IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NIKITA PETTIES, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No.: 95-0148 (PLF)**
	)	
THE DISTRICT OF COLUMBIA, *et al.*,	)	
	)	**Just-A-Mite**
Defendants.	)	**Invoice Dispute Hearing**
	)	

REPORT AND RECOMMENDATION OF THE SPECIAL MASTER
IN THE JUST-A-MITE INVOICE DISPUTE HEARING
HELD ON OCTOBER 3, 2006

I. Background.

This Report is filed pursuant to the Order in this case dated November 8, 2004, modifying and supplementing the October 11, 2002 Order Regarding Payment System for third-party providers of special education and related services. By letters dated July 3, 2006, and August 11, 2006, the provider, Just-A-Mite ("JAM"), filed requests for a proceeding before the Special Master to resolve a dispute with the District of Columbia Public Schools ("DCPS") over unpaid invoices for the months of April and June 2006.

On October 3, 2006, the Special Master, through her undersigned designee acting as Hearing Officer, held a hearing with representatives from DCPS, JAM, and University Legal Services ("ULS"), counsel for the Plaintiff class. The Hearing Officer's Findings of Fact and Conclusions of Law are set forth below.

II. Procedural History and Factual Background

JAM is a privately-run program that offers community-based services, including so-called "wrap-around services," for students with disabilities. JAM has provided wrap-around services to DCPS special education students for many years. Some students are placed in the JAM program through Individualized Education Plans ("IEPs") while others are assigned to the program by court orders issued in neglect or other child protection proceedings.

On or about May 4, 2006, DCPS received an invoice from JAM for services provided during April 2006, in the amount of $134,125 ("Invoice 126"). DCPS prepared a dispute letter, dated May 24, 2006, challenging $65,464.75 of the charges, contending that DCPS had no specific obligation to fund services for many of the students included in the Invoice, and that the documentation of services actually rendered was insufficient. DCPS witnesses claimed that they faxed the dispute letter to JAM on May 23, 2006; JAM witnesses denied receiving it. A hard copy was mailed, according to the postmark, on May 25, 2006.

On June 6, 2006, JAM mailed a written objection to DCPS's dispute,[1] noting that the challenged wrap-around services for the various students had been court-ordered. Moreover, according to JAM, it had "previously provided documentation to support the aforementioned students listed in this dispute." *See* June 6, 2006 Objection. Nevertheless, on June 20, 2006, DCPS issued its Final Administrative Decision ("FAD") on Invoice 126, denying payment of $65,464.75. The Decision asserted that JAM had failed to provide documentation "to obligate DCPS to fund invoiced services." *Id.*

[1] JAM provided "Track & Confirm" documentation from the U.S. Postal Service, reflecting failed attempts to deliver the June 6 objection on June 8 and 9, with delivery accomplished on June 12, 2006. *See* Exhibit 4 to Class Plaintiff's Pre-hearing Statement.

(emphasis in original). Rather, according to DCPS, the documents submitted by JAM, including orders from the D.C. Superior Court, directed that **other** government agencies were obligated to fund the wrap-around services, and that there was no basis for assigning liability to DCPS.

On July 3, 2006, JAM requested a proceeding before the Special Master to resolve the fee dispute over Invoice 126.

On July 5, 2006, DCPS received an invoice from JAM in the amount of $140,174.75 for services rendered during the month of June 2006 ("Invoice 128"). By letter dated July 21, 2006, DCPS disputed all of these charges, asserting that JAM had failed to provide either Student Identification Numbers or the rate per unit for the invoiced services. Again, there was a disagreement about how and when these materials were communicated. DCPS claimed that the dispute letter dated July 21, 2006 was faxed to JAM on July 20, 2006, but JAM witnesses testified that they did not receive it. Transcript of the Hearing of October 3, 2006 ("Tr.") at 26. DCPS also mailed the dispute letter on July 25, 2006, according to the postmark.[2]

JAM responded to DCPS's dispute letter on August 3, 2006,[3] by providing the requested Student Identification Numbers, but it offered no additional information regarding the rates charged for services. On August 11, 2006, DCPS issued a Final Administrative Decision denying payment of Invoice 128 in its entirety.

