

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

OSSE
STUDENT HEARING OFFICE

2010 FEB -2 AM 9:05

CONFIDENTIAL

Jane Dolkart, Due Process Hearing Officer
1150 5th Street, S.E.
Washington, D.C. 20003
202-698-3819; 202-698-3825 (Fax)

HEARING OFFICER'S DETERMINATION

IN THE MATTER OF:)	
)	
)	DATE OF HEARING
)	January 20 & 21, 2010
Petitioner,)	
)	DATE OF COMPLAINT
V.)	October 15, 2009
)	
The District of Columbia)	ATTENDING SCHOOL:
Public Schools,)	
Respondent)	

COUNSEL FOR PARENT/STUDENT: Miguel Hull
James E. Brown & Assoc.
1220 L Street, N.W.
Ste. 700
Washington, D.C. 20005

COUNSEL FOR DCPS: Nia Fripp
Office of the General Counsel
825 North Capitol Street, N.E., 9th Fl.
Washington, D.C. 20002-4232

HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This is an _____ year old student presently in the tenth grade that has been found ineligible for special education services under the Individuals With Disabilities Education Act. The student's school is _____ Educational Campus. The student has emotional problems which have prevented her from attending school. Instead, the student has received Visiting Instruction Services (VIS) from the District of Columbia Public Schools (DCPS). The student was found ineligible for special education services on May 8, 2009, and again on September 22, 2009.

This due process complaint was filed on October 15, 2009, alleging that the student was denied FAPE because DCPS inappropriately failed to find her eligible for special education and failed to provide necessary special education instruction and services. DCPS filed a response to the complaint on October 20, 2009. DCPS alleges that the student does not qualify for special education because her emotional problems do not impact her educational performance.

A Due Process Complaint Disposition was signed by the parties on October 28, 2009.

A pre-hearing conference was held on November 6, 2009, and a pre-hearing order was issued on November 23, 2009.

This case was originally set to be heard on December 3 & 4, 2009. The student had an emergency appendectomy and the case was continued to January 19 & 20, 2010. An order of continuance was issued on December 8, 2010. The case was actually heard on January 20 & 21, 2010. The Hearing Officer gave the parties until January 25, 2010 to submit legal authority and closing arguments. The case was continued two additional days in order to give the Hearing Officer sufficient time to complete the HOD following the January 25, 2010 submissions.

On January 5, 2010, DCPS field a Motion to Dismiss Parent's Administrative Due Process Complaint because the student turned 18 on January 2, 2010, thus depriving her parents of the right to bring an IDEA claim on her behalf. All rights to bring a complaint transfer to the student. On January 8, 2010, Petitioner filed a Response to the Motion to Dismiss attached to which was an authorization and representation form signed by the student, authorizing the firm of James E. Brown & Associates to represent her in this proceeding. An Order denying DCPS' Motion to Dismiss was filed on January 11, 2010.

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 to find her eligible for special education pursuant to the IDEA?
2. If eligible, failing to develop an IEP and provide appropriate special instruction and services to the student?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated November 24, 2009, containing a list of witnesses with attachments P 1-50. The disclosure was admitted in its entirety. Petitioner called as witnesses the student, the student's mother, the student's two educational advocates, _____, Dr. _____, and a social worker at First Home Care.

DCPS submitted a five day disclosure letter dated November 24, 2009, containing a list of witnesses with attachments DCPS 1-25. The disclosure was admitted except for DCPS 24, an article on somatoform disorders which was not discussed or identified in any testimony. DCPS submitted a supplemental disclosure dated January 11, 2010, with attachments 26-29. The disclosure was admitted in its entirety. DCPS submitted a second supplemental disclosure on January 11, 2010 consisting of one additional witness. DCPS called as witnesses the student's VIS teacher, a school psychologist, and the SEC at _____ Campus.

V. FINDINGS OF FACT

1. This is an _____ year old student presently in the tenth grade who has been found ineligible for special education services under the Individuals With Disabilities Education Act. (P 27, 41)
2. The student attended a DCPS pre-school and then moved to _____ for kindergarten. She returned to DCPS and successfully completed elementary school. The student began complaining about headaches, nausea, stomach aches, and other health issues during this time period. (P 17, 19, 21, Testimony of mother).
3. The student sprained her ankle when she was 2 years old. Thereafter, the student fell and re-injured her ankle on a number of occasions. The last incident occurred when she was in 6th grade and attending a DCPS middle school. The student was on crutches and was prescribed pain medication. Her attendance at school declined because of frequent visits to the doctor and the student began exhibiting increased anxiety at and about school. (P 17, 19, 21, testimony of mother, testimony of student).

