

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NIKITA PETTIES, et al., Plaintiff,)	
)	
vs.)	Civil Action No.: 95-0148 (PLF)
)	
)	Certified Learning Centers
THE DISTRICT OF COLUMBIA, et al., Defendant)	
)	
)	
)	
)	
)	
)	
)	

**REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER
REGARDING THE DISPUTE OF CERTIFIED LEARNING CENTERS**

Certified Learning Centers, Inc. (CLC) is a nonpublic provider that offers tutoring as a related service to students with disabilities. On August 1, 2006 CLC filed a request for a dispute proceeding. That request involved charges for tutoring services provided to D.J. during April 2006. The first section of this report sets forth findings of fact. The second section sets forth the provisions of the November 8, 2004 Payment Order (“Payment Order”) that pertain to this dispute. The third section discusses the parties’ positions and makes a recommendation to the Court for further relief.

Statement of Facts

In 2004, D.J. was a DCPS student with a placement at Spingarn Therapeutic Center. A request for a due process hearing was filed on her behalf and an administrative due process hearing was held on three dates during December 2004 regarding the appropriateness of the IEP and placement of D.J. The attorney for D.J. also asked that D.J. be awarded compensatory education. In an opinion dated February 23, 2005, (“February 2005 HOD”) the Hearing Officer found that there was overwhelming evidence in the record to support the conclusion that the placement at Spingarn

Therapeutic Center was an inappropriate placement for D.J.¹ The decision ordered D.J. to be placed at Pathways Edgewood in Maryland. The decision continued:

As compensatory education, for the period of February 8, 2002 to the date of enrollment in Pathways, DCPS shall also fund one-on-one tutoring by CLC within the Superintendent's cost guidelines, vocational assessments and assistance by linkage agencies for supportive employment. **DCPS shall also provide transportation and additional compensatory education from January 28, 2004 until the first day of transportation as provided by this Order** (emphasis in original).

D.J. was enrolled in Pathways in February and transportation began in March. It is not clear from the record as to when D.J. began receiving tutoring services from CLC. However, an invoice dated November 23, 2005, (#463) showed that Danya had received forty (40) hours of tutoring services from CLC between September 1 and September 30, 2005. CLC billed DCPS at the rate of \$75.00 per hour for a total of \$3,000.00. That invoice was marked paid.

CLC submitted invoices for succeeding months, some of which were apparently paid and others disputed. With respect to the invoices that DCPS disputed, it appears that CLC did not file timely objections or requests for dispute hearings.

In any event, on or about May 19, 2006, CLC submitted Invoice #823 for 40 hours of service delivered between April 1 and April 30, 2006. As before, the rate billed was \$75.00 per hour. Pursuant to Section III (d) of the Payment Order, DCPS did not consider this invoice actually "received" until June 5, which would make a dispute notice due by June 25, 2006.

In a letter addressed to CLC dated June 16, 2006, DCPS wrote as follows:

The Office of Special Education, District of Columbia Public Schools has reviewed your invoice for services provided between 4/1/06 – 4/23/06. Please be advised that the District of Columbia Public Schools is disputing \$3,000.00 of your invoice #823 for tutoring services provided to D.J. due to the following reasons:

¹ According to one of the attorneys for D.J., an original HOD was issued on January 28, 2005. However, DCPS failed or refused to provide transportation for D.J. to Pathways. Accordingly, the petitioner requested that the Hearing Officer amend the Order to require DCPS to provide transportation to Pathways. Furthermore, the reference to January 28, 2004 in the amended HOD was a typographical error, and should have read January 28, "2005".

In accordance with the 2/23/05 Hearing Officer Determination, Compensatory Education (tutoring services) to be provided until transportation services have started for D.J. Transportation services started for this student on 8/23/05. Therefore, the disputed charges on the subject invoice are inappropriate and cannot be approved for payment.²

CLC responded by certified mail on June 26, 2006. The CLC letter objected to DCPS' dispute but did not refer to the issue of compensatory education. Instead, CLC simply argued that its costs were consistent with the Washington, D.C. fair market values. The letter read, in part:

CLC officially notified the DCPS CFO in writing of our need to increase our rates to cover additional costs accrued over the past four years. The justifications for these increases are as follows:

1. CLC has honored DCPS' fixed fee schedule for over four years.
2. Added insurance requirements by DCPS and OCP, added administrative, gas, mail, payroll, and payroll tax costs for becoming a Certified DC company.
3. DCPS' current fee schedule is several years out of date (effected March 20, 2002), and has not been updated voluntarily by DCPS to even cover the Consumer Price Index increases or increases in inflation.

