

I. JURISDICTION

This proceeding was invoked in accordance with the rights established pursuant to “The Individuals with Disabilities Education Act (“IDEA”)”, Public Law 101-476, reauthorized as “The Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”)”, Public Law 108-446 and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; the D.C. Appropriations Act, Section 145, effective October 21, 1998; and Title 38 of the District of Columbia Municipal Regulations (“DCMR”), Chapter 30, Subtitle VII, Chapter 25.

II. INTRODUCTION

The student is [REDACTED] years of age, and a [REDACTED] grade student at [REDACTED] Academy, a private school located in the District of Columbia. The student is a resident of the District of Columbia, and is identified as disabled and eligible to receive special education and related services, pursuant to “The Individuals with Disabilities Education Act (IDEA); reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)”.

On July 30, 2009, Petitioner through her Attorney, filed a due process complaint, alleging that D.C. Public Schools, hereinafter referred to as “DCPS” or “Respondent”, denied the student a free and appropriate public education (“FAPE”), by failing to provide the student a Reading Specialist, pursuant to the student’s Individualized Education Program (IEP); in violation of “The Individuals with Disabilities Education Act (“IDEA”)”; reauthorized as the “The Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”).”

The due process hearing was scheduled to convene on September 18, 2009, however, on September 17, 2009, the parties executed a Settlement Agreement, which provided in pertinent part that DCPS agrees to convene a meeting no later than October 12, 2009 to review the students’ reading logs, assess the student’s reading progress, and if the team determines there were gaps in services that caused educational harm, develop a Compensatory Education Plan. Based on the parties’ agreement, Petitioner withdrew the complaint; and the hearing failed to proceed as scheduled.

On November 2, 2009, Petitioner through her Attorney, initiated a due process complaint, alleging that the District of Columbia Public Schools, hereinafter referred to as “DCPS”, denied the student a Free and Appropriate Public Education (“FAPE”), by failing to comply with the terms of the September 17, 2009 Settlement Agreement (SA). The due process hearing convened on December 7, 2009, at approximately 12:30 p.m., at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

III. PROCEDURAL POSTURE

On November 2, 2009, Petitioner through her Attorney, initiated a due process complaint, alleging that the District of Columbia Public Schools, hereinafter referred to as "DCPS", denied the student a Free and Appropriate Public Education ("FAPE"), by failing to comply with the terms of the September 17, 2009 Settlement Agreement (SA). The due process hearing convened on December 7, 2009, at approximately 12:30 p.m., at Van Ness Elementary School, located at 1150 5th Street, S.E., Washington, D.C. 20003.

On November 3, 2009 the Hearing Officer issued a Pre-hearing Conference Notice scheduling the pre-hearing conference for December 2, 2009, at 3:00 p.m... The pre-hearing conference was rescheduled, and held on December 1, 2009, at 3:30 p.m., and the Hearing Officer issued a Pre-hearing Conference Order on December 2, 2009.

On November 6, 2009, Respondent filed "District of Columbia Public School's Response, Notice of Insufficiency, Motion to Dismiss Petitioner's Due Process Complaint Notice, and Request for a Finding that the DPC is Frivolous". On November 10, 2009, Petitioner filed "Petitioner's Opposition to the Respondent's Notice of Insufficiency, Motion to Dismiss and Opposition to Respondent's Request that the Due Process Complaint Notice is Frivolous". On November 16, 2009 the Hearing Officer issued an Order denying Respondent's Motion; and confirming the due process hearing for January 5, 2010 at 9:00 a.m...

On November 19, 2009, DCPS filed with the Student Hearing Office, "DCPS Resolution Waiver Session"; which resulted in rescheduling of the due process hearing from January 5, 2010, to December 7, 2009, at 12:00 p.m.. The due process hearing convened on December 7, 2009, at approximately 12:30 p.m..

IV. ISSUE

The following issue is identified in the *November 2, 2009* due process complaint:

Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to comply with the terms of the September 17, 2009 Settlement Agreement (SA)?

V. RELIEF REQUESTED

- (1) A finding that DCPS denied the student a free appropriate public education (FAPE) by failing to comply with the September 17, 2009 Settlement Agreement.
- (2) DCPS shall immediately provide to the parent's counsel, Domiento C.R. Hill, via facsimile, a copy of the student's reading logs and progress reports.
- (3) DCPS shall fund the parent's compensatory education program.
- (4) DCS shall convene an IEP team meeting with the student's reading specialist, within ten (10) school or business days upon issuance of the HOD to review the student's goals and objectives in the IEP and review his academic progress as necessary.
- (5) All meetings shall be scheduled through counsel for the complainant in writing, via facsimile, at [REDACTED]

- (6) DCPS shall send all notices to counsel for the parent with copies of such to the parent and in the parent's native language.

