

**DC Office of the State Superintendent of Education**  
 Office of Review & Compliance  
 Student Hearing Office  
 1150 5<sup>th</sup> Street, S.E.  
 Washington, D.C. 20003  
 CONFIDENTIAL

<p>[Parent], on behalf of [Student],</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools,</p> <p style="text-align: center;">Respondent.</p>	<p>Case</p> <p style="text-align: center;">HEARING OFFICER'S DETERMINATION</p> <p>April 1, 2009</p> <p><u>Representatives:</u></p> <p>Norman Robinson, Petitioner</p> <p>Harsharen Bhuller, Respondent</p> <p><u>Independent Hearing Officer:</u></p> <p>Jim Mortenson</p>
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 STUDENT HEARING OFFICE  
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**I. PROCEDURAL BACKGROUND**

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 1:00 p.m. on March 17, 2009. The hearing concluded on March 25, 2009, upon the filing of Petitioner's post-hearing brief<sup>1</sup>. The due date for the Hearing Officer's Determination (HOD) is April 2, 2009, in accordance with the Blackman/Jones Consent Decree. This HOD is issued on April 1, 2009.

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<sup>1</sup> The Respondent declined the opportunity to file a post-hearing brief.

The hearing in this matter was conducted and this decision is written pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., and D.C. Mun. Regs. tit. 5, Chap. 30.

Present at the due process hearing were:

Petitioner's Counsel, Norman Robinson, Esq.

Respondent's Counsel, Harsharen Bhuller, Esq.

Petitioner, Student's Mother

Student

Three witnesses testified at the hearing. The Petitioner presented two witnesses and the Respondent presented one. The witnesses were:

Petitioner's witnesses:

Petitioner (P)

Dr. Mitchell Hugonnet, Child Guidance Clinic (M.H.)

Respondent's witness:

Special Education Coordinator,

School

A prehearing conference was held on February 9, 2009, and a prehearing order was issued on that date. An untimely response to the complaint was filed by the Respondent on February 6, 2009.

Six documents were disclosed and filed by the Petitioner on March 11, 2009<sup>2</sup>. One of these documents was objected to by the Respondent and was not admitted into evidence.

Petitioner's Exhibits 1, 2, 3 and 5, were admitted<sup>3</sup>. The exhibits are as follows:

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<sup>2</sup> The parties were to disclose and file documentary evidence by 5:00 p.m. on March 10, 2009, pursuant to the Prehearing Order dated February 9, 2009. Neither party met this deadline. Thus, the IHO refused to reject either party's originally disclosed documents

- P 1 - Individualized Education Program (IEP), April 22, 2008
- P 2 - Letter from Robinson to Gasque, November 6, 2008
- P 3 - Psycho-Educational Evaluation, August 14, 2008
- P 5 - Transcript, September 24, 2008

Eight documents were disclosed and filed by the Respondent on March 11, 2009<sup>4</sup>.

None of these documents were objected to by the Petitioner and were admitted into evidence as Respondent's Exhibits 1 through 8 (R 1 – R 8). The exhibits are as follows:

- R 1 - IEP, April 22, 2008
- R 2 - Letter of Invitation, April 11, 2008
- R 3 - Psycho-Educational Evaluation, August 14, 2008
- R 4 - Student Verification Form, January 27, 2009
- R 5 - Student Withdrawal/Record Transfer Form, January 27, 2009
- R 6 - Attendance Summary, August 18, 2008 to January 27, 2009
- R 7 - Truancy Referral Form, January 22, 2009
- R 8 - Students on Suspension Report, March 10, 2009

## II. ISSUE

Whether the Respondent failed to implement the Student's IEP? Specifically, whether DCPS failed to provide individualized instruction to the Student required by the IEP?

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based on not meeting the five-day disclosure deadline under 34 C.F.R. § 300.512 because neither party would be prejudiced by the late filing.

<sup>3</sup> The disclosure list included P 4, a transcript dated November 6, 2008. However, the listed document was not included in the disclosures filed with the Student Hearing Office. A tabbed copy of the disclosures was not filed directly with the IHO on the day of hearing, as required by the Prehearing Order dated February 9, 2009. Thus, P 4 does not exist.

<sup>4</sup> A ninth document that was not disclosed with the others was created after the disclosure due date. It was objected to and not admitted based on lack of relevance and the five-day rule and the IHO did not obtain a copy of it.