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[2] It appears that a copy of the DCPS envelope bearing the July 25, 2006 postmark was introduced into evidence at the October 3 hearing, but was not assigned an exhibit number.

[3] Again, JAM tendered U.S. Postal Service documentation showing that the dispute letter was mailed to DCPS on August 3, and was received by DCPS on August 8, 2006. *See* JAM's Pre-hearing Submission Binder.

JAM requested a proceeding before the Special Master to resolve the disputes over both Invoices 126 and 128. An evidentiary hearing was held before the undersigned on October 3, 2006.

III. Findings of Fact, Conclusions of Law, and Recommendations

A. *Invoice 126*

1. Timeliness.

As an initial matter, I find that JAM satisfied the procedural requirements of the Court's November 8, 2004 Order Regarding Payment for Services to Class Members ("the November 8, 2004 Order" or "the Order"), and in particular, complied with the time requirements set forth therein. The Order provides that where DCPS disputes any of the charges submitted on an invoice, it is to provide a written dispute notice by facsimile to the provider no later than 20 days after receipt of the invoice "**and** shall place such notice in the U.S. Mail **on the same day**." *Id.*, V(a) (emphasis added). If the provider disagrees with the amount disputed by DCPS, it must provide a written objection within 14 days following **receipt** of the dispute notice. *Id.*, at V(b)(emphasis added). The Order further provides that "[r]eceipt of the dispute notice is effective upon hand-delivery or three days after the postmark of a mailed dispute." *Id.*

Here, DCPS claimed that JAM failed to comply with the Order's 14-day deadline to file an objection upon receipt of the dispute notice. Specifically, DCPS contends that it faxed its notice to JAM on May 23, 2006, and that JAM's response, dated June 6 and received by DCPS on June 12 was, therefore, untimely. But DCPS's contention is not supported by the record. DCPS sent its dispute notice to JAM by facsimile on May 23, 2006, but mailed it, not "on the same day," but on May 25. Since DCPS's notice was not

hand-delivered, according to the Order it was deemed received by JAM three days after mailing, as established conclusively by the postmark, or on May 28, 2006. JAM's objection, mailed on June 6, 2006, was therefore well within the 14-day time period prescribed by the Order. While the Postal Service apparently was unable to deliver the provider's objection until June 12, nothing in the Order indicates that the provider's objection must be **received** within fourteen days of the defendant's dispute notice.[4] To the extent that DCPS has not relinquished its argument on this point,[5] I find that JAM's objection was timely filed.

2. DCPS's liability for the students and services in question.

On the merits of the dispute, DCPS contends that that it is not responsible for payment of the disputed charges on Invoice 126 because JAM failed to provide any documentation expressly ordering DCPS, as opposed to some other District agency, to pay for the services that it claimed to have delivered to the students in question. DCPS further asserts that JAM's wrap-around program does not consist of "educational-related services." Rather, according to DCPS, "the students ordered to receive the services provided by Just-A-Mite are students that were in the care and custody of CFSA for abuse, neglect and other issues non-related to education." DCPS claims that it should not have to pay for these non-educational services that CFSA has been ordered to provide.

Both JAM and ULS, as *Petties* Plaintiffs' counsel, disagree with DCPS, and contend that, according to the language of the Order, this Court's opinion in *Petties v.*

[4] To the contrary Section VI(a) of the Order, which deals with submission of a request for proceeding, indicates that such a request is "effective upon fax confirmation, hand-delivery, or three days after the postmark of a mailed objection."

[5] DCPS did not press its timeliness argument at the October 3, 2006 hearing. *See* Tr. at 7-8. But it is clear that DCPS's position is without merit.

District of Columbia, 894 F. Supp. 465 (D.D.C. 1995) ("the *Petties* decision"), and a Memorandum of Understanding ("MOU") between DCPS and CFSA, DCPS is responsible for payment of JAM's services to these students even absent a specific order expressly directing DCPS to fund those services. Upon consideration of the parties' arguments, the record in the claim, and relevant legal precedent, I agree with *Petties* Plaintiffs' counsel, and conclude that DCPS should be held responsible for payment of the disputed invoice.