On July 18, 2006, DCPS issued a Final Administrative Decision regarding Invoice #823.

That letter stated:

The Office of Special Education, District of Columbia Public Schools has reviewed your response to the attached dispute letters dated June 16, 2006, for services provided to [D.J.]. Please be advised that you failed to provide sufficient additional documentation challenging the disputed invoices.

On or about August 1, 2006, CLC requested a proceeding before the Special Master pursuant to the Payment Order. On August 17, 2006, DCPS and CLC were asked to submit copies of invoices in dispute, dispute notices, written objections of the provider and, if timeliness was an issue, evidence of delivery or receipt. The parties were also offered an opportunity to furnish additional documentation including, but not limited to, correspondence, records and policies.

² In actuality, transportation to Pathways commenced in March 2005 and then was resumed in August 2005.

Positions of the Parties

CLC raises two issues. First, the provider claims that DCPS missed the response window required in the Payment Order as DCPS did not respond to CLC's dispute within twenty days. Secondly, CLC argues that DCPS misconstrued the February 2005 HOD when it maintained that compensatory education was due only until transportation for D.J. was started. CLC notes that D.J. was granted over three (3) years of compensatory education by the February 2005 HOD, not just the few months that elapsed between enrollment at and transportation to Pathways. Moreover, CLC notes that DCPS paid CLC for services rendered between September and December 2005, even though DCPS acknowledged that transportation for D.J. had commenced by September.

DCPS claims that it disputed the invoice in a timely fashion, in that it treated the May 19 invoice as if it had been received on June 5. DCPS offered no explanation regarding its interpretation, or misinterpretation, of the February 2005 HOD.

Relevant Provisions of the November 8, 2004 Payment Order

Section III: In the event a provider does not have a written contract or the payment procedures of this Order are incorporated via contract, the following payment procedures shall apply:

a. For special education placements and services, a provider may submit actual invoices for services rendered by the 5th or the 15th of the month following the month in which services were provided (or, when the 5th or the 15th is not a business day, the first business day thereafter). All invoices must be submitted by mail, express mail, or hand-delivery, to the DCPS Office of the Chief Financial Officer.

* * *

b. Defendants shall date-stamp all invoices on the same day they are received and, upon contemporaneous request, shall provide receipts for hand-delivered invoices.

* * *

d. Invoices not received by the 5th or 15th of the month will be processed as if received on the next invoice due date, be it the 5th or 15th. Providers have the sole discretion whether to submit any given invoice by the 5th or 15th of a month.

* * *

Section V: The procedure for raising, and responding to, disputes over charges submitted on an invoice shall be as follows:

a. If defendants dispute any charges submitted on an invoice, or the adequacy of the information provided, defendants shall pay the undisputed amount of the invoice within the deadlines described above and provide a written dispute notice by facsimile, where available, to the provider no later than twenty (20) calendar days after the invoice was received, and shall place such notice in the U.S. Mail on the same day.

* * *

b. If a provider disagrees with the amount disputed by defendants, it must submit to the District of Columbia Public School' Office of Special Education, in writing, with supporting documentation, reasons for its objection no later than fourteen (14) calendar days following receipt of a dispute notice, referencing the DCPS invoice identification number. Receipt of the dispute notice is effective upon hand-delivery or three days after the postmark of a mailed dispute. If a provider fails to submit a written objection within this timeframe, then the amount paid by the defendants will be understood to be accepted by the school or provider as payment in full.

* * *

c. If defendants continue to dispute all or part of an invoice after receiving a provider's written objection and documentation as set forth in subparagraph (b) above, within ten (10) business days of receipt of such objection defendants shall issue a written rejection of any claim of the provider and the reasons for the rejection. Receipt of a provider's objection is effective upon hand-delivery or three days after the postmark of a mailed

objection. A copy of any written rejection, including the reasons therefore, shall be contemporaneously sent to plaintiffs' counsel.