### III. FINDINGS OF FACT

1. Student is a year old learner enrolled at a High School within the School District. P 1, R 1. The Student's IEP indicates the Student has been determined eligible for special education and related services under the definition of mental retardation. P 1, R 1. There is a question whether this "label" is correct. T of P 3, R 3.
2. The IEP lacks clear statements of the Student's present levels of academic achievement and functional performance. P 1, R 1. The IEP does state the Student's disability "severely impacts ability to perform on grade-level" in academics such as mathematics and language arts. P1, R 1. Data from September 11, 2007, show the Student could, at that time, perform at the fourth grade level in mathematics and first to second grade level in reading. P 1, R 1. The IEP was revised in April, 2008. P 1, R 1. The Student's academic progress, and the District's performance, are to be measured "under non-standard conditions with permissible accommodations." P 1, R 1. The Student is to receive 25 hours per week of specialized instruction and 30 minutes per week of school counseling. P1, R 1. Other supplementary aids, services, and program modifications, listed as "Accommodations/ Modifications" in the IEP, are:

Allowance of cooling-off period, time-out area in class, Allowance of extra think time when awaiting oral response from student or expecting student to follow through with request, Assistance with interpretations of instructions, Behavioral support, Directions read aloud, Extended time, Number tables or math fact sheets, Questions read aloud, Read directions/test to student, Reduced, minimalized distractions, Specific limits, clear consequences defined in advance – consequences in effect immedia [sic.]

P 1, R 1. The post-secondary goals in the IEP are:

Employment:	Summer employment
Community Participation:	100 hours of community service
Post-Secondary Education and training:	Training School
Independent Living:	plans to live on his own

P 1, R 1. No transition services are indicated and the courses of study for 9<sup>th</sup> grade, to reach the post-secondary goals are:

English 1, Algebra I, World History, Biology I, Developmental Reading, English Resource, Math Resource[.]

No courses for other grades are listed in the IEP. P 1, R 1.

3. The Student's grades were all F's in his four classes as of January 16, 2009. R 5.
4. The Student's attendance for at least the past year has been very poor. In the IEP team notes for the April 22, 2008, IEP team meeting it states:

His attendance was sporadic at best, and, in general, he rarely attended class. When he did, he would sometimes attempt to complete class assignments, but he struggled with grasping concepts and material.

P 1, R 1. The Student missed 74 days of school during the 2008-09 school year by the time of the due process hearing. R 7. Prior to March, 2009, no proposal to assess why the Student was not coming to school was made. T of T of testified credibly that she thought a functional behavioral assessment (FBA) should be done, and it hadn't before now, so they did not know why the Student was not attending. She also testified, credibly, that she wanted to create a behavior intervention plan (BIP) for the Student due to his excessive absences.) No interventions were attempted to address the attendance issues. R 7. Staff reviewed the Student's attendance record on October 14, 2008, and again on November 16, 2008, when truancy was noted in his record. R 4. It was not until January 22, 2009, that a letter was sent to the parent stating "Your son has

demonstrated a lack of interest in attending School.” The letter stated that the Student was, as a result, being removed from the rolls. R 4.

the Student’s case manager as of late, also suspected the Student may not have been coming to class due to not understanding the material. T of

5. During the summer of 2008 the Student was provided a thorough psycho-educational evaluation by the Child Guidance Clinic as a result of a referral by the Honorable Zoe Bush, Superior Court of the District of Columbia Family Court. P 3, R 3. The evaluation report was completed on August 14, 2008. P 3, R 3. T.W. testified that the Respondent was provided a copy of the report on March 13, 2009. T of This testimony is contradicted by the fact that the Respondent disclosed the report with its prehearing disclosures on March 11, 2009. That disclosure includes a facsimile record indicating the Petitioner’s Counsel faxed the document to the Respondent on October 30, 2008. This IHO finds that it is more likely than not the Respondent received the document on October 30, 2009, and that it either was not properly filed in the Student’s record, or simply did not see and review it prior to it being given to her on March 13, 2009.
6. The psycho-educational evaluation was to examine the Student’s academic ability and measure his cognitive and personality functioning. P 3, R 3. Woodcock-Johnson Tests of Achievement-III scores showed the Student functioning at a first to second grade level in reading and writing, and fourth grade level in math. P 3, R 3. The evaluation diagnosed the Student with a learning disability and specifically rejected a diagnosis of mental retardation. P 3, R 3. The evaluation concluded that the Student’s “limited reading and writing ability has lead to his

continued school truancy and general dislike of school. He likely feels that school is of little value considering that he has attended school for several years and has few academic skills to show for it.” P 3, R 3. The report also explains how the Student’s poor academic performance affects his self-esteem, and fuels insecurity. P 3, R 3. The report states that the Student’s drug use may be attributable to “[h]is increased sensitivity and heightened awareness of his cognitive defects. . . .” P 3, R 3. These findings are logical and credible.