To begin with, nothing in the Order supports DCPS's assertion that it is liable for payment of educationally-related services only when a specific court order imposes that liability on DCPS, rather than some other agency of the District Government. Rather, the Order applies, by its terms, to:

> special education schools, residential facilities and private providers of related services . . . that serve class members, including District of Columbia Public School ("DCPS") students and wards of the District of Columbia, pursuant to a court order, administrative decision, notice of placement, Individualized Education Program [*sic*] ("IEP"), or by agreement with DCPS.

Order at 1. There are, therefore, other means of triggering DCPS's liability, other than court orders. In particular, DCPS is responsible for funding services rendered by providers not only to students already in the DCPS system, but also to "wards of the District of Columbia," and the services embraced by the Order are those directed not only by court orders, but also by administrative decisions, notices of placement, IEPs, or specific agreements.

The *Petties* decision likewise refutes DCPS's argument. There, Judge Friedman found that students "who are placed and funded by DHS[6] are treated no differently vis-à-vis the [Individuals With Disabilities Education Act ("IDEA")] from students who are placed by DCPS." *Petties*, 894 F. Supp. at 468. According to the Court, therefore, it is DCPS's statutory responsibility to ensure "that **all** District of Columbia students entitled to special education and related services pursuant to the IDEA receive those services according to the requirements of the IDEA." *Id.* at 469 (emphasis added). Such responsibility includes "ensuring that the providers of services **to DHS-funded students** receive timely and complete payments." *Id.* (emphasis added). The Court later reiterated that regardless of which agency may have been ordered to fund special education services, in the end, under the IDEA, "DCPS is ultimately responsible for ensuring payment for the placement of or services to the class members." *Id.* at 469 n.4. JAM students are without question members of the Plaintiff class.

The District Court's conclusions in *Petties* are based upon and consistent with DCPS's obligations as the State Education Agency ("SEA") under the IDEA. Under that Act, the SEA is ultimately responsible for ensuring that all District children with disabilities receive a free and appropriate public education. *See* 20 U.S.C. § 1412(a)(11); *Petties*, 894 F. Supp. at 466. Indeed, according to the regulations implementing the statute:

> If a public agency other than an educational agency fails to provide or pay for special education and related services . . . the local education agency (or State agency responsible for developing the child's IEP) shall provide or pay for such services to the child. **Such local educational agency or State agency may then claim reimbursement for the services and such public agency shall reimburse the**

[6] DHS was the predecessor agency to CFSA.

local educational agency or State agency pursuant to the terms of the interagency agreement.

20 C.F.R. § 1412(a)(12)(B)(ii) (emphasis added).

Here, the MOU entered into by DCPS and CFSA on July 28, 1998, provides in relevant part, that "DCPS is ultimately responsible for providing services to students with special education needs under the IDEA," including students nowlegally committed to the custody of CFSA. The MOU further proves that "DCPS shall assume full responsibility including the . . . funding of public and private special education and related services for subject students." The MOU makes no exception for those students whose commitment orders may impose on CFSA the obligation to pay for certain services or programs. Rather, the clear intent of the MOU is to make DCPS, as between it and CFSA, liable for payment of all special education and related services, including the services provided by JAM in the instant dispute.

Finally, DCPS contends that the wrap-around services provided by JAM are not "educationally-related services." To support this contention, DCPS relies on the fact that "the students ordered to receive the services provided by Just-A-Mite are students that were in the care and custody of CFSA for abuse, neglect and other issues non-related to education." DCPS Post-Hearing Brief, at 3. But this argument is fatally flawed, for two reasons. First, the fact that the students were consigned to CFSA's care for issues not related to specific educational needs does not imply that the services rendered by JAM were not "educationally-related." Students of school age committed to the custody of CFSA through neglect or other proceedings are most assuredly in need of educational services (indeed, their needs might be seen as exceeding those of most of their peers). Nor has any argument ever been put forward that the "wrap-around services" offered by

JAM and other providers to DCPS students are by their nature not educational in character. So to the extent that DCPS is now contending that wrap-around services amount to baby-sitting, or to something else not educational, it calls into question its own policy of routinely approving such services when offered to students for whom DCPS cannot avoid assuming financial responsibility.

Moreover, DCPS's assertion ignores the broad regulatory definition of "related services":

> "Related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes . . . recreation . . . . counseling services . . . and social work services.