4. The student was retained in ^h and grades because of attendance issues. According to the student's transcript she received F's in all of her courses during the 2007-2008sy (her first year in 9th grade). As of the end of the 2008-2009sy, the student had earned 7.5 credits towards the 28 needed for graduation. (P 9, 17, 20)

5. The student has been registered to attend classes at Education Campus for the 2008-2009 and 2009-2010 school years. The student was provided with class schedules for each of these years. The student has not attended any classes at the school during this time period. The student's progress report for the 2008-2009sy indicates that she failed almost all of her courses, and the progress report for the advisory ending on October 30, 2009 shows the student failing all of her courses. (P 7-12, DCPS 29)

6. The student received some educational services through DCPS' Visiting Instruction Services (VIS). The record is unclear concerning when these services were first offered to the student. There is no evidence in the record of VIS services prior to the 2008-2009sy. VIS services are provided to students who are unable to attend school. In order to receive such services the student must obtain a Physician's Certificate of Pupil's Inability to Attend School. For the 2009-2010sy, such a certificate must be submitted every 60 days in order to continue receiving VIS services. During the 2008-2009sy, the physician's certification listed somatization disorder and major depressive disorder as the justifications for VIS services. The physician's verification form completed on November 10, 2009, listed social phobia, dysthymia/history of major depressive disorder, and dependent personality disorder as the justifications for VIS services.

During the 2008-2009sy, the student received services commencing with the second school advisory period, in November 2008. The student did not receive any educational instruction during the first advisory period as she did not attend school and was not receiving VIS services. Starting with the second advisory period, the student received VIS services on Mondays and Wednesdays for three 45 minute sessions, or a total of 4.5 hours of services per week. The student took Algebra 1, Chemistry, and English 1. She successfully passed all three courses, receiving a B in chemistry, a C in algebra and a B in English. VIS services are provided on a one student to one teacher basis.

During the 2009-2010sy, the student received VIS services commencing the first week of December. The student did not receive any educational instruction for the school year prior to December 2009, because she did not attend school. The student is presently receiving 45 minutes of instruction each day, Monday through Thursday. She is taking English and math.

VIS does not provide instruction in any elective courses.

(P 15, 16, 26, DCPS 27, testimony of VIS teacher, student, mother)

7. The student has a long history of physical and emotional problems. The student began having problems with her ankle in early childhood. She last sprained it in 6th grade and suffered pain and difficulty ambulating as a result of the injury. The student was eventually diagnosed with Patello-Femoral Syndrome, a chronic ankle sprain. The student has been prescribed pain killers as a result of the pain. The student has been on crutches or in a wheel chair during some of the time subsequent to the incident in 6th grade. The student's school attendance suffered as a result of the injury as well as a history of reluctance to attend school that began in early childhood.

The student's health complaints worsened after her enrollment in middle school. For at least the past two years, the student has suffered from anxiety, migraine headaches, nausea, stomach problems, and depression. The student is presently prescribed Topramax and Maxalt for the headaches, Tresidone to help her sleep, and Wellbutrin for anxiety and depression. The student has been unable to go to school. When she tries to go to school her anxiety soars and she develops physical symptoms, usually a migraine and/or nausea and stomach pains.

8. _____ is the student's treating psychiatrist. She has worked with the student for 3-4 years, first at the _____ Youth Center and presently at _____ Center. _____ was a credible witness who has treated the student for over three years and has substantial knowledge of the student's problems. Her testimony was given substantial weight.

_____ first diagnosed the student with somatization disorder and major depressive disorder. Somatization Disorder is described in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, as "One or more physical complaints (e.g. fatigue, loss of appetite, gastrointestinal or urinary complaints) where either appropriate evaluation uncovers no organic pathology or pathophysiologic mechanism (e.g. physical disorder or the effect of injury...) to account for the physical complaints," or "when there is related organic pathology, the physical complaints or resulting social or occupational impairment is grossly in excess of what would be expected from the physical findings."

Approximately one year ago, the student's diagnosis was changed to Social Phobia², Dependent Personality Disorder, and history of major depression. _____ explained

² Diagnostic criteria for 300.23 Social Phobia
(cautionary statement)

A. A marked and persistent fear of one or more social or performance situations in which the person is exposed to unfamiliar people or to possible scrutiny by others. The individual fears that he or she will act in a way (or show anxiety symptoms) that will be humiliating or embarrassing. Note: In children, there must be evidence of the capacity for age-appropriate social relationships with familiar people and the anxiety must occur in peer settings, not just in interactions with adults.

B. Exposure to the feared social situation almost invariably provokes anxiety, which may take the form of a situationally bound or situationally predisposed Panic Attack. Note: In children,

that the student no longer has a Major Depressive Disorder because of the medications she has been taking. She also explained that several years ago the student was in a wheelchair and could not walk. Since she has improved and is now walking, the diagnosis was changed from Somatization Disorder to Social Phobia.

Social Phobia is a form of anxiety disorder. In this case the student becomes extremely anxious when exposed to situations she fears. The student gets panic attacks when exposed to people she does not know or new situations. She feels she is being watched by them. Sometimes the phobia is so severe the student becomes paralyzed. The student gets migraines, gastro-intestinal problems, sweats, breathing problems and nausea. The etiology of such disorders is usually genetic and organically based in a chemical imbalance. The treatment is medication and therapy, both of which the student is getting. The student has side effects to some of the medications.

