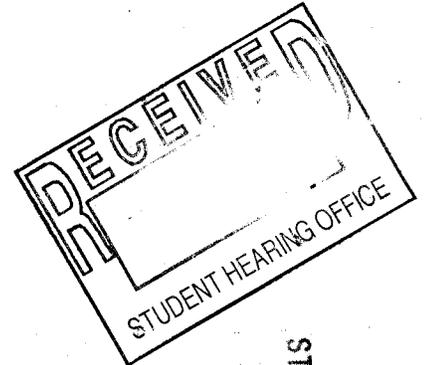


**DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION  
OFFICE OF COMPLIANCE & REVIEW  
STATE ENFORCEMENT & INVESTIGATION DIVISION  
STUDENT HEARING OFFICE**

**CONFIDENTIAL**

Jane Dolkart, Due Process Hearing Officer  
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Washington, D.C. 20003  
202-698-3819; 202-698-3825 (Fax)



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STUDENT HEARING OFFICE  
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**HEARING OFFICER'S DETERMINATION**

IN THE MATTER OF:	)	
	)	
DOB	)	DATE OF HEARING
	)	
ID	)	July 22, August 12, 14, 2009
Petitioner,	)	
	)	DATE OF COMPLAINT
V.	)	June 5, 2009
	)	
The District of Columbia	)	ATTENDING SCHOOL:
Public Schools,	)	
Respondent	)	

**COUNSEL FOR PARENT/STUDENT:** Miguel Hull  
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**COUNSEL FOR DCPS:** Kendra Berner  
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Washington, D.C. 20002-4232

STUDENT<sup>1</sup>, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S  
DETERMINATION

August 20, 2009

Representatives:

Petitioner – Miguel Hull  
DCPS – Kendra Berner

Hearing Officer:

Jane Dolkart

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<sup>1</sup> Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

# HEARING OFFICER'S DECISION AND ORDER

## I. INTRODUCTION

This is an     year old adult student who is eligible for special education under the classification of Multiple Disabled (LD and ED). The student is representing herself. The student's December 12, 2008 IEP classified the student as LD and provided for 26 hours of specialized instruction and one hour of speech and language (S/L) therapy per week in an out of general education setting.

An HOD involving the student was issued on February 17, 2009. The issue raised in the complaint was whether DCPS denied the student FAPE by failing to provide an appropriate placement for the student. The HOD found that Petitioner has refused for over three years to make any effort to access the educational opportunities offered at her school, and that she was not interested in attending school. The Hearing Officer held that Petitioner failed to prove her claim that she was denied FAPE because she was in an inappropriate placement during the 2007-2008 and 2008-2009 school years, up and until February 6, 2009. These findings and the holding in the February 2009 HOD are *res judicata* and cannot be re-litigated in the present hearing. Thus, this HOD may only address whether circumstances have changed subsequent to February 6, 2009, which would warrant a finding that the student is in an inappropriate placement.

The February 17, 2009 HOD also ordered that DCPS fund independent clinical, social history, occupational therapy, and Vineland evaluations, as well as a functional behavioral assessment, and that an MDT/IEP meeting be held within 15 school days of receiving all of the evaluation reports. A meeting was held on May 6, 2009, by which time the student had ceased attending classes and had been dropped from the roles. DCPS refused to develop an IEP or discuss placement.

This complaint was filed alleging that DCPS denied the student FAPE by refused to review the evaluation, update the student's IEP, or discuss placement because the student had dropped out of school, and that the student has an inappropriate IEP and placement.

A waiver of the resolution session was filed by DCPS on June 8, 2009.

Motions for continuances were granted on June 26 and July 28, 2009.

A pre-hearing conference was held on June 26, 2009, and a pre-hearing order was issued on July 7, 2009. DCPS filed a Notice of Insufficiency as part of its Response, on June 17, 2009. The motion was denied at the pre-hearing conference and the denial was included in the pre-hearing order.

The pre-hearing conference and order required that the parties hold an MDT meeting to develop an IEP and discuss placement prior to the then scheduled July 22, 2009. The

meeting was not held. When the hearing convened on July 22, 2009, the Hearing Officer ordered that the hearing be suspended until the required MDT meeting had been held.

Pursuant to the order of the Hearing Officer, the parties held an MDT/IEP meeting on July 23, 2009, at which time an IEP was developed that provides for a full time out of general education IEP with a disability classification of MD (LD and ED). A second meeting was held on July 31, 2009 to discuss placement. The parties were unable to reach an agreement concerning placement and the hearing proceeded.