34 C.F.R. § 300.34. The wrap-around services described in the detailed billing statements provided along with the JAM's invoice fall within this broad definition. The character of the services does not change depending on whether the individual student has been sent to JAM pursuant to an IEP, a court order, an abuse and neglect proceeding, or even a voluntary placement.

I therefore conclude, and recommend that the Court order, that the DCPS dispute as to Invoice 126 be rejected. It may well be that, for reasons having to do with internal relations among District of Columbia Government agencies, someone other than DCPS may ultimately bear responsibility for paying these charges. But JAM should not have to embroil itself in, or to await the outcome of, any such controversy, nor should the services provided to members of the Plaintiff class be put in jeopardy. By virtue of the foregoing conclusions, and in particular in reliance on the language of the interagency MOU, therefore, I have no hesitation in recommending an order directing that DCPS pay

for JAM's disputed services, even if it has some claim for reimbursement that it can assert against a sister agency.[7]

For these reasons, it is the recommendation of the Special Master that DCPS be ordered to pay the full amount of $65,464.75, representing the disputed charges of Invoice 126.

B. *Invoice Number 128*

1. Timeliness.

Here too, DCPS challenged the timeliness of JAM's objection; and once again, I find that its contention is unfounded. According to DCPS, it sent its written dispute notice by facsimile on July 20, 2006, and therefore JAM's objection, received on August 14, was outside the 14-day time limitation.

But the Order requires that the dispute notice be **both** faxed and mailed to the provider, and specifically states that receipt is effective three days after mailing, which I conclude is evidenced by the postmark. In this instance, although DCPS claims that it faxed the dispute notice on July 20, it did not mail it until five days later, on July 25, 2006.[8] Consistent with the Order, therefore, the dispute notice was deemed received as

[7] I indicated at the end of the hearing that I was troubled by the notion that I might be recommending the imposition of payment obligations on agencies of the District Government that had not appeared at the proceeding. I invited the parties to address this subject in their post-hearing briefs, although neither did so. Nevertheless, because the District of Columbia is itself a defendant in the *Petties* litigation, and the Office of the Attorney General is notified of all payment dispute hearings under the Order (including this one), and has the option of attending and participating in them on behalf of the District if and when it chooses (indeed, it appeared in a number of matters over which I have presided), I am persuaded that there is no unfairness on these facts in creating a liability that may ultimately attach to an arm of the District Government other than DCPS.

[8] JAM again offered testimony that it did not receive the fax, although DCPS again had a confirmation sheet indicating that the communication had gone through. I do not need to resolve this controversy, however, since there is no doubt that the mailing did not take place, as the Order directs, on the same day. DCPS's argument that "mailing" takes place on the day on which an envelope is sealed and delivered to its agency mail room, even if it then sits there for a week without entering the mail stream, is frivolous.

of July 28, 2006. JAM mailed its objection on August 3, within the 14-day deadline, and it was therefore timely submitted.

2. Adequacy of documentation.

As to the substantive objection to Invoice 128, I also recommend that DCPS's dispute be rejected as unfounded. According to DCPS, Invoice 128 does not comply with the Order because JAM failed to provide the specific rate charged for its services.[9] JAM contests DCPS's dispute over the rate information, claiming that DCPS was aware, or should have been aware, of the rates charged by JAM in light of the prior payment history between the parties. Dr. Ava Hughes-Booker, testifying on behalf of JAM during the October 3, 2006 hearing, expounded on JAM's position:

> What I want to say about the rate sheet is that we have had hearings before the Special Master that probably date to 2002 and 2004, where the rate sheet is part of a decision that was made by [the Special Master] where each phase was reviewed, accepted and endorsed by D.C. Public Schools.
>
> The other piece I want to make sure that we reiterate is that the discussions specific to wrap-around services . . . was also accepted and reviewed at the Special Master's hearing. So when we have a provider that has been providing services to the students and families in the District of Columbia for well over six, possibly seven years, there's never been any dispute about the rate. The rate has stayed consistent for seven years.
>
> The rate phases have been a part of the Office of Special Education, Office of General Counsel, as well as Office of Finance. There's never been a dispute about it; it has been paid in

[9] In its Final Agency Decision, DCPS also relied on the failure of JAM to provide student identification numbers. This basis for refusing to pay an invoice, upon which DCPS relied little at the hearing, is rejected, for two reasons. First, the numbers were promptly given to DCPS as soon as it was communicated to JAM that they were requested. And second, the record shows that DCPS had never insisted that students be identified by number in any of the six most recent months as to which I have seen documentation, including April 2006, which was the subject of the dispute over Invoice 126. DCPS witnesses acknowledged that the specificity with which students were identified in JAM invoices has not changed at all since the beginning of this year, and that they have never before or since disputed an invoice for this reason.

