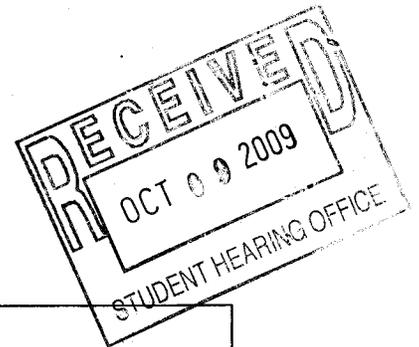


DC Office of the State Superintendent of Education  
Office of Compliance and Review  
Student Hearing Office

1150 5th Street, SE  
Washington, DC 20003  
Tel: 202-698-3819  
Fax: 202-442-5556



**Confidential**

<p>STUDENT<sup>1</sup>, by and through Parent  Petitioners,  v.  District of Columbia Public Schools  Respondent.</p>	<p><b>HEARING OFFICER'S DECISION</b></p> <p><b>Date: October 9, 2009</b></p> <p><u>Hearing Officer: Wanda I. Resto, Esquire</u></p>
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<sup>1</sup> Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

## I. PROCEDURAL BACKGROUND

On August 27, 2009, parent's counsel filed a Due Process Complaint (Complaint) against the District of Columbia Public Schools (Respondent), pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education (FAPE). The Petitioner contends that the Respondent failed to comply with a May 3, 2009 Hearing Officer Decision issued by the undersigned hearing officer.

The Petitioner requested the Respondent be deemed to have denied the Student a FAPE and ordered to fund and place the Student at Rock Creek Academy, with transportation, and tuition reimbursement retroactive to the date of enrollment. The Petitioner asked that the Respondent convene a multidisciplinary (MDT) meeting to review evaluations, and complete an appropriate individualized educational program (IEP) for the Student and provide any required related services.

Additionally, the Petitioner asked that at the MDT meeting, the Respondent discuss and determine appropriate compensatory education to compensate for the failures as identified in the Complaint. The Petitioner asked that in the alternative, the Respondent fund an independent evaluation to determine appropriate compensatory education, and following that evaluation, the Petitioner, at her option, to bring a due process complaint in order to present evidence and testimony on the issue of compensatory education.

On September 14, 2009, the DCPS filed a Response to the Parent's Administrative Due Process Complaint. The Respondent asserted the Student's evaluations were completed in April and May 2009 with a final report completed on May 25, 2009. A MDT meeting was held on June 1, 2009; the parent was not present at the meeting because she did not agree with the evaluations. The Respondent alleged it proceeded with the meeting in order to update the Student's IEP with the most recent information available to the team at that time, and in order to comply with the HOD issued May 3, 2009.<sup>2</sup> The Respondent claimed the independent evaluations were forwarded to DCPS on August 4, 2009, prior to the beginning of the school year. The Respondent argued there was no educational harm to the student for a minor delay in reviewing the evaluations. The Respondent asserted the student did not miss instructional time, and has been unilaterally placed at a full time therapeutic day school. The Respondent further asserted it would hold a meeting to review the independent evaluations revise the IEP, discuss placement and compensatory education if required.

A telephonic pre-hearing conference call for the above reference matter was conducted on September 17, 2009 at 9:00 AM. Attorney Douglas Tyrka participated on behalf of the Petitioner. Attorney Candice Sandifer participated on behalf of the Respondent. The parties agreed the IEP had not been reviewed and placement has not been discussed. The Petitioner requested a summary decision claiming there was no factual dispute and therefore she was entitled to a decision based on the allegations in the Complaint.

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<sup>2</sup> The HOD issued May 3, 2009 ordered, within 15 calendar days of receipt of the report of the evaluations the Respondent to convene an MDT meeting to review all current evaluations, and revise the Student's IEP, discusses and determined if a new placement is appropriate.

On September 23, 2009, the Petitioner filed a Motion for Summary Decision. The Petitioner argued that in this case, the Respondent did not present evidence in opposition to the documentary evidence and sworn statements submitted by the Petitioner.<sup>3</sup> The Petitioner argued that the Respondent had not disputed any of the Petitioner's factual allegations. The Petitioner asserted the party opposing summary determination, must "present significant probative evidence tending to support" a position contrary to the Petitioner's. Anderson, 477 U.S. at 249. The Petitioner contends that the Respondent could have presented the hearing officer with preexisting documents and/or with verified statements from witnesses, but it declined to present anything.

