

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

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STUDENT HEARING OFFICE  
2011 FEB 22 AM 9:45

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PETITIONER, on behalf of  
[CHILD],<sup>1</sup>

Petitioner,

v

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

Date Issued: February 20, 2011

Hearing Officer: Peter B. Vaden

Case No:

Hearing Date: February 17, 2011

Student Hearing Office, Room 2003  
Washington, D.C.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PARENT (the "Parent"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, the Parent alleges that DCPS denied the Child a FAPE by not sending a representative to a December 21, 2010 IEP meeting, who was knowledgeable about compensatory education and placements, and by failing to provide a suitable placement location for Child.

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<sup>1</sup> Personal identification information is provided in Appendix A.

The Child, an AGE girl, is a resident of the District of Columbia and is eligible for special education services under the primary disability, Developmental Delay (“DD”). The Parent’s Due Process Complaint, filed on December 28, 2010, named DCPS as respondent. The undersigned Hearing Officer was appointed on January 4, 2011. The parties met for a resolution session on January 6, 2011. No agreement was reached and the parties decided that the case should proceed to a due process hearing. A prehearing telephone conference was held with the Hearing Officer and counsel on January 20, 2011 to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on February 17, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording system. The Parent appeared in person and was represented by counsel. Respondent DCPS was represented by counsel. The Parent, whose native language is Spanish, left the hearing after giving her testimony. Spanish language interpreters provided simultaneous interpretation of the proceedings while the Parent was present. The Parent testified, and her testimony was translated by the interpreter. The Parent called as witness EDUCATIONAL ADVOCATE. DCPS called as witnesses SPED COORDINATOR and PROGRAM DEPUTY DIRECTOR. Parent’s Exhibits P-1 through P-17 and DCPS’s Exhibits R-1 through R-6 were deemed stipulated without objection, and received into evidence pursuant to the Prehearing Order.

#### **JURISDICTION**

The Hearing Officer has general jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029. At the beginning of the due process hearing, DCPS moved to dismiss Parent’s allegations of failure by DCPS to comply with an October 19, 2010 settlement agreement (the

“Settlement Agreement”) for lack of subject matter jurisdiction.<sup>2</sup> I reserved ruling on the jurisdiction issue to allow the both parties the opportunity to file post hearing legal memoranda in support of their respective positions. Because determination of the jurisdiction issue is dependent upon certain factual findings, I defer addressing the question of my jurisdiction to the Conclusions of Law section of this determination.

### **ISSUES AND RELIEF SOUGHT**

- a. Whether DCPS denied Child a FAPE, and failed to comply with the Settlement Agreement, by not assuring that a representative, knowledgeable about placement and compensatory education, attended the December 21, 2010 Eligibility/IEP meeting; and
- b. Whether DCPS has denied Child a FAPE by not enrolling her in

As of the hearing date, Child was enrolled at \_\_\_\_\_ Parent seeks an award of compensatory education for DCPS’s alleged delay in enrolling Child and for DCPS’s alleged failure to perform special education eligibility evaluations when requested by Parent in March 2010.

### **FINDINGS OF FACT**

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer’s Findings of Fact are as follows:

1. Child is an AGE resident of the District of Columbia. Exhibit P-2
2. Child was identified on December 21, 2010 as a child with a disability requiring special education services under the classification, DD. Exhibit P-4

<sup>2</sup> DCPS also asserted as an “affirmative defense,” in its response to the due process complaint, that the Hearing Officer lacked jurisdiction to review the parties’ compliance with the October 19, 2010 settlement agreement.

3. On March 19, 2010, counsel for Parent made a written request to DCPS that Child be evaluated for special education and related services. Exhibit P-15

4. Parent filed a complaint for due process on or about July 20, 2010. Exhibit R-1

5. On October 21, 2010, Parent and DCPS entered into the written Settlement Agreement providing, *inter alia*, that, "In lieu of the formal Due Process Hearing in the above-referenced matter, the parties to this action . . . agree to resolve this matter under the terms and conditions set forth herein." Exhibit R-1

6. The Settlement Agreement provided, *inter alia*, that "This Settlement Agreement is in full satisfaction and settlement of all claims contained in the pending Complaint, including those claims under the IDEA and § 504 the Parent now asserts or could have asserted within the statute of limitations as of the date of the signed Settlement Agreement." Exhibit R-1