> the past. The perplexity that we have at this point is why it is being disputed today.

Tr., at 41-42.

As an initial matter, while DCPS objected to Invoice 128 because it claimed that JAM failed to provide sufficient rate information, DCPS has in the past consistently paid JAM invoices without objection, even though they offered no detail in form or substance that was missing from Invoice 128. In particular, Invoice 126, which as noted above was disputed for other reasons, but not for lack of specificity about rates, contains precisely the same level of detailed rate information as Invoice 128. It is unreasonable to insist that a provider divine, without any notice or indication of a change in DCPS policy, that what it has always done is no longer acceptable. Counsel for the *Petties* class Plaintiffs, in its post-hearing submission, put the point clearly: "the provider certainly cannot be faulted for not providing more detailed rate information when this format has consistently been accepted for payment by DCPS." ULS Post-Hearing Brief, at 3.

In addition, the record reflects that JAM previously provided DCPS with adequate rate information on several occasions. First, JAM's CEO Morris Dickerson testified that he had tendered to DCPS a document entitled "Intensive In-Home Wrap-Around Service Rates" (accepted into evidence at the October 3 hearing as Hearing Officer's Exhibit 1). That document provides a detailed explanation of JAM's rate structure, showing a three-phase system based on the number of hours and kinds of services provided to a particular student. While DCPS witnesses testified that they had never seen this document, neither of them had been in post before the beginning of 2006. Mr. Dickerson testified that he had provided it to the prior Finance Director for DCPS last year.

Similarly, JAM pointed to a May 23, 2005, email exchange with former DCPS counsel, which JAM characterized as a "Settlement Agreement," wherein JAM's phased rate system is clearly referenced. *See* JAM Exhibit 3. The document, apparently drafted by DCPS counsel, again reflects an understanding of and familiarity with JAM's rate system. Although the DCPS Budget Officer, Karl Muhammad, and its Budget Analyst, Gregory Hall, both testified that they were unaware of the existence of these materials or of JAM's rate structure, this does not change the fact that the information was provided to DCPS at one time. Presumably, it still exists in the JAM file, in the DCPS offices or computer systems.

More importantly, however, and even if my conclusions about the significance of the documentary evidence are incorrect, examination of Invoice 128 and the attachments provided by JAM reflect that the information they reflect satisfies the requirements of the Order. The Order provides that invoices shall include, among other information, an itemization of the services provided, including the unit of service, the frequency or service, "and the rate per unit of service (**for example**, cost per hour)." At III(e) (emphasis added).

DCPS contends that, in Invoice 128, JAM failed to provide "the specific rate for services provided." But I find that the Invoice very clearly and unequivocally indicates the rates that were charged. It is true that not all of them are set forth on a "per-hour" basis. But nothing in the Order or in the parties' prior practice suggests that they should be. A "rate per unit of service" need not be calculated on an hourly basis. Invoice 128 provides a rate for each student identified, albeit perhaps not at a level of detail that

DCPS now says it would prefer.[10] And so even if DCPS were unfamiliar with JAM's phase-based rate structure, despite the apparent exchange of documents in 2005 setting it out in some detail, it cannot be said that JAM failed to provide its "rate per unit of service."

Nor was DCPS limited to JAM's one-page invoice listing students' names and rates. DCPS's own submission demonstrates that it was also provided a detailed "Service Report" for each student, setting out the specific dates, hours, and nature of the service(s) rendered. Accordingly, even if the information on the face of the invoice was insufficient, DCPS should have been able, with the exercise of minimal calculations, to determine unit rates (even if not hourly rates) from the documentation it was routinely given by JAM.

Given the information tendered by JAM in support of its request for payment of Invoice 128 and in light of the prior payment history between the parties, it is the recommendation of the Special Master that DCPS be ordered to pay $140,174.75 for the services covered by Invoice 128.