The student is also insecure and in need of constant reassurance. She remains at home most of the time and rarely goes out alone. submitted two physician's certifications of the student's inability to attend school, one on April 14, 2009, and one on November 10, 2009.

the anxiety may be expressed by crying, tantrums, freezing, or shrinking from social situations with unfamiliar people.

C. The person recognizes that the fear is excessive or unreasonable. Note: In children, this feature may be absent.

D. The feared social or performance situations are avoided or else are endured with intense anxiety or distress.

E. The avoidance, anxious anticipation, or distress in the feared social or performance situation(s) interferes significantly with the person's normal routine, occupational (academic) functioning, or social activities or relationships, or there is marked distress about having the phobia.

F. In individuals under age 18 years, the duration is at least 6 months.

G. The fear or avoidance is not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication) or a general medical condition and is not better accounted for by another mental disorder (e.g., Panic Disorder With or Without Agoraphobia, Separation Anxiety Disorder, Body Dysmorphic Disorder, a Pervasive Developmental Disorder, or Schizoid Personality Disorder).

H. If a general medical condition or another mental disorder is present, the fear in Criterion A is unrelated to it, e.g., the fear is not of Stuttering, trembling in Parkinson's disease, or exhibiting abnormal eating behavior in Anorexia Nervosa or Bulimia Nervosa.

Specify if: Generalized: if the fears include most social situations (also consider the additional diagnosis of Avoidant Personality Disorder)

has spoken with the First Home Care social worker who has been providing therapy to the student. has indicated to her that the student cannot attend school at the present time. is of the opinion that, although the student has made progress, she cannot attend school at present. is hopeful that with continued therapy and medication management the student will improve sufficiently to attend. She notes that the student wants to attend school.

9. , a social worker with the DC Department of Mental Health, is based at Education Campus. He provides counseling to students at the school. obtained a masters degree in social work in 1997, and has been working for the Department of Mental Health in their mental health program for students for three years. He conducts individual, group and family therapy. was an articulate witness who had good insight into the student and her problems. He has clearly gotten to know the student as a result of his therapy sessions with her and was a credible witness. His testimony is given great weight because of his personal knowledge of and on-going relationship with the student.

first met the student on September 11, 2009. At a September 10, 2009, MDT meeting the student's mother was informed that the student was not yet registered at the school. The student was required to show up at the school in person to receive her schedule and to meet each of her teachers before registration could be completed. On September 11, 2009, the student went to the school with her mother to complete her registration. The student could not enter the school building. Instead she stood or sat outside in front of the school crying and shaking and repeating that she was scared and did not want to go in. found the student in front of the building, on her knees, crying. He talked with her, and tried to calm her down. Eventually the student took his arm and was able to get her into the building with some resistance. spoke with the student's mother and was informed that the student suffered from anxiety, depression and school phobia.

began therapy with the student both at the student's home and a few times in the school building after school hours. He has been meeting with the student once a week since mid-September and has included the mother in a few of the sessions. goal is to integrate the student back into the classroom, but this has not yet happened. testified that the student is not yet ready to enter the classroom. She suffers from depression and anxiety. He is trying to determine the underlying causes for the social phobia and the related physical symptoms but has barely begun to scratch the surface of the situation. He has no idea how long it may take before the student can attend school.

(Testimony)

10. , a VIS teacher who taught the student biology and some chemistry during the 2008-2009sy testified. has a masters degree in biology and has taught biology for 27 years, mostly in DCPS schools. was a credible witness who worked with the student on a 1:1 basis for approximately eight months and has substantial familiarity with the student. describes the student as having good

academic skills, a good grasp of the materials, good attention, and a positive attitude towards learning. The student was conscientious and completed her assignments.

There were times when _____ began a session and the student became ill. The student also cancelled sessions, especially near the end of the year because she was too ill to proceed. In these instances, _____ dropped off the work for her and the student always completed it. _____ observed the student ill, her face flushed and in pain, even to the point of tears.

The student expressed apprehension about going to school. Based on her knowledge of the student _____ indicated that she believes the student when she says she cannot handle learning in a school setting.

11. At the end of the 2008-2009sy there was an end of year school ceremony for DCPS students in the VIS program. The ceremony was held in the cafeteria of a DCPS high school and was planned by _____. Several of the students performed at the ceremony. The student played the guitar at the urging of _____. _____ indicated that it took a lot of persuading and preparation to get the student to perform. _____ began rehearsing with the student in May for the June performance. There were approximately 40 people at the ceremony, including the student's family which sat in the front row. The student was anxious the day of the performance and her sister had to take her into the bathroom to calm her down. _____ sat directly in front of the student when she performed. (DCPS 28, Testimony of _____)

12. The student testified concerning her inability to go to school and events concerning her efforts to attend school. The student's testimony was consistent with that of all other witnesses and is thus credible. The student testified that she is not emotionally ready to go back to school but would like eventually to go to school and to receive her high school diploma. The student described herself as depressed, unable to go out much without her mother, and having few friends. She indicated that she tries to go back to school but is unable to get out of the house because when she tries to get ready to go she gets migraines, nausea and vomiting, and stomach problems.