## **II. JURISDICTION**

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.*, 34 CFR Part 300 *et seq.*, and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

## **III. ISSUES**

Has DCPS denied the student FAPE by

1. Failing timely to develop an appropriate IEP?
2. Failing to provide an appropriate placement?

## **IV. DOCUMENTS AND WITNESSES**

Petitioner submitted a five day disclosure letter dated July 14, 2009, containing a list of witnesses with attachments P 1-29. The disclosure was admitted in its entirety. Petitioner called as witnesses the student, the student's mother, the student's educational advocate, and the Admissions Director at \_\_\_\_\_ of DC.

DCPS submitted a five day disclosure letter dated July 14, 2009, containing a list of witnesses with attachments DCPS 1-3. DCPS submitted a supplemental disclosure on August 6, 2009, consisting of DCPS 4-7. The disclosure was admitted in its entirety. DCPS called as a witness the SEC at \_\_\_\_\_

## **V. FINDINGS OF FACT**

1. This is an \_\_\_\_\_ year old adult student who is eligible for special education under the classification of Multiple Disabled (LD and ED). The student is representing herself. The student's December 12, 2008 IEP classified the student as LD and provided for 23.7 hours of specialized instruction and 30 minutes of speech and language (S/L) therapy per \_\_\_\_\_

week in an out of general education setting.<sup>2</sup> The MDT notes of this meeting indicate that is seen as a temporary placement for the student. (DCPS 2)

2. Pursuant to an HOD issued on February 17, 2009, an MDT/IEP meeting was convened on May 6, 2009, in order to review evaluations ordered in the February 17, 2009 HOD, revise the student's IEP, if appropriate, and determine placement for the student. At the meeting, DCPS team members determined that the student should receive 26 hours of specialized instruction and 1 hour of counseling per week. DCPS team members refused to discuss placement for the student and refused to develop a new IEP for the student because she had been dropped from the attendance roles. (P 11)

3. At the hearing, DCPS admitted that it was improper to refuse to develop an IEP and provide a placement for the student because she was not presently registered at or another school.

4. The record does not indicate the precise date on which DCPS dropped the student from its rolls, but it appears to have been some time prior to March 1, 2009. The student did not attend school from some time in February to the end of the 2008-2009 school year. (DCPS 1)

5. The student testified at the hearing. She would not make eye contact and was mostly unresponsive to questions asked of her. Her primary reason for not going to school was that the school was too big. However, the student went to school and roamed the halls on most days since at least the 2007-2008 school year, up until she ceased attending in spring 2009. The student testified that she wants to finish High School and would be willing to ride the short yellow bus to if necessary. She was unable to say why would be any better than It was the impression of the Hearing Officer that the student was coached in what to say since her answers concerning riding the yellow bus and remaining in school for another 3 years contradicted the testimony she gave as found in the February 17, 2009 HOD. It was not clear from her testimony that the student was really committed to attending school. (Testimony of the student, Testimony of student's mother, P 6, 7)

6. On November 12, 2008, the student received a comprehensive psychological evaluation conducted by Interdynamics, Inc. This evaluation was part of the record of the February 11, 2009 HOD and has already been considered in determining whether the student required a new placement. The evaluation found that the student had cognitive abilities mostly in the extremely low to low range. The student's achievement skills were mostly in the extremely low to low range. Her ability-achievement discrepancy analysis indicated learning disabilities in math and reading. The student's emotional functioning was also assessed during the evaluation and indicated that the student was sad and felt

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<sup>2</sup> Children in the District of Columbia reach the age of majority on their eighteenth birthday, which for this student occurred on November 11, 2008. When a student with a disability reaches the age of majority under State law, all rights accorded to parents under Part B of IDEA transfer to the child. 34 CFR 300.520.

insecure socially and personally. The student was diagnosed with a mood disorder. (P 5, 7)

7. On March 18, 2009 the report of a clinical psychological evaluation of the student was completed. The evaluation was conducted at Interdynamics, Inc. by a psychology graduate student under the supervision of Dr. James Ballard, a licensed clinical psychologist. The student was administered a battery of psychological tests. In addition, the evaluator reviewed the results of a February 27, 2009 Vineland, a classroom observation conducted on November 17, 2008, teacher interview forms completed on November 17 and 19, 2008, and school records. All of the documents reviewed were available to the Hearing Officer issuing the February 17, 2009 HOD.