On September 24, 2009, the Respondent filed an Opposition to Petitioner's Motion for Summary Decision it asserted it is entitled to present evidence at a hearing to show that there was no educational harm as a result of the delay in reviewing evaluations. The Respondent further argued that on May 6, 2009 a letter was issued by the Office of Special Education allowing the petitioner to obtain the previously mentioned evaluations, as well as updated academic testing. The evaluations were completed by the District and an IEE was issued as well. The Respondent argued it was in compliance with the Hearing Officer's Decision in this respect.

On September 29, 2009, the hearing officer denied Petitioner's Motion for Expedited Hearing; the circumstances in the current Complaint did not establish facts sufficient to merit an expedited hearing. However, the hearing officer offered and the parties agreed to accelerate the hearing date based on availability of the parties. The Order also *denied* in part Petitioner's Motion for Summary Judgment. The hearing officer accepted as undisputed facts the existence of a May 3, 2009 HOD which ordered the Respondent, *inter alia*, to convene an MDT meeting to review all current evaluations, revise the Student's IEP as appropriate, and discuss and determine placement. The Petitioner on August 4, 2009, faxed the independent comprehensive psychological and speech and language evaluations; a MDT meeting with the parent participation has not been conducted; nor has an appropriate educational placement for the student been provided. The Petitioner unilaterally placed the student in a private full time special education school

The September 29, 2009 Order determined that the due process hearing would focus on two matters; the presentation of evidence by the Respondent towards rebutting the presumption of harm; and the presentation of evidence by the Petitioner to demonstrate the appropriateness of the full time special educational placement chosen by the Petitioner. The Order also affirmed that in the District of Columbia the violation of a HOD carries a presumption of harm to the student.

At the hearing the Petitioner presented a disclosure letter dated September 28, 2009 listing four witnesses; two witnesses testified. The Respondent presented a disclosure letter dated September 28, 2009 identifying six witnesses and to which three documents were attached, labeled DCPS 1 through 3; one witness testified.

The hearing was conducted in accordance with the rights established under the IDEIA and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations

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<sup>3</sup> Petitioner accompanied the Motion with a Verified Statement of the Petitioner affirming the Respondent had not discussed nor determined an appropriate educational placement for the student. Verified Statement of the Admissions Specialist at RCA affirming the student was enrolled in the school on August 26, 2009 and the school can provide the services required by the student.

(D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures (“SOP”).

## II. ISSUE(S)

1. Can the Respondent rebut the presumption of harm?
2. Whether the Petitioner’s choice of a full time special educational placement is appropriate for the student?

## III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student was attending a DCPS during the 2007-209 school years.<sup>4</sup>
2. A May 3, 2009 HOD determined, *inter alia*:
  - a. that the Student did not make academic progress and was denied services during the 2007-2008;
  - b. the Student’s IEP was not implemented in the school year 2008-2009 ;
  - c. the student is more than four years below grade level;
  - d. at [REDACTED] the Student’s IEP was not implemented;
  - e. the Petitioner was denied participation in the decision-making process for the 2008-2009 school year;
  - f. the Petitioner proved the Respondent failed to develop an appropriate IEP, and failed to provide specialized instruction for the 2008-2009 school year.<sup>5</sup>
  - g. the Petitioner proved that the Student was denied a FAPE;
  - h. the Student’s IEP provides 12 hours weekly of specialized instruction and the Petitioner’s choice of placement is not appropriate for the unique needs of the Student; the school only offers a full-time special education program.
3. The May 3, 2009 HOD ordered DCPS, *inter alia*:
  - a. within 15 calendar days of receipt of certain evaluations, to convene an MDT meeting to review all current evaluations, revise the Student’s IEP as appropriate, and discuss and determine placement;
  - b. to provide the parent with information regarding placement to include student/teacher ratio, make-up of disabilities, behavior interventions available, qualifications of staff and service providers, transition services available, class size, and interaction with non-disabled peers.
4. On August 4, 2009, the Petitioner faxed the independent comprehensive psychological and speech and language evaluations, along with three proposed dates on which the parent was available to meet for an MDT meeting, to the appropriate DCPS contacts.

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<sup>4</sup> P#1 Complaint filed August 27, 2009.

<sup>5</sup> The Order also required the Respondent to fund an independent evaluation to determine where the Student is academically, where the Student should be and what services will get her there, following that evaluation, the Petitioner, could present a due process complaint to present evidence and testimony on whether compensatory education award is warranted.