VI. PRELIMINARY MATTERS

As a preliminary matter, Petitioner requested to strike Exhibit LC-7 (Draft Settlement Agreement) of its disclosures dated December 2, 2009, and substitute LC-2 of the disclosures representing the due process complaint unsigned by parent, with a copy of the complaint signed by parent. Receiving no objections from Respondent, the Hearing Officer accepted the modifications in Petitioner's disclosures.

As a preliminary matter, the Attorney representing Respondent at the onset of the hearing represented that the Hearing Officer lacked jurisdiction to decide matters related to compliance and/or enforcement of the September 17, 2009 Settlement Agreement because 20 U.S.C. 1415 (f)(1)(B)(iii) provides that in cases when a resolution is reached to resolve the complaint at a meeting described in clause (i) (i.e. resolution meeting), the parties shall execute a legally binding agreement that is—

- (I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and
- (II) *enforceable in any State court of competent jurisdiction or in a district court of the United States.*

Petitioner's Attorney responded that the Settlement Agreement was drafted at the resolution meeting, however, not executed by the parties until one day prior to the hearing. In response to Petitioner's representations, Respondent's Attorney withdrew the motion to dismiss for lack of subject matter jurisdiction. Thereafter, during the hearing, another Attorney representing Respondent renewed the motion to dismiss, for lack of subject matter jurisdiction.

Petitioner renewed its prior position, and argued that 20 U.S.C. 1415 (f)(1)(B)(iii) provides that Settlement Agreements reached at resolution meetings, *may* be enforced in a court of law, rendering such discretionary, and therefore, not precluded from review by a Hearing Officer in an administrative due process hearing. Petitioner also argued that Respondent's motion to dismiss was untimely, and failed to comply with the Standard Operating Procedures, governing the timely filing of motions.

The Hearing Officer held that 20 U.S.C. 1415 (f)(1)(B)(iii) governs the administration of special education due process hearings conducted by the State Education Agency or Local Education Agency, and review of settlement agreements reached at resolution meetings; in all jurisdictions. However, the provision does not apply to the District of Columbia, at this time.

The Hearing Officer explained further that the Federal District Court has assumed jurisdiction over special education due process hearings, and timely implementation of Hearing Officers' Decisions and Settlement Agreements, in the District of Columbia. Pursuant to the court's jurisdiction over these matters, the District of Columbia Public Schools and parent's Attorneys executed the Blackman/Jones Consent Decree, which is intended to govern the timely-

issuance of HODs; and timely implementation of HODs and settlement agreements in the District of Columbia. The Consent Decree grants Hearing Officers the authority to decide matters related to the timely implementation of Hearing Officers' Decisions and Settlement Agreements, resulting from special education due process complaints, through administrative hearings; without distinguishing between those agreements reached at a resolution meeting, or otherwise.

The Hearing Officer concluded that the Hearing Officer has the authority to decide whether DCPS denied the student a FAPE, by failing to comply with the September 17, 2009 Settlement Agreement; and denied Respondent's motion to dismiss due to lack of subject matter jurisdiction.

VII. DISCLOSURES

The Hearing Officer inquired of the parties whether all disclosures were submitted by the parties; and whether there were any objections to the disclosures. Receiving no objections, the following disclosures were admitted into the record as evidence:

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF PETITIONER

- Petitioner's Exhibits 01 through Petitioner's Exhibits 15; and witness lists dated December 2, 2009.

DISCLOSURES ADMITTED INTO EVIDENCE ON BEHALF OF RESPONDENT

- Respondent's witness list dated December 4, 2009, and the November 6, 2009 Response, with Exhibits.

VIII. DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

ISSUE 1

Whether D.C. Public Schools denied the student a free appropriate public education (FAPE); by failing to comply with the September 17, 2009 Settlement Agreement?

Petitioner represents that on September 17, 2009, the parties executed a Settlement Agreement (SA); wherein the parties agreed that DCPS would convene a meeting no later than October 12, 2009 to review the student's reading logs, assess the student's reading progress, and if the team determines there were gaps in services that caused educational harm, develop a Compensatory Education Plan; and that DCPS failed to comply with the SA.