The report notes that

.... [the student] has learning problems which she avoids revealing by her withdrawing from the classroom and not turning in assignments or homework. She appears to be frustrated by the school work, noting that 'classes take too long.'" Her typical response in coping with her learning difficulties is to withdraw from the academic experience, leaving her unavailable to learn and perpetuating her difficulties."

"The results of projective testing revealed a teenager who experiences a level of stress that she cannot adequately cope with, given her coping skills. In addition, she has feelings of insecurity and inadequacy which are likely related to her academic difficulties....These feelings likely lead to feelings of ineffectiveness in the school environment, and then to avoidance behaviors."

The student experiences anxiety, insecurities, and depression. The report found that she requires extensive supports throughout her school day. The student was diagnosed with the same disorders listed on the November 12, 2008 comprehensive psychological evaluation: mood disorder, reading disorder, math disorder, and disorder of written expression.

The report recommended that the student needs a structured school setting with a small classroom size and without transitions so that she receives the attention and assistance she requires. The report found that it was essential that the student receive counseling for her to be successful in school. Other recommendations were made.

(P 7)

8. On July 14, 2009, per order of the Hearing Examiner, an MDT/IEP meeting was held at [redacted]. A revised IEP was developed at the meeting. The Team agreed that the student should be classified as LD and ED, and that she needed a full time 100% out of general education setting with 26 hours of specialized instruction, 1 hour of counseling, and .5 hours of OT per week. The Team met a second time on July 31, 2009, in order to discuss placement for the student. As of the time the meeting was to commence, the SEC at [redacted] had not been contacted by the placement supervisor for cluster 5 with a

placement for the student. After the educational advocate had left the meeting, he was called and informed that the student was to be placed at [redacted] It was discussed that the student might be placed at the [redacted] at [redacted]

When the prior notice of placement was faxed to the educational advocate it was for placement at the regular [redacted] (Testimony of Educational Advocate, DCPS 4-7)

9. Lisa Maylott, the new SEC at [redacted] as of August 17, 2009 testified. She knew nothing about the student until the day of the hearing when she was faxed the student's IEP, MDT notes from the July 24 and 31<sup>st</sup> meetings, and the student's March 2009 clinical assessment. She briefly read the documents. Ms. Maylott was a credible witness. She gave honest answers to the questions asked and admitted when she did not know or was unsure of something.

[redacted] does not have a self contained ED or LD classroom. There is an ED cluster program in which some students spend most of their day in a self contained classroom. The students do not have full time out of general education IEPs. Ms. Maylott did not know the number of students in the classroom. The ED classroom does not teach specific courses like Algebra I. Rather the classroom covers reading, writing, math, life skills, and vocational skills. Students cannot receive Carnegie Units towards a high school diploma in the class.

In order for the student to take physical education, art, music, or vocational courses, the student would have to take courses with her non-disabled peers. Lunch would be with her non-disabled peers. In order to earn Carnegie Units the student would have to take courses in an inclusion setting. The student has expressed an interest in becoming a child care provider. There is no vocational program in child care. [redacted] has 800 students. There are 2 social workers and 1 psychologist assigned to the school.

(Testimony of Lisa Maylott, Testimony of student)

10. [redacted] cannot implement the student's IEP. It cannot provide a self contained small out of general education classroom. The student has an emotional disturbance but she should not be placed in an ED setting. [redacted] cannot provide the student with the opportunity to receive Carnegie Units outside the general education setting.

[redacted] does not have a vocational program suitable for the student. [redacted] is an inappropriate placement for the student.

11. [redacted] of Washington DC is a private therapeutic special education school serving students with LD and ED. It offers the DCPS curriculum and awards high school diplomas. It also has a certificate program and provides GEDs. All teachers are certified in special education and a content area. [redacted] has accepted the student into their LD program. The school rejected an ED program for the student because she is not aggressive, does not act out and does not present behavioral problems outside of her attendance problems.

The school has about 110 students. The student would be in a classroom with no more than 10 other students. The school provides computer based learning programs, 1:1 instruction, and has a reading specialist. provides vocational training in the areas of child care, cosmetology, information technology, and computer graphic design. Each student is provided with individual and group counseling.

(Testimony of Tina Stith-Twine)

## VI. DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.*, guarantees “all children with disabilities” “a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. ¶ 1400 (d)(1)(A). The IDEA defines FAPE as

Special education and related services that – (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the State educational agency..., (c) Are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 – 300.324.

