DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE

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STUDENT HEARING OFFICE

STUDENT, **By and through PARENT,**[1] ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	)))))))))))	**Case No. 2012-0398** **Bruce Ryan, Hearing Officer** **Issued: August 10, 2012**

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed May 29, 2012, on behalf of a year old student (the "Student") who resides in the District of Columbia and who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. Petitioner is the Student's mother.

Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") under the IDEA by (1) failing to provide her with an appropriate educational placement, and (2) failing timely to conduct a recommended psychiatric assessment, as described further below.

DCPS filed its Response to the Complaint on June 19, 2012. DCPS contends that (1) her neighborhood DCPS senior high school ("High School") can properly implement the Student's current individualized education program ("IEP"), and (2) the Student's IEP team did not authorize a psychiatric assessment, and a psychiatric assessment is not warranted for the Student.

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

On June 21, 2012, the parties held a resolution meeting, which did not resolve the Complaint. The parties also did not agree to end the statutory 30-day resolution period early. The resolution period therefore ended on June 28, 2012, and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") is due to expire on August 12, 2012.

On June 28, 2012, a Prehearing Conference ("PHC") was held to discuss and clarify the issues and requested relief. At the PHC, the parties agreed to schedule the due process hearing for August 2, 2012, and if necessary, August 3, 2012. A Prehearing Order ("PHO") was issued on June 29, 2012. The parties then filed their five-day disclosures, as required, by July 26, 2012.

The Due Process Hearing was held in Hearing Room 2006 on August 2 and 3, 2012. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-43.

Respondent's Exhibits: R-1 through R-5.

In addition, the following Witnesses testified on behalf of each party:

Petitioner's Witnesses: (1) Parent-Petitioner; (2) Educational Advocate ("EA"); (3) Therapist; and (4) Assistant Education Director, Private School.

Respondent's Witnesses: DCPS presented no witnesses.[2]

Oral closing arguments were presented on the record at the conclusion of the hearing.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513,

[2] DCPS' five-day disclosures identified the Special Education Coordinator ("SEC"), Social Worker, and Special Education Teacher at High School as possible witnesses, but none of them were presented at the hearing. DCPS argued in closing that Petitioner failed to meet her burden of proof, thereby relieving DCPS of any evidentiary duty to rebut her evidence.

and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*"). The statutory HOD deadline is August 12, 2012.

III. ISSUES AND REQUESTED RELIEF

As specified in the PHO, the issues presented for determination at hearing are:

(1) Failure to Provide Appropriate Placement — Has DCPS denied the Student a FAPE by failing to provide an appropriate educational placement, as of May 2012, for the following reasons:

(a) High School cannot implement the Student's current IEP because it offers only inclusion-setting classrooms;

(b) High School cannot implement the Student's current IEP because it has only three teachers who are certified in both special education and content area, and thus the Student is not able to obtain her Carnegie Unit credits to graduate with a high school diploma as provided in her IEP; and

(c) The Student is not receiving the special education services to which she is entitled under her current IEP (*i.e.*, 26 hours per week outside of the general education setting)?

(2) Failure to Evaluate (Psychiatric) — Has DCPS denied the Student a FAPE by failing to conduct a psychiatric assessment of the Student, as recommended by her MDT/IEP Team in May 2012 to determine her possible need for residential placement, given (*inter alia*) the Student's recent psychiatric hospitalizations, increasing depression, and running away from home?

Petitioner requests that DCPS be ordered (a) to place and fund the Student at Private School; (b) to fund the parents' independent psychiatric assessment; and (c) to reconvene an MDT meeting to review the psychiatric evaluation, review and revise the Student's IEP as appropriate, and discuss and determine whether the Student requires a change in placement. *See Prehearing Order,* ¶ 7. [3] As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issues specified above. 5-E DCMR §3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005).

