held on February 9, 2009, and a prehearing order was issued on that date. An untimely response to the complaint was filed by the Respondent on February 10, 2009.

24 documents were disclosed and filed by the Petitioner on February 11, 2009. None of these documents were objected to by the Respondent and were admitted into evidence as Petitioner's Exhibits 1 through 24 (P 1 – P 24). The exhibits are as follows:

- P 1 - Administrative Due Process Complaint Notice, January 27, 2009
- P 2 - Administrative Due Process Complaint Notice, September 29, 2008
- P 3 - Hearing Officer's Determination (HOD), November 13, 2008
- P 4 - Administrative Due Process Complaint Notice, December 8, 2008
- P 5 - HOD, January 12, 2009
- P 6 - Individualized Education Program (IEP) team meeting notes, January 21, 2009
- P 7 - Advocate's meeting notes, January 21, 2009
- P 8 - IEP, May 23, 2008
- P 9 - IEP team meeting notes, May 23, 2008
- P 10 - Advocate's meeting notes, May 23, 2008
- P 11 - IEP team meeting notes, July 29, 2008
- P 12 - Advocate's meeting notes, July 29, 2008
- P 13 - Observation Report, September 17, 2008
- P 14 - IEP, September 14, 2007
- P 15 - IEP team meeting notes, September 14, 2007
- P 16 - DCPS 3rd Grade Report, School Year (SY) 2007-08
- P 17 - DCPS IEP Report Card, June 6, 2008
- P 18 - DCPS IEP Report Card, September 14, 2007

- P 19 - Comprehensive Psychological Evaluation, September 7, 2006, September 14, 2006, September 26, 2006
- P 20 - Confidential Report of the Comprehensive Psychological Evaluation, May 16, 2008
- P 21 - Compensatory Education Plan, May 23, 2008
- P 22 - Compensatory Education Plan, February 10, 2009
- P 23 - Placement Acceptance Letter from [REDACTED] Academy, February 9, 2009
- P 24 - Curriculum Vitae, Dr. Ida Jean Holman

Ten documents were disclosed and filed by the Respondent on February 10, 2009.

None of these documents were objected to by the Petitioner and were admitted into evidence as Respondent's Exhibits 1 through 10 (R 1 – R 10). The exhibits are as

follows:

- R 1 - Compensatory Education Plan, January 21, 2009
- R 2 - E-mail chain ending from Crowder to George, Tuesday, February 10, 2009, 2:54 PM
- R 3 - HOD, January 12, 2009 (same as P 5)
- R 4 - IEP team meeting notes, January 8, 2009, January 21, 2009
- R 5 - IEP Report Card, May 23, 2008
- R 6 - IEP Report Card, SY 2008-09
- R 7 - Report Card, SY 2008-09
- R 8 - Teacher Comments, SY 2008-09
- R 9 - Service Tracker, January 28, 2009
- R 10 - IEP, May 23, 2008 (same as P 8)

II. ISSUES

1) Whether the Respondent failed to comply with the January 12, 2009, HOD? Specifically, whether the IEP addressed the Student's behaviors as required, whether progress reports and tracking forms are being provided as required by the November, 2008, HOD, and whether compensatory services have been determined and provided?

2) Whether the Student is being denied a free appropriate public education (FAPE) as a result of the Respondent's alleged inability or unwillingness to implement the IEP as written, including, but not limited to, the Student's placement?

III. FINDINGS OF FACT

1. Student is a year old learner enrolled in a segregated special education setting within the School District. P 8, R 10.
2. An HOD was issued on November 12, 2008 concerning the Student. P 3. The HOD required the Respondent to:
 1. ...within fifteen (15) business days of the issuance of this Order, convene a multidisciplinary team (MDT) meeting to review the student's IEP, particularly the BIP, and ensure that the BIP is being implemented at "School A" and that parent is being provided the daily reports the BIP requires.
 2. The MDT when it meets shall also discuss and address the parent's concerns about the student sexual behaviors and how that might be impacting the student and other students in the classroom and school. The parent shall provide to the MDT any information she has obtained from the student's private psychiatrist regarding this behavior.
 3. DCPS shall provide at the MDT meeting the student's progress reports and the tracking forms for the psychological services that are being provided to the student.
 4. The MDT meeting shall be scheduled through counsel for the student and parent.
 5. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).
3. An HOD was issued on January 12, 2009. P 5, R 3. The HOD required:
 1. If it has not done so already, the IEP team must meet to address the matters in the November 12, 2008, HOD by January 23, 2009. The IEP team meeting must be held at a mutually agreeable place and time within the deadlines described herein and pursuant to 34 C.F.R. § 300.322. The Respondent must document at least three alternative dates and times for the IEP team to meet which will be communicated to the Parent and her Counsel. If the Parent fails to agree to at least one of the proposed dates and times, the IEP team must meet during one of the proposed times to conduct the review and make the determinations required and inform the Parent and her Counsel that it will proceed at that time. The IEP team must also develop a compensatory education plan. This plan may be developed at the aforesaid IEP team meeting, or at a subsequent meeting which must be held no later than January 30, 2009. The requirements for selecting a meeting time described herein will apply for a second meeting, too.

