District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
Student Hearing Office

1150 5th Street, SE
Washington, DC 20003
Tel: 202-698-3819
Fax: 202-698-3825

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Confidential

STUDENT[1], by and through his Parent Petitioners, v. DCPS Respondent. Case	HEARING OFFICER'S DETERMINATION Hearing Date: January 8, 2009 Representatives: Counsel for Petitioners: Miguel Hull, Esq. 1220 L Street NW, Suite 700 Washington, DC 20005 Counsel for DCPS: Candice Sandifer, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002 Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), the Rules of the Board of Education of the District of Columbia and the DC Appropriations Act, Section 145, effective October 21, 1998.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened on October 20, 2008, at the Vann Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on September 15, 2008, alleging the issues outlined below.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (KB 1-12 and DCPS Exhibits 1-2) which were admitted into the record.

ISSUE(S): [2]

1. Did DCPS fail to provide a free and appropriate public education by failing to properly comply with the October 9, 2008, HOD?

2. Did DCPS fail to provide a free and appropriate public education by failing to implement the student's IEP?

FINDINGS OF FACT [3]:

1. The student is a ·year-old special education student who attends School A, a District of Columbia Public High School. He previously attended School B, a full time special education program, during the 2006-2007 school year. The student began attending School A at the start of the 2007-08 school year. (DCPS Exhibit 1)

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[2] The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

[3] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding.

2. A Hearing Officer's Determination (HOD) was issued on October 9, 2008, regarding the student. The Hearing Officer concluded the student's individualized educational program (IEP) was not being fully implemented. The HOD ordered DCPS to convene a multidisciplinary team (MDT) meeting at School A within fifteen (15) business days of the issuance of the HOD to review the student's IEP, review the services being provided the student, to ensure the student's IEP was being implemented and to review the student's placement for the 2008-09 school year. The HOD directed that the MDT meeting be scheduled through the petitioner's counsel. (DCPS Exhibit 1)

3. The HOD was issued to the parties[4] by the Hearing Officer by way of email and noted in the Student Hearing Office (SHO)'s electronic docketing system. There was no separate copy of the HOD provided to SHO and, therefore, no copy of the HOD was sent to DCPS and the typical DCPS distribution lists for HODs. Consequently, the HOD was not provided to the special education coordinator at the School A until the complaint was filed a copy of the HOD was sent by the petitioner's counsel to DCPS counsel on December 3, 2008. (Representations of both counsel, testimony)

4. Once the HOD was received by the DCPS the special education coordinator at School A scheduled a MDT meeting for December 23, 2008. The petitioner's counsel requested that the meeting be postponed until after the new year. However, the DCPS special education coordinator based on instructions from her DCPS supervisor conducted the MDT meeting without the parent or her counsel present. testimony)

5. The student has not been provided all the special education services prescribed by his IEP since he began attending School A. (Parent's testimony)

6. The student has been accepted to
a private special education school that can provide the student special education and related services and provide the student educational benefit. testimony)

CONCLUSIONS OF LAW

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

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[4] The DCPS counsel to whom the HOD was issued left DCPS employ soon after the HOD was issued and perhaps never received the HOD by email.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief. [5] In this case the student/parent is seeking relief and has the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

1. Did DCPS fail to provide a free and appropriate public education by failing to properly comply with the October 9, 2008, HOD? Conclusion: Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

Although DCPS did not actually receive a copy of the HOD until December 3, 2008, DCPS failed to comply with the HOD by failing to schedule the MDT meeting through parent's counsel as the HOD required. As a result, the MDT meeting was held and neither the parent nor her educational advocate was present. Based on the parent's credible testimony, the student has continued to receive fewer hours than the student's IEP prescribes. Pursuant to the Blackman Jones Consent Decree failure to comply a HOD creates a rebuttable presumption of harm to the student. There was sufficient evidence presented that the student's IEP is not being implemented at School A and no evidence was presented to rebut a presumption of harm to the student.

2. Did DCPS fail to provide a free and appropriate public education by failing to implement the student's IEP? Conclusion: Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

DCPS has an obligation to provide the student with a free appropriate public education ("FAPE"), which consists of "special education and related services that are provided in conformity with the individualized education program. 20 U.S.C. § 1401 (9); 20 U.S.C. § 1401 (29) ("The term 'special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability [. . .]."); 34 C.F.R. § 300.17, 34 & 39; and D.C. Mun. Regs. tit. 5 § 3000.1. See also Scott v. District of Columbia, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and Board of Education of the Hendrick Hudson Central School District v. v. Rowley, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

Based on the parent's credible testimony the student's IEP has not been fully implemented since the student's attendance at School A. Despite the fact that this issue was adjudicated once and an HOD issued directing DCPS to review and implement the student's IEP and review his placement there has been no full review of the services being provided the student. Based on the credible testimony of the parent the student's IEP is still not being implemented.

According to the applicable statutes and regulations, a placement is to be to in an appropriate school. 20 U.S.C.§ 1402 (9) (D) ("FREE APPROPRIATE PUBLIC EDUCATION- The term 'free appropriate public education' means special education and related services that include an appropriate preschool, elementary school, or secondary school education in the state involved."

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[5] 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 with FAPE.

34 C.F.R. § 300.17 (c); § 1401 (29) (D) ("The term 'special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability [. . .]."); § 1414 (e) (public agency to ensure that parents are involved in the placement decision); 34 C.F.R. § 300.17 & 39; 34 C.F.R. § 300.116 (placement is to be based on student's IEP as determined by team including the parents); 34 C.F.R. § 300.327 & 300.501 (c); D.C. Mun. Regs. Tit. 5 § 3013.1-7 (LEA to ensure that child's placement is based on the IEP); and D.C. Mun. Regs. Tit. 5 § 3000.

The Hearing Officer concludes that the based on the failure to implement the IEP and the failure to comply with the HOD, the student has been denied FAPE. Based on the testimony of the Hearing Officer concludes that can provide the student educational benefit and the student should be placed at as an interim placement as remedy for the services that student has not been provided and because DCPS did not comply with the HOD.

ORDER:

1. DCPS shall immediately place and fund the student at the High Road Upper School of Washington DC on an interim basis and provide transportation services.

2. Within twenty (20) business days of the issuance of this Order, DCPS shall convene a multidisciplinary team (MDT) meeting at to review the student's IEP and discuss and determine the student's placement for the remainder of the 2008-09 school year.

3. All meetings shall be scheduled through counsel for the parent, Miguel A. Hull, Esq. in writing, via facsimile, at 202-742-2097 or 202-742-2098.

4. 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).

APPEAL PROCESS:

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

/s/ **Coles B. Ruff, Esquire**

Impartial Special Education Hearing Officer
Date: January 18, 2008