Petitioner also represents that “according to the Blackman/Jones Consent Decree there exists a rebuttable presumption of harm whenever DCPS fails to do, inter alia, comply with settlement agreements. *See also Hawkins v. District of Columbia*. Petitioner further represents that because DCPS failed to comply with the terms of the September 17, 2009 settlement agreement, by failing to reconvene the student’s MDT meeting by the agreed upon date, however, it also failed to provide the agreed upon reading logs at the October 27, 2009 MDT meeting; and as a result the agreement was not complied with and the student was harmed.

Respondent represents that it complied with the September 17, 2009 settlement agreement; and on October 12, 2009, a letter of invitation for a meeting was forwarded to parent proposing the following three (3) dates and times for a meeting: October 12, 2009 at 9:30 a.m., October 15, 2009 at 12:30 p.m., or October 16, 2009 at 12:30 p.m.; and parent refused all dates offered and requested that the meeting convene on October 27, 2009; which it accepted.

Respondent represents that pursuant to parent’s request, on October 27, 2009, DCPS convened an IEP team meeting with the parent and Education Advocate, at [REDACTED] Academy, to implement the terms of the September 17, 2009 Settlement Agreement; and at the meeting the student’s Reading Specialist reviewed the student’s reading progress. Respondent also represents that the team reviewed specific performance data from the Woodcock Johnson Test of Achievement, 3rd Edition; and the reading specialist explained the student’s progress observed, during the summer, 2009.

Respondent represents that the team also reviewed the student’s summer schedule and determined he missed two hours of reading; agreed to provide a plan to make up the missed hours, which has since been provided; and the two hours of missed services caused no educational harm; therefore, compensatory education services were not warranted. Respondent concluded that there is no requirement in the Settlement Agreement to provide copies of reading logs as alleged by Petitioner in the complaint; the Settlement Agreement was complied with, and therefore, there is no justiciable claim or controversy in this matter; and the complaint should be dismissed.

Respondent concludes that the Settlement Agreement provides that parent must contact the Office of Special Education Unit if there was a concern regarding compliance, and to provide DCPS a reasonable opportunity to bring the case into compliance, which failed to occur prior to filing of the complaint. Respondent also concludes that parent’s refusal to meet until October 27, 2009 tolls the settlement agreement timeline.

Discussion

The Blackman/Jones Consent Decree consists of two subclasses. The first subclass referred to as the “Blackman class” refers to that part of the class addressing a public agency’s failure to timely conduct due process hearings; and the “Jones” subclass refers to that portion of the class addressing the public agency’s failure to timely implement Hearing Officer Determinations and Settlement Agreements; which is applicable in this matter.

The Blackman/Jones Consent Decree requires full and timely implementation of Hearing Officer Determinations and Settlement Agreements concerning a child's identification, evaluation, educational placement, or provision of a FAPE. Timely implementation of a Settlement Agreement is significant in ensuring the provision of a FAPE to a student; and that the student receives the services he/she is entitled to receive under the IDEA; and any delay in completely and timely implementing a Settlement Agreement compromises that entitlement, and harms the student.

The Blackman/Jones Consent Decree creates a **rebuttable presumption of harm to the student**, once Petitioner has satisfied its initial burden, of proving that DCPS failed to implement the September 17, 2009 Settlement Agreement, in a timely manner. Once Petitioner establishes that DCPS failed to implement the September 17, 2009 Settlement Agreement, in a timely manner; the burden of proof is then placed upon DCPS to present evidence rebutting the presumption of harm to the student. Therefore, harm to the student is presumed, and parent is not required to present evidence that the student was harmed, as a result of its failure to timely implement a Settlement Agreement, until after DCPS introduces evidence at the hearing to rebut the presumption of harm to the student. In such case, DCPS may then present evidence, at the same hearing, to defend against the claim of harm."

In establishing a rebuttable presumption of harm to the student, as a result of any delay or failure to timely implement a Settlement Agreement, the courts not only consider the period of time associated with the delay or failure to timely implement the Settlement Agreement, however, the courts also consider the total amount of time involved since the initial violation; and the services the student is entitled to receive under the IDEA, however failed to receive during this period.