2. The November 12, 2008, HOD indicates there are significant issues to be resolved, concerning the Student's behaviors, by the IEP team. As a result, the compensatory education plan to be devised by the IEP team must include, at a minimum, one hour of psychological counseling services per week, inclusive of breaks in regular school programming, until January 30, 2010. The IEP team must specify the kind of counseling services to be provided, by whom, and where. If the services are to be provided privately, the Respondent must be billed directly for the services. This requirement for psychological counseling is in addition to such services already provided in the IEP.
 3. The Respondent must follow all necessary State and Federal regulations, including but not limited to notice requirements, in the accomplishment of the above orders.
4. An IEP team meeting was convened on January 8, 2009, one day following the prior due process hearing. R 4. The Petitioner was not at the meeting and the team determined to reconvene after contacting Petitioner's attorney. R 4.
5. An IEP team meeting was convened on January 21, 2009, with the Petitioner participating. P 6, P 7, R 4. The Petitioner asserts that the IEP team refused to discuss the Student's sexual behavior. T of P, T of C.M. The evidence shows that although the Petitioner's concerns about sexual behavior was brought up at the January 21 IEP team meeting, staff had little to contribute to the discussion because they were generally not seeing sexual behaviors. P 6, P 7, R 4. The IEP team discussed the student's sexual behaviors. P 6, P 7, R 4. There were only one or two incidents of inappropriate sexual behavior. One was an allegation reported by the Petitioner that an incident had occurred at school where the Student laid on top of a female student. Testimony (T) of P, P 7. In another incident the student allegedly touched a girl's "behind". T of P. Both of these incidents occurred near the beginning of the school year and the Petitioner was not aware of them until the hearing in that case. T of P. The Petitioner is also concerned the Student has made inappropriate sexual comments when provided reading material. T of P, P 7. Behavior interventions have been employed when inappropriate comments have

been made. P 6, R 4, T of D.M. The Petitioner did not present any information to the IEP team from the Student's private psychiatrist regarding sexual behavior. P 6, P 7, R 4.

6. The Petitioner was provided with the Student's point sheet with comments at the January 21 IEP team meeting. P 7.
7. The staff at the January 21, 2009, IEP team meeting all indicated the Student was performing well academically and functionally. P 6, P 7, R 4.
8. Written reports indicate the Student is performing well academically and functionally. R 5, R 6, R 7, R 8.
9. The Student's IEP requires 31 hours per week of specialized instruction and 1 hour per week of psychological services. P 8, R 10. The IEP notes that the Student is not in a general education setting 100% of the time. P 8, R 10. The IEP notes that a combination of general education and resources classes was rejected because of potential physical harm to himself or others. P 8, R 10. The Petitioner asserts the Student is out of the self-contained setting at his school because he or she the exits and entrances are not adequately monitored. T of C.M. There is no statement in the IEP indicating the Student may have no contact with peers without disabilities. P 8, R 10.

IV. CONCLUSIONS OF LAW

1. The case Blackman v. District of Columbia, 2006 WL 2456413 (D.D.C. 2006) resulted in a consent decree between the litigants. Part of that consent decree provides compensatory education for class members. Id. at 20-22. "Compensatory

Education is an important mechanism for addressing the loss of services caused by the denial of timely hearings and the failure to receive timely implementation of HODs and SAs.” Id. at 21. The consent decree “establishes a rebuttable presumption of harm. . . for students who failed to receive timely implementation of HODs and SAs. Id.