5. The Respondent did not conduct a MDT meeting nor provided an educational placement for the student, after review of the independent evaluations.
6. In the District of Columbia the violation of a HOD carries a presumption of harm to the student.
7. The student's June 2009 speech-language evaluation recommended 60 minutes a week of speech-language therapy.<sup>6</sup>
8. The student's June 2009 psychological evaluation recommends, *inter alia*, the student continues to receive services under the emotionally disturbed classification. The student is in need a full time therapeutic program to address her academic deficits, significant cognitive limitations, and emotional discomfort. The evaluator indicated that the student would function best in a highly structured specialized educational program with a small pupil to teacher ratio and with an instructional learning environment that utilizes multiple presentation formats to include visual, auditory, and kinesthetic modalities. The evaluator indicated that the student requires psychotherapeutic intervention that monitors the student's emotional progress. The student also needs a special educational program that is highly controlled, organized, therapeutic, and void of excessive external stimuli with intensive academic and support services. The evaluation also includes a recommendation that the student receive individual therapy to recognize, express her emotions, and help build self confidence.<sup>7</sup>
9. The Petitioner enrolled the student in a private full time special education placement in August 2009.
10. The student is attending the private school since August 26, 2009. She is in a classroom of six students with a teacher certified in special education. The student is receiving speech/language and counseling services. The program provides one-on-one specialize instruction with multidisciplinary approach. There is a behavior modification program with a Specialist assigned per floor. The student is adjusting appropriately to the private placement.<sup>8</sup>

#### IV. CONCLUSIONS OF LAW

##### FAPE Determination

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The IDEIA regulations at 34 C.F.R. § 300.17 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."

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<sup>6</sup> P3 June 30, 2009- Speech-language Evaluation.

<sup>7</sup> P2 June 29, 2009 -Psychological Evaluation Report

<sup>8</sup> Testimony of the Director of Admissions -Private school

## **Burden of Proof**

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that based solely upon the evidence presented at the hearing, an impartial hearing officer shall 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 a FAPE.

The Respondent did not meet its legal obligation under the IDEIA.

## **Violations of Hearing Officer's Decision**

On August 24, 2006, DCPS entered into a consent decree ("Consent Decree") in the Blackman v. District of Columbia, Civil Action No. 97 1629 (D.D.C. Aug.24, 2006) which provides that noncompliance with an HOD creates a rebuttable presumption of the harm that is necessary to prove in order to establish a denial of FAPE. The Consent Decree covers any student "now and in the future" whose HOD has not been timely implemented. All of these students are class members. Under the terms of the Consent Decree, class members cannot opt out of the class.

There is no dispute that the student is a member of the Jones Consent Decree class by virtue of DCPS's failure to timely implement the HOD issued in the student's favor. There is also no dispute that the Respondent violated the May 3, 2009 HOD. There is no dispute that the Respondent has not convened a MDT to discuss current evaluations nor provided the student with a placement for the 2009-2010 school year.

## **Placement**

The IDEIA requires that the determination of the educational placement of a child with a disability should be done annually and must be based on a child's IEP. 20 U.S.C. 1412(a)(5). Pursuant to 34 C.F.R. § 300.116 of the IDEIA regulations it is required when determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

The Student attended [REDACTED] for the 2006-2007 and 2007-2008 school years. The parent enrolled the Student at [REDACTED] as her neighborhood school in the start of the 2008-2009 school year, when she "aged out" of the middle school.

In the May 3, 2009 HOD, this hearing officer determined that the Respondent had denied the student a FAPE by failing to develop and implement the student's IEP; failing to provide services; denying the Petitioner participation in the decision making process, and that the placement at [REDACTED] appeared to be inappropriate. The hearing officer in that HOD also made a finding that High Road Academy was not an appropriate placement for the student because the student IEP provided only 15 hours and HRA is a full time special education setting.

The Respondent met in June 2009 when evaluations conducted by DCPS of the student's were completed. The Petitioner did not participate in that meeting because she had challenged the evaluations,

that DCPS had performed, and was awaiting the results of the independent evaluation. The Respondent alleged it met without the Petitioner in order to be in compliance with the HOD's timelines. It also asserted that no single procedure should be used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.<sup>9</sup> The results of the evaluations must be given considerable weight in determining the child's eligibility for services and in the development of the child's IEP.<sup>10</sup> Here the uncontroverted evidence was that the student requires a full time special based on the entirety of the record as reflected in the May 3, 2009 HOD and supported by the independent evaluation submitted by the Petitioner.