According to paragraph 78 of the Consent Decree "***if the defendants introduce evidence at a hearing to rebut the presumption, the student shall have the opportunity, at the same hearing, to present evidence to show that he/she has been harmed.*** Paragraph 78 of the Blackman/Jones Consent Decree also provides that in order to rebut the presumption of harm; at the hearing, DCPS ***will*** have the ***burden of proving*** one of the following situations:

- (1) DCPS has already provided or agreed to provide compensatory education to the class Member for Blackman/Jones delays;
- (2) the issue of compensatory education has already been determined by a Hearing Officer and the Hearing Officer has either ordered compensatory education or has determined that the child is not entitled to compensatory education for Blackman/Jones delays;
- (3) the class member has been found ineligible for special education services;
- (4) the student graduated with a regular diploma;
- (5) the student no longer is a resident of the District of Columbia;
- (6) the student graduated with a certificate of IEP completion;
- (7) the student has been in general education on a full-time basis for at least one academic year because the student met his/her IEP goals;
- (8) the student has been in a non-public general education school for at least three consecutive grading periods or (27) weeks, whichever is greater; or

- (9) the sole unimplemented HOD or SA provision pertained to reimbursement for services the parent obtained privately.

The record reflects that on September 17, 2009, the parties executed a Settlement Agreement, which provides in pertinent part, that DCPS agrees to convene a meeting no later than October 12, 2009 to review the students' reading logs, assess the student's reading progress, and if the team determines there were gaps in services that caused educational harm, develop a Compensatory Education Plan.

The record also reflects that on October 9, 2009, DCPS forwarded a letter of invitation to parent, for a Multidisciplinary Development Team (MDT) meeting to develop/review the student's IEP, review evaluation or reevaluation information, review records to support completion of services, discuss compensatory education, and placement, including three (3) proposed dates for the meeting, which Petitioner rejected. The parties agreed to meet on October 27, 2009, the date proposed by Petitioner. Meeting participants included: the Special Education Coordinator, DCPS Compliance Case Manager, Education Advocate, Special Education Teacher, Clinical Therapist, Education Advocate, and parent.

The student's Reading Specialist subsequently joined the meeting, reviewing results of the Woodcock Johnson III assessment; and provided the team a verbal assessment of the student's performance and progress based on her observation of the work performed by the student over the Summer. However, during her testimony, the Reading Specialist offered conflicting information regarding the services the student received; the period of time the student received reading services; whether she provided the student reading services, and during what period of time.

The Reading Specialist testified that she failed to work during the Summer, therefore, she was uncertain of the number of sessions the student missed or may be entitled to; she only worked with the student on July 24, 2009, and July 31, 2009; the school year began August, 2009, and the student began receiving reading services in September, 2009; and by the time of the October 27, 2009 meeting the student had received eleven (11) reading sessions, approximately 8 of which she provided. Therefore, it is unclear for what period of time the student received, or failed to receive reading services; the provider of the services; the period of time the student received reading services, and by whom; and the period of time the Reading Specialist based its opinion regarding the student's performance and progress.

The Reading Specialist also testified that she provided the team no written documentation regarding the student's performance at the October 27, 2009 meeting, however, after the meeting forwarded to the advocate the student's reading logs for the two (2) dates of service during the Summer of 2009; and subsequently assisted in drafting reading goals for the student.

According to the testimony of the Special Education Coordinator, she was not aware of the September 17, 2009 Settlement Agreement, prior to the October 27, 2009 meeting, and understood that the purpose to meeting was to review the student's progress with the Reading Specialist.

At the October 27, 2009 meeting, the Education Advocate represented that she and parent reserved the right to revisit the compensatory education issue after receipt and review of additional evaluations (i.e. Comprehensive Psychological), requested by the Clinical Therapist. The Education Advocate also testified that DCPS failed to provide any measurements of the student's progress for the missed services; and that she continued to reassert revisiting the issue once the evaluations are received and reviewed.

The advocate concluded by testifying that progress needed to be measured and since the information was not available at the meeting, they were unable to determine the student's progress since receiving the reading services. The advocate's meeting notes also indicate that at the October 27, 2009 MDT meeting, she requested that ten (10) weeks of reading progress reports be forwarded to her office by November 13, 2009; goals to be addressed by the reading specialist with reports of progress; and the team agreed that Rock Creek Academy would fax to her office the student's IEP by close of business on October 28, 2009.

A discussion of the purpose of the October 27, 2009 meeting is warranted in this matter, in addressing the primary issue in the complaint. According to the October 9, 2009, letter of invitation, the *purpose* of the meeting was to develop/review the student's IEP, review evaluation or reevaluation information, review records to support completion of services, discuss compensatory education, and placement.