The student indicated that she did go to the school building on September 11, 2009, with her mother, but experienced great fear when she tried to enter the building, her chest closed up and she had trouble breathing. She stood in front of the school, in the rain, crying. She feared she would not know anyone, would not know what to do. _____ talked with her and eventually she went into the building and to his office. She talked with _____ and _____ the SEC. Both of them took her around the school and then she went home.

_____ developed a plan where the student would go to school for one 1:1 class, English. _____ would meet the student and escort her to _____ office for the class. The student went one time with her mother in late October and made it to _____ office. She was not able to return again.

The student has been receiving counseling from _____ since September. She began seeing him in his office at the school in approximately mid-November. The student indicated that all of her sessions at the school were after school hours. At some point the student had trouble going to the school even after school hours and _____ began coming to her home.

The student indicated that she wanted to get services to help her so that she can go back to the classroom. She agrees that she does not experience academic problems in her home school setting but would like to have more hours of classes and take a full course load.

(Testimony of student)

13. The mother's testimony corroborated the testimony of the student and other witnesses. The mother indicated that she has seen improvement in the student since the student began counseling with _____ (Testimony of mother).

14. Two eligibility meetings have been held to determine if the student is eligible for special education. The first meeting took place on May 8, 2009, and the second meeting took place on September 22, 2009. Additionally, a meeting took place on November 6, 2009, to determine if the student was eligible for services pursuant to Section 504 of the Rehabilitation Act. In each instance DCPS determined that the student was not eligible. (P 32, 36, 37, 40, 41, 42, DCPS 25)

15. The participants in the May meeting included the SEC, the educational advocate, the mother, the school social worker, and the school psychologist. The student's treating psychiatrist and therapist were not at the meeting. No reports or notes from the therapists were reviewed, nor had anyone from DCPS spoken with the student's treating psychiatrist and therapist. The eligibility team reviewed a social work update to a report from 2006, and a psycho-educational evaluation report completed on May 5, 2009.

Meeting notes from the meeting indicate that the meeting focused on the student's ankle condition and her cognitive and academic performance. The team agreed that it needed more information concerning the student's emotional problems, including the student's medical and therapy records. The DCPS psychologist agreed that a clinical psychological evaluation was warranted, although the SEC did not believe it was appropriate for DCPS to conduct a clinical psychological evaluation. The student was found ineligible for special education at that time and it was agreed the eligibility determination would be reviewed once the necessary information concerning the student's emotional health was received.

(DCPS 13, 14, P 20, 21)

16. The social work update, dated May 4, 2009, consisted of interviews of the student and her mother at their apartment. The information concerning the student's background and history is consistent with all other reports and testimony. The report notes that the student

suffers from headaches, anxiety, and depression but does not contain any detail about these problems. (P 21)

17. The psycho-educational evaluation consisted of interviews with both the mother and the student, the Cognitive Assessment System (CAS), the Beery Developmental Test of Visual-Motor Integration (VMI), and the Wechsler Individual Achievement Test – 2nd ed. (WIAT-2). The evaluation was conducted by _____ has a B.A. in psychology and an M.A. in school psychology. She has been a school psychologist for 10 years, specializing in conducting bilingual assessments. She is certified in N.Y. and D.C.

_____ indicated that she usually uses the Wechsler Adult Scale of Intelligence (WASI) to measure cognitive ability. However, because the student had been tested using the WASI in the past, she chose to use the CAS instead. The student earned a CAS full-scale score of 79, which is within the Below Average Classification. However, there was significant variation on the scales and the student's potential could be higher than the score reflects. The student displayed cognitive weaknesses in the areas of planning and attention.

The student was administered the WIAT-2 to measure her academic achievement. The student tested significantly below her age and grade equivalent in reading comprehension, mathematics, and written expression. She was at or slightly above grade level in word reading, pseudoword decoding, spelling, listening comprehension, and oral expression.

The report concluded that the student's academic needs in planning and attention are not impacting her academic progress. There was speculation that the student's planning and attention needs might be the result of the medications she was taking.

_____ indicated in her testimony that she believes the student does have the symptoms the student describes, but believes the student is capable of going to school now.

(P 21, Testimony of _____)

18. Following the May 8, 2009 eligibility meeting, DCPS provided an IEE letter authorizing Petitioner to obtain a comprehensive psychological evaluation of the student. The evaluation was conducted by interdynamics, Inc., under the supervision of _____. The evaluators interviewed the student's mother as well as the student. They reviewed, *inter alia*, the Eligibility Meeting Report from the May 8, 2009 eligibility meeting, the social work evaluation report of May 4, 2009, the psycho-educational evaluation report of April 29, 2009, the various Physician's Certificate of Pupil's Inability to Attend School, and the student's grades from her VIS instruction. A classroom observation was conducted on June 4, 2009.