The Respondent has not convened a meeting to determine an appropriate placement for the student for the 2009-2010 school year as ordered in the May 3, 2009 HOD. The HOD made a finding the student had previously been denied a FAPE and had received an inappropriate placement. The Respondent ignored the essence of the IDEIA when it convened a meeting to discuss the student's IEP or placement without the parent; the Respondent's allegedly attempted to comply with the HOD dates without the parent and current evaluation; shows total disregard for the substance of the IDEIA and the serious nature of a HOD.

The 2009-2010 school year recently begun, and the Respondent failed to make a determination and to provide an appropriate educational placement for the student for the 2009-2010 school year. The Respondent failed to address not only the student's unique needs it has not provide any placement. The Petitioner as a parent has an obligation to register the in a school that can provide the educational services the student requires. The Petitioner could not sit at home; waiting for the Respondent to convene a meeting to discuss placement. The Petitioner relied on recommendations from the evaluation and the failure of the DCPS to provide a placement; and enrolled the student in a school that she believes and the testimony from the school personnel demonstrated can provide the student the unique needs.

The Respondent failed to rebut the presumption of harm established in the Consent Decree.

### **Compensatory education**

The Respondent has denied the Student a FAPE. The denial of a FAPE entitles the student to a compensatory award.

"Under the theory of "compensatory education," courts and hearing officers may award educational services . . . to be provided prospectively to compensate for a past deficient program." See, *G. ex rel. RG v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 308 (4th Cir. 2003). More specifically, as the Fourth Circuit has explained, "[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." *G. ex rel. RG*, 343 F.3d at 309

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<sup>9</sup> 34 C.F.R. §300.304(b)(2).

<sup>10</sup> 34 C.F.R. §300.305(a).

In *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) the D.C. Circuit held, with respect to compensatory education, that, "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place."

The Petitioner in May 2009 was provided an opportunity to receive an independent evaluation to determine where the Student is academically, where the Student should be and what services will get her there. The Petitioner after obtaining the results of the evaluation was authorized to file a due process complaint to present evidence and testimony on what amount of compensatory education award was warranted. The Petitioner did not present any evidence to establish a compensatory education award. The Petitioner must include any claim for compensatory education from the violation in this proceeding in any subsequent complaint claiming damages against the Respondent on behalf of this student.

#### V. SUMMARY OF DECISION

The Respondent is found to have denied a FAPE to the student by failing to comply with the terms and conditions of the May 3, 2009 HOD, and by failing timely to determine an appropriate educational placement for the 2009-2010 school year. The Respondent failed to rebut the presumption of harm established in the Blackman/Jones Consent Decree. The Petitioner is entitled to her requested relief—the funding of the student's placement with transportation at [REDACTED], retroactive to the date of the student's August 2009 enrollment in the school. The Petitioner must include any claim for compensatory education from the violation in this proceeding in any subsequent complaint claiming damages against the Respondent on behalf of this student.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the Respondent has denied the Student a FAPE and issues the following:

#### VI. ORDER

**ORDERED**, the Respondent shall by November 9, 2009 issue a prior notice of placement to [REDACTED] of Washington, D.C. The Respondent shall fund the placement of the student at the [REDACTED] for the 2009-2010 school year retroactive to the date of enrollment and will provide transportation to the school and back to the student's residence of record;

**IT IS FURTHER ORDERED**, the student will be provided with 60 minutes a week of speech-language and the counseling therapy as currently provided;

**IT IS FURTHER ORDERED**, the Respondent shall, by November 9, 2009, convene a multidisciplinary team meeting to review all current evaluations, review and revise the student's IEP to incorporate the findings of the psychological evaluation and current information supplied by service providers and the parent;

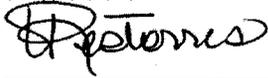
**IT IS FURTHER ORDERED**, that the Respondent shall afford the Petitioner clear and documented opportunities to participate in any meeting in which the student's placement is discussed;

**IT IS FURTHER ORDERED**, Day-for-day Caveat: any delay in meeting 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. The Respondent shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives;

This order resolves all matters presented in the Petitioner's August 27, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

**NOTICE OF RIGHT TO APPEAL**

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)



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**Wanda Iris Resto - Hearing Officer**

**Signed: October 9, 2009**

APPENDIX A  
INDEX OF NAMES

In the MATTER OF "Student" V. DCPS

Student Name: [REDACTED]	[REDACTED] [REDACTED]
Student's legal guardian	[REDACTED]
Student /Parent's Representative	[REDACTED]
Admission's Director [REDACTED] [REDACTED]	[REDACTED]
[REDACTED] Coordinator (previously at [REDACTED])	[REDACTED]
School System's Representative	Tonya Chor, Esquire
Home School	[REDACTED] Senior