Discussion and Recommendation

The provider and class counsel contend that DCPS' June 25 dispute letter was untimely in that it was issued more than 20 days after receipt of the May 19 invoice. The argument is that Section III (d) permits DCPS to treat invoices as if received on the 5th or 15 for purposes of payments but that timelines for dispute notices run from the actual date of receipt of the invoice.

In my view this argument is not consistent with the language of Section III (d). That section is not limited to the "payment of invoices" but reads instead, "Invoices not received by the 5th or 15th of the month will be processed as if received on the next invoice due date . . ." (emphasis added). Processing must include more than simply paying; it must also include the scrutiny that is applied to each invoice received by DCPS.

Moreover, the construction advanced by class counsel and the provider is not consistent with the history of the provision. In a status report filed with the Court on November 17, 2003, the Special Master wrote as follows:

One feature of the [then existing] payment process that is troublesome is the requirement that DCPS respond to invoices on a rolling, rather than fixed, timetable. The current Payment Order reads: "[P]roviders will submit to defendants actual invoices for services rendered no later than the 5th (or the first business day thereafter) of the month following the month in which services were provided." This "requirement", however, is moderated considerably two paragraphs later where the procedure states:

Failure to timely submit an invoice by the 5th of the month following the month in which services were rendered, will constitute a waiver of defendant's obligation to make payment by the 5th of the following month. Each day for which receipt of the invoice remains outstanding will extend the date of payment by defendants by the equivalent number of days.

Accordingly, a provider can submit an invoice on the 5th of the month, or the 6th, or the 13th, or the 21st or any other day of that month or a succeeding month. In response, *DCPS' obligation to issue a dispute notice – and to pay the undisputed*

portion of the invoice – also shifts from day to day. Clearly this process increases the chances for error and ultimately for delay.

* * *

Accordingly, the Special Master will recommend that if and when certain preliminary steps are taken the Payment Order be modified to reflect two “fixed” invoice due dates.

Report of Special Master Regarding the Implementation of Payment Order Dated October 11, 2002, at pp 7 – 9.

In light of the above, DCPS did not error when it treated the May invoice of CLC as if received on June 5, 2006. Given this, a dispute letter dated June 25, 2006 was not untimely.

The second question is whether DCPS’ basis for dispute can be supported by the evidence. The February 2006 HOD clearly contemplates two “timeframes” for compensatory education: 1) from February 2002 to date of enrollment at Pathways (or approximately three years); and 2) from January 28, [2005] to the first day of transportation, which may have occurred as early as March 2005 but occurred no later than August 28, 2005. However, the dispute notice clearly stated that the funds were not paid because the transportation portion of the HOD had been satisfied. Clearly, that was not the extent of DCPS’ obligation for compensatory education and therefore, the underlying basis for the dispute is unsupported³.

Despite the inadequacy of the dispute notice’s content, for some reason the provider did not respond to the assertion made by DCPS. Instead, when CLC submitted its objection on June 26, 2006, the provider addressed only the cost of the service (i.e., \$75.00 per hour). The objection was completely silent with respect to the issue of D.J.’s continuing right to additional compensatory education. Thus, the “dispute” and the “objection” passed like proverbially ships in the night.

³ The HOD does not clearly define how many hours of one-to one tutoring would fulfill three years of compensatory education and if the dispute notice had read, “Compensatory education requirements fulfilled,” the matter before the Special Master or a Hearing Officer might have required a determination as to the number of hours of tutoring required by the February 2005 HOD.

Thereafter, DCPS had one more opportunity to examine the record and formulate a legitimate basis for a dispute. Yet, the final administrative decision merely reiterated the earlier basis for the dispute. Accordingly, as DCPS had the last chance to articulate a legitimate basis for a dispute -- and failed to do so -- DCPS must pay the remaining amount owed on the invoice for April services.

A proposed Order is attached.

Respectfully submitted,

Elise T. Baach
Special Master

June 12, 2007