The evaluators administered the WAIS-III, the Woodcock Johnson III Tests of Achievement, Form A (WJ-III, Form A), the Comprehensive Test of Non-Verbal Intelligence (C-TONI), and 11 assessments designed to evaluate the student's emotional status. A four page summary of the student's background, education, medical history, and of the documents reviewed is entirely consistent with all other reports and is thorough and accurate.

The student's FSIQ was 95, placing her general cognitive ability in the average range. Her verbal reasoning abilities, verbal comprehension index, performance score, working memory, and perceptual organization index were all in the average range. The student's processing speed abilities were in the low average range. The student's general cognitive abilities were generally in the average range.

The WJ-III was administered to determine the student's academic functioning. The student's reading standard score was low average, her mathematics standard score was low average, and her written language standard score was low average. These scores were lowered because the student has problems with fluency in reading, math and written language. The fluency with which the student performs academic tasks is limited to negligible. Her slowness at completing academic tasks suggests she will have difficulty succeeding in a typical classroom where she will not be able to keep up.

Concerning the student's emotional state the report states as follows:

Clinical measures, projective testing, as well as the clinical interview conducted with [the student] indicate that she is a young woman who meets criteria for Major Depressive Disorder, Recurrent. In the past month her disorder is characterized by depressed mood most of the day, nearly every day, marked diminished interest or pleasure in all or most all activities most of the day nearly every day, insomnia, psychomotor retardation, fatigue, and feelings of worthlessness. The symptoms cause clinically significant distress or impairment in social, and educational functioning.

[The student] also meets criteria for Somatization Disorder. She has endorsed many physical symptoms occurring over the past several years. While doctors have concluded that her previous ankle injuries should not cause this level of debilitation, 'the student's] pain is very real to her. As a result, treatment has been sought, with little improvement, and she has evidenced significant impairment in social and educational functioning. She meets criteria for Somatization Disorder because after appropriate investigation, her pain symptoms and gastrointestinal symptoms could not be fully explained by a known medical condition or the direct effects of a substance.

While all parties working with [the student] understand that her attendance at a traditional school is important to her educational, and social developments, it is this examiner's opinion, that at the current time, her emotional problems continue to impede her ability to access a traditional school. She is a troubled young lady

with a constellation of symptoms that require long term psychotherapy before the goal of attending school will be recognized. At the current time, [the student's] depression as well as her physical complaints are debilitating, and she lacks insight about the function of her physical complaints and their correlation with her emotional functioning. Also, her unmediated learning disorder has probably also been a factor that has impeded her ability to attend school regularly.

The student was given a diagnosis of Learning Disorder NOS, Major Depressive Disorder, Recurrent, Severe and Somatization Disorder. The report recommended that a time frame be developed to transition the student back into the school system. She would need considerable support for this to happen. The student should continue with psychotherapy and a cognitive behavioral approach would be helpful.

(P 17, Testimony of

19. A second meeting was convened on September 10, 2009 to review the independent comprehensive psychological evaluation, and the neurological and psychiatric reports from the Center and to revisit the issue of eligibility for special education. There are no DCPS notes about the meeting. The student's educational advocate took notes and they are part of the record.

Present at the meeting were the student's father, her educational advocate, her social worker from Center, a regular education teacher, two school psychologists, a special education teacher, the SEC, and the attendance counselor. None of the DCPS persons in attendance had ever met the student with the exception of the SEC. The DCPS part of the team determined that the student was not eligible for special education because she was not emotionally disturbed as defined by the IDEA and was progressing adequately academically so was not learning disabled. The school psychologist indicated that in order to qualify for special education services the student needs to come to school. She cannot qualify for ED because the school does not have evidence concerning emotional problems at school since she does not come to school. Likewise, the school would need to determine if she needed specialized instruction based on her performance in a classroom. (P 35, 40, 41, 42, DCPS 2-6, Testimony of

20. On November 6, 2009, a meeting was held to determine if the student was eligible for Section 504 services. The DCPS part of the team determined that the student's emotional problems did not impact her academics, and her problems with sleeping, inattention, and learning were mild to moderate. Therefore, the student was not eligible for Section 504 services. There is an unattributed statement in the DCPS meeting notes that says "[The student] chooses not to attend the school, she does not leave home, she just won't go."

The team did propose a plan to reintegrate the student into the school setting. The proposal included tutoring at home in an amount to be determined, the student to meet with at 10:30 at school, the student to attend Algebra class and then go home.

(P 32, DCPS 25)

21. The SEC at Educational Campus is This is her second year as SEC at this school. She was a special education teacher for 4 years before becoming the SEC. has an M.A. in special needs teaching, and an M.A. in educational administration. She oversees the special education process at the school and attended both eligibility meetings and the Section 504 meeting. testimony about events concerning the student over the past two years is consistent with other testimony.

is of the opinion that the student can participate in the general education curriculum on grade level without any modifications or specialized instruction. She believes that in order to qualify for special education the educational impact must be an academic impact.

does not agree with or She believes the student can come to school. She does not know whether the student actually gets migraines or has gastro-intestinal problems

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 IDEAs 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 (3rd 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).