2. The January 12, 2009, HOD required the IEP team to “meet to address the matters in the November 12, 2008, HOD by January 23, 2009.” The IEP team was required by the November HOD to “review the student’s IEP, particularly the BIP, and ensure that the BIP is being implemented at ‘School A’ and that parent is being provided the daily reports the BIP requires.” The team was also required to “discuss and address the parent’s concerns about the [Student’s] sexual behaviors and how that might be impacting the student and other students in the classroom and school. The parent shall provide to the [IEP] any information she has obtained from the student’s private psychiatrist regarding this behavior.” The November order further requires that the Respondent, at the IEP team meeting, provide to the Petitioner “the student’s progress reports and the tracking forms for the psychological services that are being provided to the student.” In the subsequent January HOD, as a result of the Respondent’s failure to rebut the presumption of harm for the Respondent’s failure to implement the November HOD, compensatory education was required pursuant to the Blackman/Jones consent decree. Minimally included in the compensatory education plan to be determined by the IEP team was the provision of “one hour of psychological counseling services per week, inclusive of breaks in regular programming, until January 30,

2010[.]” in order to deal with “significant issues. . . concerning the Student’s behaviors[.]” The order required the team to “specify the kind of counseling services to be provided, by whom, and where.”

3. The Respondent has complied with the November HOD and has failed to completely comply with the January HOD. The Respondent convened an IEP team meeting January 21, 2009 with the Petitioner present. The BIP and its implementation were discussed and the Petitioner was provided with the point sheet with comments. The Petitioner’s concerns about the Student’s sexual behaviors were discussed. Other than an incident of touching another student’s rear-end, and making inappropriate comments, the staff did not see a problem with sexual behavior that was not being handled. The parent did not present any information to the IEP team, or to the IHO, from the Student’s psychiatrist indicating a problem with sexual behaviors. The Petitioner presented limited evidence about the Student’s behavior. The focus of the Petitioner’s evidence was about her *concern* about the Student’s behaviors. This, combined with the school’s staff indicating they saw little problem with behavior that was not being successfully handled, has led, in this IHO’s opinion, to the Petitioner’s attempts to remove the Student from his school and place him in a private placement at public expense. Such a placement is not warranted.
4. The team did fail to create a compensatory education plan as required by the January 12, 2009, HOD. The compensatory education plan states “DCPS will provide 1 (one) hour of psychological counseling per week to be completed by 01/20/2010.” DCPS is specified as the provider. The plan fails to specify where

the services will be provided, rendering the plan non-compliant. This error must be corrected.

5. The Respondent provided sufficient evidence that the failure to specify the location of the required psychological counseling services has not harmed the Student. The evidence indicates that as of January 21, 2009, the Student is doing reasonably well at school and there have been no significant behavioral problems. By working with a psychologist, pursuant to the January 12, 2009, HOD, over the next year, it is reasonably expected the Student will learn sufficient skills to manage his behaviors well, in spite of his disability.
6. The Petitioner has not shown that the IEP is not being implemented at this time. The Petitioner's argument is that the IEP is not being implemented with regard to placement because the Student may have access to students without disabilities, including riding a bus with students without disabilities. Assuming this claim is true, it would not violate the IEP. There simply is no requirement articulated in the IEP requiring the Student to be completely sequestered from students without disabilities. The requirement for 32 hours per week of special education and related services does not translate to "no contact" with students without disabilities. Thus, the Student has not been denied a free appropriate public education (FAPE).

V. DECISION

1. The Respondent violated the Blackman/Jones Consent Decree when it failed to implement the January 12, 2009, HOD, because it did not specify the location of the Student's compensatory psychological counseling services as required by the HOD.
2. The Respondent has presented sufficient evidence to show there is no harm for the delay in implementing the aforesaid HOD.
3. The Respondent did not fail to implement the IEP.

VI. ORDER

1. The Respondent must provide the Student's compensatory psychological counseling services in a private room in the building the _____ is located. The location must be specified in the compensatory education plan so that staff and the Petitioner can identify where the Student will receive the services. This is ordered because the IEP team has already determined that the Respondent will provide the psychological counseling services. These counseling session must begin, if they have not begun already, no later than March 12, 2009.

IT IS SO ORDERED.

Dated this 4th day of March, 2009.

A handwritten signature in black ink, appearing to be 'Jim Mortenson', written over a horizontal line.

Jim Mortenson, Esq.
Independent Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).