IV. FINDINGS OF FACT

Based upon the evidence presented at the due process hearing, this Hearing Officer makes the following Findings of Fact:

1. The Student is a ·year old student who is a resident of the District of Columbia. Petitioner is the Student's mother. *See Parent Test.; P-2.*

[3] As of the PHC, Petitioner's requested relief also included funding of her compensatory education program for alleged denials of FAPE from May 2, 2012 through the 2012 summer. This request was withdrawn at hearing.

2. The Student has been determined to be eligible for special education and related services as a child with Multiple Disabilities under the IDEA, including specific learning disabilities. *See P-27* (12/01/2011 Final Eligibility Determination Report).[4] She has also been diagnosed with a mood disorder and Attention Deficit Hyperactivity Disorder ("ADHD"). *Id., p. 3. See also Parent Test.* The Student's general intellectual ability has been measured within the Average range when compared to others her age. *P-10, p. 7.*
3. Since May 2011, the Student has attended her neighborhood DCPS senior high school ("High School"), where she was in the 11th grade during the 2011-12 school year. Prior to that date, she attended a D.C. public charter school for which DCPS acted as the local educational agency ("LEA"), where she was retained in the 10th grade. *See Parent Test.; P-2; P-20.*
4. On or about November 30, 2011, DCPS developed an initial IEP for the Student that provided 13 hours per week of Specialized Instruction in a General Education setting and 30 minutes per week of Behavioral Support Services in an Outside General Education setting. *See P-23, p. 6.*
5. Petitioner did not agree with the 11/30/2011 IEP and filed a due process complaint. The complaint resulted in a March 2012 settlement agreement ("SA"), in which DCPS agreed to reconvene a meeting of the Student's MDT/IEP team to review and revise the IEP and to discuss and determine placement. *See P-34.* The parties agreed that the SA was in full satisfaction and settlement of all claims as of that date, and Petitioner then withdrew the complaint with prejudice. *Id.*
6. On or about May 2, 2012, DCPS convened an IEP Team meeting with Petitioner in attendance pursuant to the terms of the March 2012 settlement agreement. *R2-1; P-35.*
7. At the May 2, 2012 meeting, the MDT/IEP Team determined that the Student was in need of a more restrictive program, in which the Student would receive 26 hours of Specialized Instruction in an Outside General Education setting, plus 1.5 hours per week of Behavioral Support Services. *P-36; R2-2; R3-6.* The IEP Team determined that more

[4] The 12/01/2011 eligibility determination resulted from a settlement agreement in which DCPS agreed to fund and review Petitioner's independent comprehensive psychological evaluation, independent speech and language evaluation, independent functional behavioral assessment ("FBA"), and independent vocational assessment of the Student. *See P-4.*

intervention was needed due to her emotional/behavioral issues and declining attendance,[5] and that the Student requires specialized support outside of the general education setting as her least restrictive environment ("LRE"). *R3-7. See also EA Test.; Parent Test.*

8. At the May 2, 2012 meeting, the IEP Team also determined that High School was able to implement the IEP and was an appropriate location of services for the Student. *R2-2.*
9. At the May 2, 2012 meeting, Petitioner and the Student's Educational Advocate agreed with the IEP revisions, but disagreed that the IEP could be implemented at High School. *P-35* (EA meeting notes), p. 3. They believed that "[t]he severity and pervasiveness of [Student's] depression warrants consideration of either placement in a residential facility or a full-time therapeutic day program." *Id.*[6] They therefore requested a change in placement/location of services to an appropriate alternative school/program that could meet the Student's needs. *See EA Test.; Parent Test.*
10. In response to Petitioner's concerns expressed at the May 2, 2012 meeting, the IEP Team discussed the possibility of placing the Student at a different school that could provide the full-time therapeutic day program that Petitioner believed was needed. *See EA Test.; Parent Test.; Therapist Test.* During this discussion, the Special Education Coordinator ("SEC") chairing the meeting stated that she would forward the Student's file to DCPS' central administrative offices for review of alternative special education placements by the so-called "LRE Site Committee." *Id. See also P-35* (advocate meeting notes). To date, no action by this committee has been reported back to the IEP Team.
11. At the May 2, 2012 meeting, Petitioner also requested that DCPS either conduct or fund a psychiatric evaluation to ascertain the Student's possible need for residential placement. *P-35, p. 3. See also EA Test.; Parent Test.* DCPS declined to conduct this evaluation.
12. In June 2012, the Student received failing final grades in most of her subjects, including English, Principles of U.S. Government, Physics, and Health Education. *See P-40.* In several subjects, teachers noted the Student's excessive absences. *Id. See also R5*