Central to the IDEA’s guarantee of FAPE “is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The educational agency must provide a “basic floor of opportunity” for students with disabilities. It need not provide the best education possible, but the educational benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16*, 331 IDELR 10 (3<sup>rd</sup> Cir. 1988).

As a condition of receiving funds under the Act, IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See*, 20 U.S.C. ¶ 1413. In addition, school districts must develop comprehensive plans for meeting the special education needs of disabled students. *See*, 20 U.S.C. ¶ 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include “a statement of the child’s present levels of educational performance, ... a statement of measurable annual goals, [and] a statement of the special education and related services ... to be provided to the child....” 20 U.S.C. ¶ 1414(d)(1)(A).

Pursuant to IDEA § 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 IDEA § 1415 (f)(3)(E)(ii), in matters alleging a procedural violation a hearing officer may find that the 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.

Petitioner has the burden of proof in this case. *Schaffer et al. v. Weast*, 546 U.S. 49 (2005).

The sole issue before the Hearing Officer is whether, based on information and events occurring after February 17, 2009, DCPS is providing the student with an inappropriate placement.

Once an IEP is developed, the school district must determine an appropriate placement for the child that is designed to meet the child's needs as set out in the IEP. Placement decisions must be made in conformity with the child's IEP. 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006). Thus, it is the IEP which determines whether a placement is appropriate, not the other way around. *See, Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (DDC 2006).

If there is an appropriate public placement available that is "reasonably calculated to enable the child to receive educational benefits," the District need not consider private placement. This is true even though a private placement might better serve the child, *See Hendrick Hudson Dist. Bd. Of Educ. V. Rowley*, 458 U.S. 176, 207 (1982). However, "[i]f no suitable public school is available [DCPS] must pay the costs of sending the child to an appropriate private school." *Jenkins v. Squillacote*, 935, F.2d 303, 305 (D.C. Cir. 1991). *See also, Burlington School Committee v. Mass. Dept. of Education*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

The major change that has occurred subsequent to the February 17, 2009 HOD denying the student placement at \_\_\_\_\_ is that the student now has a full time out of general education IEP, and the IEP has added ED to her disability classification in recognition of the student's mood disorder and anxiety. \_\_\_\_\_ was only meant as a temporary placement for the student even before the changes in her IEP. With the present IEP, \_\_\_\_\_ acknowledges that it cannot implement the student's IEP. Thus, some change of placement is necessary. DCPS has proposed \_\_\_\_\_ as the student's new placement. However, the testimony of the new SEC at \_\_\_\_\_ makes clear that it is an inappropriate placement for the student. It cannot implement a full time 100% out of general education placement, it cannot provide Carnegie Units unless the student takes inclusion classes, it cannot provide an adequate vocational program for the student, and it places the student in an ED setting. DCPS has denied the student FAPE by placing her at \_\_\_\_\_ for the 2009-2010 school year.

Aside from \_\_\_\_\_ the only placement proposed for this student at the hearing is \_\_\_\_\_ of DC. Given this student's long standing and extreme attendance problems the Hearing Officer is reluctant to place the student in a private school at DCPS expense. However, no other choices are provided. \_\_\_\_\_ is an appropriate placement for the student. The Hearing Officer will require that \_\_\_\_\_ provide a monthly

attendance report to the private school placement monitor. If the student fails to maintain a 90% attendance record for any two months of the 2009-2010 school year, DCPS may remove the student from \_\_\_\_\_ and place her in a DCPS public school.

## VII. SUMMARY OF RULING

DCPS has denied the student FAPE by inappropriately placing her at \_\_\_\_\_. The student is to be placed at \_\_\_\_\_ of DC and her attendance is to be monitored on a monthly basis.

## VIII. ORDER

It is hereby **ORDERED** that

1. DCPS shall fund the student at \_\_\_\_\_ of DC for the 2009-2010 school year, including transportation. The student shall be required to take the school bus to and from school to better ensure her attendance at school.
2. \_\_\_\_\_ shall send a monthly attendance report to the appropriate DCPS Placement Monitor on or before the 10<sup>th</sup> day of every school month. The student must maintain a 90% attendance record for the first 60 days of the school year. If she fails to maintain a 90% attendance record, the student is to be removed from \_\_\_\_\_ and placed in a DCPS public school. After the first 60 days of school, should the student fail to obtain at least a 90% attendance record in any two months of the remaining school year, DCPS may remove her from \_\_\_\_\_ and place her in a DCPS public school.

**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/ Jane Dolkart  
Impartial Hearing Officer

Date Filed: August 20, 2009