7. At the time Parent executed the Settlement Agreement, she was represented by her attorney of record in this proceeding. Exhibit P-14

8. On December 21, 2010, the Child's Eligibility/IEP team met at PRESCHOOL. In addition to Parent, Educational Advocate and a paralegal/translator, participants included CASE MANAGER (a special educator), a family care coordinator, a physical therapist, a speech-language pathologist, an occupational therapist and a clinical psychologist. Exhibits P-2, P-3, P-4 and P-6

9. Case Manager, the clinical psychologist, and the family care coordinator were DCPS employees. The other DCPS participants were DCPS contractors. Testimony of Program Deputy Director

10. At the eligibility part of the December 21, 2010 meeting, the team determined that

Child was a student with a disability who needs special education and related services under the primary disability, DD. Exhibit P-4

11. In the IEP part of the December 21, 2010 meeting, the IEP team agreed that Child would receive 15 hours per week of Specialized Instruction in the general education setting. As Related Services, Child would receive 60 minutes per week of speech-language pathology and 60 minutes per week of behavioral support services outside of general education. In addition, Child would receive 30 minutes per month of behavioral support services as a Consultation Service.

Exhibit P-2

12. The IEP states that compensatory education was discussed at the IEP meeting followed by the comment, "Parent/Advocate allege that the mother requested an evaluation for special education services in March of 2010." The IEP does not provide compensatory education.

Exhibit P-2

13. Parent signed the IEP and affirmed that she agreed with its contents. Exhibit P-2

14. At the December 21, 2010 IEP meeting, DCPS offered to place Student at

Parent, through her advocate requested

DCPS to consider placement at BES, where Parent's son was a student. On January 3, 2011,

DCPS agreed to Parent's request to place Student at BES. Exhibit P-13, Testimony of Parent

15. was able to implement Student's IEP. Exhibit P-13

16. DCPS schools were closed for winter break from December 20 through 31, 2010.

17. On January 14, 2011, a Friday, Parent visited and attempted to enroll the Child. Parent did not bring paper work and, because was not Child's neighborhood school, the BES staff was not at first aware that Child has been placed at Parent was invited to

return on Monday, January 17, 2011. Parent returned with Child on January 18, 2011 and enrolled child immediately. Testimony of SPED Coordinator

18. Parent was aware that on January 3, 2011, DCPS had advised her advocate that Child could attend Parent delayed attempting to enroll Child at until mid-January because she was waiting for a confirmation letter. Eventually, Educational Advocate instructed Parent to go to Testimony of Parent

### CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the argument and legal memoranda of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

### DISCUSSION

The burden of proof in a due process hearing is the responsibility of the party seeking relief, in this case, the Parent. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005) (Burden of proof in an administrative hearing challenging an IEP placed upon the party seeking relief); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

#### 1. SUBJECT MATTER JURISDICTION

The first issue alleged by Parent in this case is that DCPS denied Child a FAPE and failed to comply with the Settlement Agreement by not sending a representative to a December 21, 2010 eligibility/IEP meeting who was knowledgeable about placement and compensatory education. *See* Prehearing Order, January 21, 2010. DCPS contends that I should not consider this issue because a special education hearing officer does not have jurisdiction to enforce a settlement

agreement between a parent and a local education agency (“LEA”). DCPS is correct that under the IDEA, hearing officers generally have no authority to enforce settlement agreements. *See, e.g., H.C. ex rel. L.C. v. Colton-Pierrepoint Central School District*, No. 08-4221-CV, 52 IDELR 278, 109 LRP 44855 (2d Cir. July 20, 2009) (summary order) (IHO had no authority to enforce settlement agreement – essentially a contract between the parties.)

Parent contends that in the District of Columbia, the consent decree in *Blackman-Jones* (“Consent Decree”) establishes that the failure to implement or comply with settlement agreements amounts to denial of a FAPE for which a due process complaint may be filed. *See Blackman v. District of Columbia*, 454 F.Supp.2d 1 (D.D.C. 2006) (approving Consent Decree); *see also Blackman v. District of Columbia*, Civil Action No. 97-1629, 2006 WL 2456413 (D.D.C. Aug. 24, 2006) (Consent Decree). Parent’s reading of *Blackman-Jones* is overly broad. The Consent Decree contains a lengthy section on compensatory education for class members. *See* Consent Decree, pp. 41 through 47. However, the Consent Decree specifies that its use of the term “Compensatory education” in this section “refers to compensatory education for Blackman/Jones delays only.” *Id.* at 41, n. 14. (In its introduction, the Consent Decree recites that as of December 7, 2005, DCPS reported that 1,459 outstanding settlement agreements were overdue. *Id.* at 7.) Assuming, without deciding, that Child is a *Blackman/Jones* class member, the evidence in this case does not establish that there was any delay in implementing the Settlement Agreement. The Parent’s complaint is not that DCPS delayed complying, but rather that DCPS failed to comply with the Settlement Agreement by not sending a representative to the Child’s IEP meeting who was knowledgeable about placement and compensatory education. Therefore, in this case, nothing in the Consent Decree would override the principal that a hearing