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[5] Among other things, the IEP Team received reports that the Student was sleeping in class, not performing her school work, walking the halls during classes, displaying variability in mood, and refusing to attend her weekly outside therapy sessions. *See EA Test.; Parent Test.; Therapist Test.; P-35* (advocate meeting notes).

[6] At the meeting, Petitioner also reported that the Student had recently been hospitalized psychiatrically at Children's National Medical Center for running away from home and self-mutilation (cutting). *P-35, p. 2; EA Test.; Parent Test.; Therapist Test.*

(06/13/2012 IEP progress report noting that poor attendance has impacted growth). As a result, the Student must repeat 11th grade in the 2012-13 school year. *See Parent Test.; EA Test.*

13. Since the May 2012 IEP meeting, DCPS has taken no further action to propose any alternative school placement that can fulfill the requirements set forth in the Student's IEP or to convene another MDT/IEP Team meeting for that purpose.
14. The evidence presented by Petitioner is insufficient to prove at this time that the Student's May 2012 IEP requiring 26 hours per week of specialized instruction in an Outside General Education setting cannot be implemented at High School during the 2012-13 school year.

V. DISCUSSION AND CONCLUSIONS OF LAW

As the party seeking relief, Petitioner carries the burden of proof on each issue. *See* 5-E DCMR §3030.3; *Schaffer* v. *Weast,* 546 U.S. 49 (2005). "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a Free Appropriate Public Education (FAPE)." 5-E DCMR §3030.3. The hearing officer's determination is based on the preponderance of the evidence standard, which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof on either Issue 1 (inappropriate educational placement) or Issue 2 (failure to evaluate).

Issue 1: Failure to Provide Appropriate Placement

FAPE means "special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include ***an appropriate preschool, elementary school, or secondary school education in the State involved***; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9) (emphasis added); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1. The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia,* 561 F. Supp. 2d 63, 65 (D.D.C. 2008)

(*citing Honig v. Doe,* 484 U.S. 305, 311-12 (1988)). *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. An "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Anderson* v. *District of Columbia,* 109 LRP 18615 (D.D.C. 2009), slip op. at 6, *quoting Board of Education* v. *Rowley,* 458 U.S. 176,200,207 (1982); *see Kerkam v. McKenzie,* 862 F. 2d 884 (D.C. Cir. 1988).

"Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes ***offering placement in a school that can fulfill the requirements set forth in the IEP.***" *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (emphasis added). Moreover, local statutory law in the District of Columbia requires that "DCPS shall ***place*** a student with a disability in ***an appropriate special education school or program***" in accordance with the IDEA. D.C. Code 38-2561.02 (b) (emphasis added). *See also Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), *citing McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming "placement based on match between a student's needs and the services offered at a particular school"); *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991) ("If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school."). Educational placement under the IDEA must be "based on the child's IEP." 34 C.F.R. 300.116 (b) (2). DCPS must also ensure that its placement decision is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA. *See* 34 C.F.R. §§ 300.114-300.116.

In this case, Petitioner claims that DCPS has denied the Student a FAPE by failing to provide an appropriate educational placement because High School allegedly cannot implement the requirements of the Student's May 2012 IEP. Specifically, Petitioner alleges that High School does not have the program and staff capable of providing 26 hours of specialized instruction in an Outside General Education setting to a child with the Student's particular disabilities and educational needs whose projected exit category is a high school diploma.