#### IV. CONCLUSIONS OF LAW

1. The Federal Regulations at 34 C.F.R. § 300.17 state:
  - Free appropriate public education or FAPE means 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 SEA, including the requirements of this part;
  - (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
  - (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.
  
2. The Respondent argues that because the Student was truant for most of the current school year, he did not avail himself to the services in the IEP and, therefore, DCPS did not fail to implement the IEP. The Respondent cited, in closing argument, Hinson v. Merritt Educational Center, 579 F.Supp.2d 89, 103 (D.D.C . 2008), to support this position. In Hinson the parent asserted that because the Student had failing grades, the IEP was inappropriate. Id. The student in Hinson had just recently been determined eligible for services before the dispute leading to the due process hearing erupted. Id. at 96: The issues in Hinson did not include whether the IEP had been implemented, but rather whether the Student was timely identified and whether the IEP and placement were appropriate. Id. at 102-104.

However, the Student's attendance was raised as a defense by the LEA, which argued that the student's poor grades were attributable to a failure to attend, a position the IHO agreed with. Id. at 103. The Court stated:

Here, there is evidence that the student has been absent from school for substantial periods of time. Although the Parties disagree on whether all of the student's absences were voluntary, the Hearing Officer found that both Plaintiff and Defendant agree that "the student did not attend classes." A.R. at 5. In light of extensive absences throughout the school year and giving proper deference to the Hearing Officer's Determination, Plaintiff has not shown that the student's poor academic performance resulted from a lack of appropriate services rather than the student's own extended absences. The Hearing Officer's conclusion that was not "availing himself of educational benefit" under these circumstances was a reasonable determination. Indeed, it is difficult to say how the Hearing Officer could have determined that the services in the IEP were not working when the student had not yet taken advantage of those services.

Id. Because the issue in the present case is not whether the IEP was appropriate, but rather whether it was implemented, and because of the unique factual evidence in this case, the IHO's and Court's determination in Hinson is not applicable here. The evidence in this case shows the Student failed to attend due to the Respondent's failure to ensure he could participate and progress in the general curriculum, and then removed him from the rolls, ensuring the IEP could not be implemented, and denying the Student a FAPE.

3. An IEP must be reviewed by the IEP team:

periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and [the IEP team]

(ii) Revises the IEP, as appropriate, to address —

(A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;

(B) The results of any reevaluation conducted under § 300.303;

(C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);

(D) The child's anticipated needs; or

(E) Other matters.

(2) Consideration of special factors. In conducting a review of the child's IEP, the IEP Team must consider the special factors described in paragraph (a)(2) of this section.

34 C.F.R. § 300.324(b).

4. 34 C.F.R. § 300.324(a)(2) states, in relevant part:

The IEP Team must —

(i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;[.]

5. The Student's failure to attend school is a behavior issue. This is obvious based on the facts in the record, such as the Psycho-Educational Evaluation of August 14, 2008 (P 3, R 3), and the testimony of [redacted] that he needs an inclusive program to help keep him in school and a FBA and BIP due to his excessive absences. It is noted that [redacted] was only recently put on the Student's case and given her perspective, the Respondent may have addressed the Student's behavior with regard to attendance earlier. There is no evidence staff who followed the Student prior to [redacted] did anything to help the student. Staff, after half a year of school, expelled him and cut him off from a FAPE allegedly because he "demonstrated a lack of interest[.]" Indeed, it is clear that until [redacted] was assigned to the Student's case, the Respondent demonstrated a lack of interest in the Student. There is no other logical explanation for either the failure to address his attendance issues, or the lack of education he has received from the Respondent, despite being identified as a child in need of special education and related services so that he could have the opportunity to be involved in and progress in the general curriculum. The failure to demonstrate any meaningful progress during the entire 2007-2008 school year is prime evidence of this. An FBA and BIP will be required, in part, to revise the IEP to be appropriate for the Student and so that it can be implemented.
6. The Student cannot read or demonstrate math skills at or near the level of his peers. The evidence shows he made essentially no progress on key academic

skills during the 2007-2008 school year. He is barely at a second grade level in reading and writing and nearly to a fifth grade level in math, and this was no improvement from the prior year. These academic deficiencies do and will continue to impede his progress at the secondary level. The purpose of special education is not to advance a child with a disability from grade to grade regardless of what he or she learns (or does not). Rather, the purpose, when it comes to specially designed instruction, is:

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(a)(3). In this case, it was likely the failure of the Respondent to provide appropriate special education services that led to his truancy. He was in a classroom environment, with his peers, and he could not function academically. This will have to be more clearly determined by the FBA. However, the evidence is sufficient to show that this is not a case of a Student simply "not availing himself" to the IEP. Rather, he was so far behind his peers, and so sensitive to this fact, that it was difficult for him to be present and perform and maintain his dignity. Since his teachers and other school staff did not grasp and deal with this issue, the Student found a way to cope on his own, and skipped school. Appropriate services would have prepared him to be involved in and able to progress in the general curriculum. This denial of a free appropriate public education must be remedied by the Respondent. Because the Petitioner failed to present any supporting evidence of the Petitioner's claim that the Student must attend this will not be awarded. The Student must be provided a

full, comprehensive evaluation to determine whether the Student continues to have a disability, and the educational needs of the Student and to establish:

- (ii) The present levels of academic achievement and related developmental needs of the child;
- (iii)(B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and
- (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

34 C.F.R. § 300.305(a)(2). The evaluation must also include age appropriate transition assessments related to training, education, employment, and, independent living skills. The results of the evaluation process, including the FBA, will be used to review and revise the IEP, which must be implemented by the Respondent, so that the Student will be provided the opportunity to close the performance gap between where his current academic achievement is and the educational standards of the District of Columbia so that the Student can graduate with a diploma.

### **DECISION**

1. The Respondent failed to implement the Student's IEP and denied him a free appropriate public education.

### **VI. ORDER**

1. Within 20 calendar days of the date of this decision, the Respondent will complete a full, comprehensive evaluation of the Student, including review of existing data, consistent with the requirements of 34 C.F.R. §§ 300.303-300.311, D.C. Mun. Regs. tit. 5, Chapter 3005 (2007), and the conclusions in this Order.

2. Each assessment of the evaluation will result in an assessment report pursuant to D.C. Mun. Regs. tit. 5, Chapter 3006 (2007).
3. The IEP team must meet and review the evaluation results and develop an evaluation report, consistent with D.C. Mun. Regs. tit. 5, § 3006.5 (2007). This meeting must occur within 5 calendar days of the completion of the evaluation. The Parent and Student must be provided at least three alternative times to meet for a sufficient amount of time to review and discuss the assessment reports and draft an outline of the evaluation report. The final evaluation report must be provided to the Parent within three business days of the IEP team meeting, along with at least three proposed times to meet to review and revise the IEP, based on the evaluation report, within five calendar days of the provision of the evaluation report.
4. If the Petitioner fails to select any of the presented meeting times, the Respondent shall inform the Petitioner of the date and time it will proceed with the meeting, and must proceed with the meeting with or without the Petitioner.
5. The IEP must be designed around the post-secondary goals, as determined through the age appropriate transition assessments related to training, education, employment, and, independent living skills. The annual academic and functional goals must be designed to move the Student toward being involved in and progressing in the general curriculum and being able to meet the District of Columbia educational standards for graduation at some point in the future. The special education and related services must be designed to help the Student reach the annual goals. The educational placement of the Student must be the least restrictive environment possible in attempting to reach the annual goals. This will be a setting in which the Student will receive intensive services to aid his

academic achievement, and one in which the Student's attendance will be addressed with positive behavioral interventions as described in a behavior intervention plan. Because the Petitioner did not provide supporting evidence for the requested \_\_\_\_\_ School, the IHO declines to order placement at that school. However, this does not preclude the IEP team from determining that placement at \_\_\_\_\_ would be appropriate.

6. The IEP must be monitored by the Respondent, at least quarterly, for full implementation by staff. Monitoring, at a minimum, must include verifiable evidence collected and maintained by the Respondent, of IEP implementation, which can be accessed by the Petitioner or her designee at any time. Monitoring must occur until the Student graduates or otherwise declines further education from the Respondent.

**IT IS SO ORDERED.**

Dated this 1st day of April, 2009.



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Jim Mortenson, Esq.  
Independent Hearing Officer

## **NOTICE OF APPEAL RIGHTS**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).