officer does not have jurisdiction to enforce a settlement agreement between a parent and an LEA.

In closing argument, counsel for Parent requested that I award compensatory education for DCPS's alleged failure to complete eligibility evaluations requested by the Parent before the Settlement Agreement was concluded. This would require that I review, interpret and determine whether the parties complied with the Settlement Agreement. I find that this requested relief is beyond the limits of my jurisdiction.

Notwithstanding, for any IEP meeting, the LEA must send a representative, who—

- (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
- (ii) Is knowledgeable about the general education curriculum; and
- (iii) Is knowledgeable about the availability of resources of the public agency.

34 CFR § 300.321(a)(4). If, as Parent alleges, DCPS failed to send a representative to the December 21, 2010 IEP meeting who was knowledgeable about placement and compensatory education, that omission would be a procedural violation of the IDEA which occurred subsequent to the Settlement Agreement. The Hearing Officer, undoubtedly has authority to determine whether DCPS has complied with the procedures set forth in the IDEA. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Consequently, the Hearing Officer may consider DCPS's alleged failure to send an appropriate representative to the IEP meeting as a possible denial of FAPE. The Parent's second issue, whether DCPS denied Child a FAPE by not enrolling her in BES, also requires no consideration of the Settlement Agreement. Therefore, I find that I have subject matter jurisdiction over Parent's claims in this case and deny DCPS's motion to dismiss. For the same reasons, I deny DCPS's motion for a directed finding made during the hearing.

2. DID DCPS DENY CHILD A FAPE BY NOT SENDING A REPRESENTATIVE TO THE DECEMBER 21, 2010 ELIGIBILITY/IEP MEETING WHO WAS KNOWLEDGEABLE ABOUT PLACEMENT AND COMPENSATORY EDUCATION?

Parent contends that the participants at the December 21, 2010 IEP meeting were not employees of DCPS and were not knowledgeable about placement or compensatory education. As stated in the previous section, the IDEA requires that the IEP team include an LEA member, who—

- (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
- (ii) Is knowledgeable about the general education curriculum; and
- (iii) Is knowledgeable about the availability of resources of the public agency.

34 CFR § 300.321(a)(4). If none of the DCPS participants in the IEP meeting had been knowledgeable about placement or compensatory education, DCPS would have been in violation of its duty to ensure that qualified, knowledgeable participants attended the meeting. However the evidence establishes that all of the LEA representatives at the IEP meeting were either DCPS employees or contractors. There was no evidence that DCPS did not comply with the IDEA's IEP team membership requirement, or that Case Manager, a DCPS employee, was not knowledgeable about placement or compensatory education. DCPS prevails on this issue.

3. DID DCPS DENY CHILD A FAPE BY NOT ENROLLING HER IN

In her due process complaint, Parent alleged that DCPS had identified \_\_\_\_\_ as the location where Child's IEP services would be implemented and the IEP team had no information to determine whether \_\_\_\_\_ was able to implement the IEP. Parent requested that DCPS be ordered to place Child at \_\_\_\_\_ on an interim basis, with transportation. The IEP meeting in this case was

held, and the due process complaint was filed, during DCPS's winter break. On January 3, 2011, DCPS informed Parent's advocate that, as requested by Parent, it had issued a Prior Notice of Placement ("PNOP") for Child to attend Parent enrolled Child at on January 18, 2011 and she now attends this school. The evidence does not establish either that was unable to implement the Child's IEP or that DCPS caused the Parent's two-week delay in enrolling Child at

I find that DCPS did not deny Child a FAPE by failing to enroll her at .

### **ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED:

All relief requested by the Parent in her Due Process Complaint is denied. This case is dismissed.

Date: February 20, 2011

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

### **NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(I).