I cannot help but observe – although this cannot be part of my formal recommendation to the Court – that the parties to this dispute can easily avoid having to utilize this contentious, expensive, and time-consuming procedure in the future if they

[10] In a typical case, Invoice 128 notes, for Wrap-Around Services, a "quantity" of "1," and a "rate" of $7,500.00. It is hard to see how an objection can be mounted as to specificity: JAM charges $7,500 for "wrap" services for students in the program for an entire month. Of the 21 students in the disputed Invoice 128 – as to which DCPS paid nothing, contending that it had insufficient information about rates as to **any** student – the charges for 13 were $7,500 or a readily-identifiable fraction (½ or ¾) of $7,500. If, at this late date, and having paid many hundreds of thousands of taxpayer dollars to JAM for "wrap-around services," DCPS professes not to know what JAM actually does for students under that description, then there may be a problem here, but it is not with specificity of invoicing. It is with the accountability of DCPS for its handling of public money.

simply adopt some common-sense techniques to keep each other advised about their concerns.

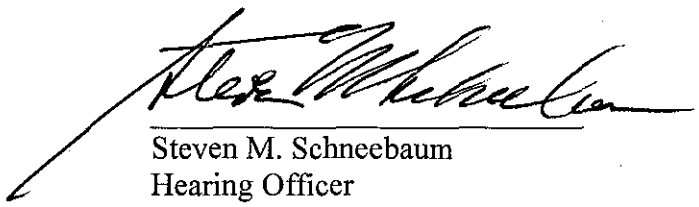
JAM, for its part, should routinely include along with its monthly invoice a copy of its current "Intensive In-Home Wraparound Service Rates" sheet, and it should explain any instance in which it is deviating from the figures set out in that table (as, for example, when a student is present for only part of a month, or where his or her level of service changes). Where it is charging according to a different formula, for any reason, it should say so, and provide an explanation.

And if DCPS requires a greater level of specificity than what is offered by JAM, it should articulate what it is that it wants. The substance of these two disputes could and should have been cleared up in a single phone call.

IV. Conclusion

For all of the foregoing reasons, the undersigned Hearing Officer, as designee of the Special Master, recommends that DCPS be ordered to pay JAM $65,464.75 in connection with Invoice 126, and $140,174.75 in connection with Invoice 128.[11]

Respectfully submitted,



Steven M. Schneebaum
Hearing Officer
Designee of the Special Master

Dated: November 7, 2006

[11] At the hearing, JAM made some allusion to requiring interim or emergency relief, which may be sought under paragraph 6(g) of the Order. Neither before nor since the hearing, however, has JAM troubled itself to submit to me any evidence to suggest that, in fact, either its survival or the well-being of Plaintiff class members is threatened by any delay in the payments to which I have concluded it is entitled. Since I believe that both the Order and common sense require that a proponent of emergency relief bears the burden of showing its entitlement to such relief, I suggest that the Court reject any claim for an interim order, unless JAM is able to make a showing of imminent and irreparable harm that I have simply not seen.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NIKITA PETTIES, *et al.*,	)	
	)	
Plaintiffs,	)	
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v.	)	**Civil Action No.: 95-0148 (PLF)**
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THE DISTRICT OF COLUMBIA, *et al.*,	)	
	)	**Just-A-Mite**
Defendants.	)	**Invoice Dispute Hearing**
	)	

ORDER

Upon consideration of the Report and Recommendations of the Special Master in the matter of Just-A-Mite, filed with the Court on November 7, 2006, and the briefs and arguments of the Parties, it appearing to the Court that the provider has demonstrated (1) its compliance with the terms and conditions of the November 8, 2004 Order Regarding Payment for Services to Class Members, and (2) its entitlement to full payment of the two invoices disputed herein, it is this ____ day of November 2006,

IT IS HEREBY ORDERED that the Report and Recommendations of the Special Master, dated November 7, 2006, be approved; and it is

FURTHER ORDERED that DCPS pay to Just-A-Mite the amount of $65,464.75, representing the disputed charges of Invoice 126; and it is

FURTHER ORDERED, that DCPS pay to Just-A-Mite $140,174.75 for the services covered by Invoice 128.

Paul L. Friedman
United States District Judge