A. Does the Student Have a Disability?

The IDEA defines a child with a disability as “a child...having ...a serious emotional disturbance...a specific learning disability..., and who, by reason thereof, needs special education and related services” 34 CFR § 300.8(a)(1). This Hearing Examiner finds that the record is insufficient to prove that the student has a learning disability, although it must be noted that the student’s academic success has occurred while she is receiving 1:1 instructional services through VIS. It is quite possible that were the student to receive instruction in a classroom her academic performance would be affected by her problems with processing speed and attention. The following inquiry will focus on whether the student has an emotional disturbance.

Emotional Disturbance is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, that adversely affects a student's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general, pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.7(c)(4)

Thus, the student must have both an emotional disturbance (ED), and an emotional disturbance that adversely affects her educational performance. The evidence is overwhelming that the student meets the criteria for an emotional disturbance. It defies logic that DCPS found that the student did not qualify as emotionally disturbed because she had not been observed in a school setting. In fact, it is a form of cruelty to suggest that a student with a severe school phobia cannot qualify as ED unless she goes to school and participates in a classroom setting.

The student's treating psychiatrist and treating therapist are trained professionals with substantial personal knowledge of the student. Both testified credibly about the student's emotional problems. Likewise the June 2009 clinical part of the psychological evaluation confirmed that the student suffered from depression and somatization. who was the student's VIS teacher for almost a year witnessed the student in physical distress and indicated that she believed the student was unable to attend school as a result of her emotional problems. The only persons who question whether the student is really unable to come to school are the SEC and the school psychologist who conducted the DCPS psychological evaluation. The SEC has no training in psychology, does not know the student very well and could provide no explanation as to why she believed the student was capable of coming to school. Her testimony in that regard was not credible. The school psychologist met the student only once and did not conduct any psychological testing. Again, she provided no explanation as to why she believed the student could attend school. Her testimony in that regard is not credible.

The student meets all of the five listed factors except A.

The student has trouble maintaining interpersonal relations with peers. Both the student and her mother testified that the student does not have friends. Both therapists indicated that the student hardly ever leaves the home without her mother. The student is afraid she is being looked at and judged by adults and peers. The student exhibits inappropriate behavior or feelings under normal circumstances. It is a normal circumstance for students to go to school. The student's school phobia and unwillingness to attend school are inappropriate. The student has been diagnosed with major depressive disorder, for which she takes medication. Lastly and most obvious, the student develops physical symptoms or fears associated with personal and school problems. Whenever the student contemplates attending school she develops nausea and vomiting, problems breathing, and gastro-intestinal problems. All of these symptoms have been exhibited to a marked degree and over a long period of time. The student has an emotional disturbance.

B. Does The Student's Disability Adversely Affect Her Educational Performance?

The question of whether the student's disability adversely affects her educational performance is the crux of the disagreement between Petitioner and DCPS. Neither the IDEA nor its Regulations further define what is meant by adversely affecting educational performance. The District of Columbia Municipal Code is of no help as it merely repeats the language found in the IDEA. *See*, DC Mun. Regs. Title 5 Chapter 30. The courts are split on the question of how narrowly or broadly to interpret educational performance.

1. DCPS' Position

DCPS argues that adversely affecting educational progress means that the disability must impede the ability of the student to learn. This means that the disability must affect the student's academic performance as shown by the student's grades and success on standardized tests and evaluations. It is not sufficient that the impact affects the student's social progress. The student must show a need for modified specialized instruction to access her academics. Even if the student's grades are falling, if she is still passing all of her classes the school district has met its obligations since the education to which access is provided must 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). It need not provide the best possible education.

DCPS cites a number of cases in support of its position. And, indeed, there is a split in the Circuits concerning how broadly to interpret educational progress. However, all of the cases are distinguishable from the present case. In *Loch v. Edwardsville School District No. 7*, 327 Fed. Appx. 647 (7th Cir. 2009), the student suffered from anxiety and depression and stopped attending classes. However, the student's psychological problems had not interfered in her enrollment and attendance at a local community college. The student's own psychiatrist testified that the student did not need medication for anxiety and had denied having anxiety on her last visit. Thus, the court held that the student did not have an emotional disturbance, not that she had a disturbance which did not sufficiently impact on her educational progress. In the present case, the student clearly has an emotional disturbance and could not attend any school at present.

In *Forest Grove School District v. TA*, 2009 US Dist LEXIS 1153, 1156 (D. Or. 2009), on remand from the Supreme Court, the District Court found that the parents had not placed the student in an especially expensive private school because of concerns about his ADHD or trouble with school work, but rather because of their concerns about his drug use and related behavioral problems. The Court correctly stated that the school district was only responsible for learning related symptoms of a disability. The Court did not say that learning related symptoms was limited to academic achievement.