According to the October 27, 2009 MDT meeting notes, the *purpose* of the meeting was to discuss the hours that were missed for the reading specialist support for the student during the Summer of 2009. The notes also reflect that according to the DCPS Compliance Case Manager the *purpose* of the meeting was to discuss compensatory education, and if the student was harmed as a result of the missed services, the argument needed to be made at that time; and it was prepared to have the discussion. The Education Advocate's meeting notes reflect that the *purpose* of the meeting was to review reading logs, assess gaps in reading specialist services, and determine if compensatory education is warranted.

In addressing compensatory education services, according to the October 27, 2009 meeting notes, the DCPS Compliance Case Manager reported that compensatory education was not warranted, the student missed two (2) hours of reading services, from July 10, 2009 to August 24, 2009; and under missed services the student would receive two (2) hours of reading services.

Findings of Fact

1. On September 17, 2009, the parties executed a Settlement Agreement, wherein DCPS agreed to convene a meeting by October 12, 2009 to review the students' reading logs, assess the student's reading progress, and if the team determined there were gaps in services that caused educational harm, develop a Compensatory-

Education Plan. The October 12, 2009 due date to convene the meeting was waived, due to the parties subsequent agreement to convene the MDT meeting on October 27, 2009.

2. The DCPS Compliance Case Manager failed to ensure that all team members were aware of the Settlement Agreement, and its terms; the purpose of the meeting; expectations of the parties; and ensured that the team which convened on October 27, 2009 included an individual qualified and prepared to implement the terms of the SA, by reviewing with the team the student's reading logs, so that the team could assess the student's reading progress, determine whether there were gaps in services causing educational harm, and develop a compensatory education plan, if warranted; as provided in the September 17, 2009 SA.
3. The Reading Specialists' knowledge regarding the student's performance and progress since he began receiving reading services is limited, and the information insufficient, therefore, absent adequate information regarding the services the student received or failed to receive from July 24, 2009 through October 27, 2009 (i.e. student's reading logs), the team was unable to assess the student's reading progress, determine if there were gaps in services, and develop a compensatory education plan.
4. On December 1, 2009, after the October 27, 2009 meeting, the Special Education Coordinator faxed to the Education Advocate the Summer Reading Logs for the student, consisting of reading services the student received on July 24, 2009 and July 31, 2009, however, the faxed information failed to include reading logs or information regarding the reading services the student received or failed to receive from July 24, 2009 and ending October 27, 2009, the date of the team meeting.
5. As of the date of hearing, DCPS failed to convene a meeting including individuals having knowledge of the reading services the student received or failed to receive; or professionals qualified and prepared to review with the team the students' reading logs for the entire period during which the student received reading services (July 24, 2009 through October 27, 2009). As a result, the team remains unable to assess the student's reading progress, or determine whether there were gaps in services that caused educational harm, and/or develop a Compensatory Education Plan, as agreed in the September 17, 2009 SA.
6. Applying the criteria set forth in the Blackman/Jones Consent Decree, regarding the rebuttable presumption of harm to the student, DCPS failed to rebut the presumption of harm to the student, as a result of its failure to comply with the September 17, 2009 Settlement Agreement, in a timely manner. Therefore, harm to the student is presumed.

Conclusion of Law

It is the Hearing Officers' decision that Petitioner satisfied its burden of proof by presenting evidence that DCPS failed to comply with the September 17, 2009 Settlement Agreement; and the violation represents a continued denial of a FAPE, entitling the student to compensatory education services, during the period of noncompliance.

IX. ORDER

Based on the aforementioned, it is hereby:

1. **ORDERED**, that no later than December 19, 2009, DCPS shall provide to the parent's counsel, Domiento C.R. Hill, via facsimile, a copy of the student's reading logs and progress reports, from July 24, 2009 to the date of this decision; and it is further
2. **ORDERED**, that DCPS shall convene an IEP team meeting with the parent and student's Reading Specialist, within ten (10) school days from the date of this decision and Order, including individuals qualified and prepared to review with the team the students' reading logs from July 24, 2009 to the date of this decision, to assess the student's reading progress, and if the team determines there were gaps in services that caused educational harm, develop a Compensatory Education Plan; and it is further
3. **ORDERED**, that DCPS shall fund the student's compensatory education services; and it is further
4. **ORDERED**, that all meetings shall be scheduled through counsel for the complainant in writing, via facsimile, at 202-742-2098; and it is further
5. **ORDERED**, that DCPS shall send all notices to counsel for the parent with copies of such to the parent and in the parent's native language; and it is further
6. **ORDERED**, that 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, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives; and it is further
7. **ORDERED**, that this decision and order are effective immediately.