In *Alvin Independent SD v. AD*, 503 F.3d 378, (5th Cir. 2009), the court emphasized that the student not only passed all his classes and met statewide standards, but also made age appropriate social progress and was well liked by his peers and teachers. The student had committed a theft and a robbery. The student's behavioral problems were not the result of his ADHD but socially maladaptive behavior.

The two cases cited by DCPS which best support its position are both out of the 2nd Circuit. In one case the student was found not to have a severe emotional disturbance in part because his educational performance was not adversely affected since the student was receiving passing grades. But the court also found that the student's problems were related to drug use, not an emotional disability. *NC v. Bedford Central Sch. D.*, 300 Fed. Appx. 11 (2nd Cir. 2008). In *A.J. v. Bd. of Ed., East Islip Union Free Sch. D.*, 2010 US Dist. LEXIS 1371 (E.D.N.Y. 2010), the court noted that the law in the second circuit supports a finding that in order to qualify for special education the student must be impeded in his ability to learn and must need special education in order to be successful academically. There are other second circuit cases that strongly support Petitioner. *See infra, p. 21.*

There is no case law in the District of Columbia supporting this narrow definition of educational performance, nor does DCPS cite to any such cases. Petitioner's argument concerning the meaning of educational performance is supported by case law in many circuits, including the District of Columbia, and better comports with the statutory interpretation and purpose of the IDEA.

2. Petitioner's Position

Petitioner argues that a student who cannot access a regular classroom because of emotional problems is eligible for special education as emotionally disturbed, even if they are achieving academically because of specially provided instruction.

Petitioner first argues that this student does require special education in order to be successful academically. Special education is defined as specifically designed instruction intended to meet the unique needs of a child with a disability and is not limited to a typical school environment and must be provided in a variety of other settings. 34 CFR § 39 (b)(3), D.C. Mun. Regs. Tit. 5 § 3000. Specially designed instruction includes the adaptation of "content, methodology, or delivery of instruction ... to ensure access to the general curriculum. In this case the student requires 1:1 instruction at home in order to access the curriculum. The student cannot access the curriculum if her instruction is delivered in a school setting. The fact that the student does not require curriculum modification does not mean that she is not eligible for special education.

Adverse impact on educational performance includes an ability to access the regular classroom and school building. DCPS suggests that the student has appropriately advanced from grade to grade with satisfactory academic achievement. However, the facts suggest otherwise. As a result of her social phobia and depression the student has been unable to attend school since 8th grade. As a result she failed almost all of her courses for two years and had to repeat both 8th and 9th grade. The student should be in the 12th grade based on her age, but is only in the 10th grade, precisely because of her inability to access her education. Even now that she is getting VIS, she is not receiving sufficient instruction to receive a full year of credit for one year of work and she has not been provided with any electives.

The student has been unable to access the general education curriculum because she has been unable to be educated in the regular classroom. In the Supreme Court's seminal case on special education, *Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley* 458 U.S. 176 (1982), the Court made clear that adverse educational impact implicitly contemplates the ability to function appropriately in the regular education classroom and not the ability to function appropriately in some other setting. As the court said, "[w]hen the [disabled] child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be an important fact in determining education benefit.[. . .]" The Court in *Rowley* went on to say "[w]e do not hold today that every [child with a disability] who is advancing from grade to grade in a regular school system is automatically receiving [FAPE]." In both of these quotations, the Court made clear that the advancing from grade to grade was contemplated to be in a regular school setting and even then, the Court said that that still did not mean that the student was ineligible for special education. Here, even if is deemed to be advancing from grade to grade, she is certainly not doing it in a regular school setting.

That a student is eligible for special education when they cannot function in a regular education setting is also reinforced by the IDEA at 34 C.F.R. 300.101 (c), which states "each state must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade."

In its discussion accompanying the publication of the final 2006 regulations, the U.S. Department of Education explained the language of these provisions:

Section 300.101(c) provides that a child is eligible to receive special education and related services even though the child is advancing from grade to grade. Further, it is implicit from paragraph (c) of this section that a child should not have to fail a course or be retained in a grade in order to be considered for special education and related services. A public agency must provide a child with a disability education and related services to enable him or her to progress in the general curriculum, thus making clear that a child is not ineligible to receive special education and related services just because the child is, with the support of those individually designed services, progressing in the general curriculum from grade-to-grade or failing a course or grade. 71 Fed Reg. 46,580 (2006).

Case law in the District of Columbia and elsewhere supports this more expansive understanding of educational performance. In *N.G. et. al. v. District of Columbia, et. al.*, 556 F. Supp. 2d 11 (2008), the U.S. District Court for the District of Columbia found an adverse impact on educational performance, even though the student in question who was diagnosed with depression and ADHD was making academic progress. The court noted that the student's success resulted from the accommodations provided by the private schools where her parents had unilaterally placed her. In that case, the hearing officer at the

administrative level found that the student was not eligible for special education because, despite her emotional problems, the student was making appropriate progress at her private school. In rejecting this reasoning, the court in *N.G.* noted that such a standard, where students making adequate progress in an appropriate program could be automatically disqualified from receiving the very services enabling their success, is “woefully short of what the statute requires.” Instead, the court relied on broader information about the student’s needs and psychological functioning to conclude that she could not have realistically been expected to achieve passing marks and advance from grade to grade without some kind of assistance. As the court noted: “[t]hat N.G. can perform well in precisely the school environment recommended by her doctors does not mean she is not disabled or that her disabilities do not adversely impact her educational performance. *Id.*”

Just as in *N.G.*, any academic success that the student may have is due solely to the fact that she receives instruction at home. Although DCPS may dispute this, the evidence here undeniably shows that she cannot function in a regular classroom at this time.

Likewise, in *Bd. of Ed. Of Montgomery County v. S.G.*, 2006 WL 544529 (D. Md. 2006), *aff’d*, 230 Fed. Appx. 330 (4th Cir. 2008), the student was diagnosed with Schizophrenia. Her cognitive abilities and grades were high. The school district argued that the student was not eligible for special education because there was no adverse impact on her academics and she did not require modifications to the curriculum. The court rejected this definition of educational impact as too narrow and noted that the student required instruction delivered in a therapeutic environment that allowed her to deal with her condition. The court held that general education instruction provided in a therapeutic setting constitutes “special education” under the IDEA. This is exactly the kind of instruction needed by this student.

Lastly, *Gagliardo v. Arlington Central School District*, 489 F.3d 105 (2nd Cir. 2007) is factually similar to the present case. In *Gagliardo*, the student was classified with an emotional disturbance because he suffered from depression and social anxiety. In ninth grade the student started experiencing anxiety about attending school. As a result his grades declined. In 10th grade the student refused to attend school. The student began an outpatient mental health program and the social worker indicated that the student could not return to the public school as yet, but required a structured educational setting. Home tutoring was suggested and the school district began providing home tutoring services.

The student had a high average IQ, and average and superior achievement scores. The student attempted to return to his public school for his junior year but refused to attend classes. The student’s treating physician determined that the student could not attend classes due to his severe anxiety and depression. Thereafter the student received home schooling. The parents obtained a

psychiatric evaluation of their son. The evaluation recommended that the student would benefit from an alternative placement with a small teacher to student ratio and a therapeutic environment. The psychiatrist emphasized that it was urgent that the student reintegrate into a school setting and that prolonged home instruction would aggravate the problem. The school district readily classified the student as emotionally disturbed and eligible for special education. The dispute in the case is merely over whether the student was required to attend the school district's offered private placement or whether the district could be required to reimburse the parents for their own chosen school.

In sum, the facts of this case, the relevant statutes, and the case law support a finding that the student is eligible for special education as a student with an emotional disturbance. The student's disability has had an academic impact on the student in that she has been held back two grades as a result of not attending school and is not taking a full course load at present. Further, the student's grades and achievement have been obtained in a setting where accommodations have been made for her disability, including schooling at home on a 1:1 basis. Also, educational impact covers more than academic achievement. The student is educationally impacted because she cannot receive instruction in a regular classroom and because she is socially isolated.

DCPS has denied the student FAPE by failing to find her eligible for special education and failing to provide her with the specialized instruction and related services her ED requires.

C. Remedy

Unfortunately Petitioner has provided few suggestions and even less information concerning an appropriate remedy for this student beyond continuing her VIS services at the level of 4 hours a day, and providing appropriate counseling. From a review of other cases and discussions of the student's particular diagnosis it seems clear that there must be a coordinated effort amongst the school, the family, and the student's therapists to develop a plan to eventually transition the student into the classroom. Use of wrap around services might be beneficial. It also seems likely that the student will need to attend a therapeutic school that can provide the trained emotional support she needs at all times during the school day, and that has small classes and a small student to teacher ratio. However, there is no evidence in the record from which the Hearing Officer can develop a proper transition plan or determine an appropriate eventual placement for the student.

testified that if the student is found eligible for special education, he will not be able to provide the student with counseling services per his contract with DCPS. A way should be explored to allow to continue counseling the student. Perhaps he can provide the counseling services as part of wrap around services through First Home Care.

VII. SUMMARY OF RULING

DCPS has denied the student FAPE by failing to find her eligible for special education under the classification of Emotional Disturbance.

VIII. ORDER

It is hereby **ORDERED** that

1. No later than 15 school days from the issuance of this decision, DCPS shall convene an IEP meeting in order to develop an IEP for the student and to determine placement. The IEP team shall develop a coordinated plan to transition the student into the classroom that calls for cooperation among the student, the student's family, the school, and the student's therapists.
2. Until such time as the student is able to attend classes in a school setting, DCPS shall provide the student with 4 hours per day of Visiting Instructional Services at the student's home.
3. DCPS shall provide the student with two hours of therapy per week.
4. Any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

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: February 1, 2010