Petitioner's witnesses testified that, at least as of November 2011, they understood that High School generally offered only "inclusion-model" classrooms (*i.e.*, a general education setting with non-disabled peers) for specialized instruction, except for certain intellectually disabled students. *See EA Test.; Parent Test.; Therapist Test.* Petitioner also presented documentary evidence obtained from DCPS regarding the certifications of the Student's teachers

during the 2011-12 school year, as well as information on dually certified teachers. *See P-37 through P-41.* However, the Hearing Officer concludes that, at this point, Petitioner has raised no more than a suspicion that High School may be unable to implement the Student's IEP when the 2012-13 school year commences. Petitioner has not demonstrated that High School lacked the resources to do so as of May 2012, or that her prospective placement there would necessarily be inappropriate and constitute a denial of FAPE going forward. Accordingly, I conclude that Petitioner has not met her burden of proof.

To the extent the documentary evidence addresses the instruction received by the Student prior to May 2012, it is irrelevant because the prior IEP provided for an inclusion setting, and Petitioner settled and resolved all claims under such prior IEP. For the May-June 2012 period (during the 2d term of the 2d semester), the evidence at most indicates that the Student's Physics teacher may not have been content certified, thus impairing the Student's ability to earn Carnegie Units in that course. *See P-38.* However, the Student could not have been harmed by this deficiency since she failed Physics anyway, due in part to her excessive absences. *P-40.* With respect to the Student's other academic courses that term, the evidence shows that her History/Government teacher is content certified in Social Studies, and that Petitioner failed to request information concerning the Student's English teacher's licensing. *See P-37; P-38; P-40; P-41.* The Student received failing grades in both of these courses too, thus negating any impact on Carnegie Units.

Significantly, no evidence has been presented concerning the total number of special education teachers at High School, what courses and classrooms they may have been assigned to, the extent to which such teachers may or may not have been involved in the Student's instruction during May-June 2012, and the composition of the Student's individual classes in terms of disabled and non-disabled students. Moreover, Petitioner testified that she did not know how many hours of specialized instruction the Student received and in what setting during this period. For these reasons, the evidence is insufficient to determine whether or not DCPS failed to implement the May 2, 2012 IEP during the last two months of the 2011-12 school year. [7]

[7] In any event, at hearing Petitioner's counsel confirmed that Petitioner did not allege or seek to recover compensatory education or other relief for any denial of FAPE in the form of a material failure to implement the IEP during the May-June 2012 time period. Rather, Petitioner is claiming that the May-June 2012 experience at High School demonstrates that her ***prospective*** placement there would be inappropriate and constitute a denial of FAPE going forward.

In addition, staff resources and programs at individual schools can change over the course of the summer to meet the needs of current or incoming students. Teachers may be reassigned, new teachers may be hired, class schedules can change, and the licenses and professional qualifications of existing teachers may evolve. In this sense, Petitioner's complaint appears premature, as it remains to be seen whether DCPS will be able to implement the Student's current IEP at her present location when the new school year begins.

For High School to be an appropriate school placement under D.C. Code §38-2561.02 (b) and the IDEA, High School must provide (at a minimum) at least ***26 hours of specialized instruction outside of the general education setting, consistent with the academic, developmental and functional needs of the Student as set forth in the May 2012 IEP.*** Obviously, this cannot be achieved in her former inclusion classrooms since the IEP Team has determined that the Student's LRE for specialized instruction is outside general education – *i.e.,* the nature and severity of her disabilities are such that she can only make progress on IEP goals and objectives by being removed from the general education classroom to receive these services. *See R3-7.* Nor can it be achieved in a self-contained classroom serving students with intellectual disabilities who are not on a high school diploma track, and whose educational needs are quite different than hers. *See EA Test.*

The Hearing Officer recognizes that DCPS may still be in the process of adjusting the Student's special education program to meet her individualized needs, as she was only initially evaluated and found eligible during the middle of the 2011-12 school year, and her IEP was just substantially expanded near the end of that school year. However, if it turns out that High School cannot fulfill the requirements of the Student's May 2012 IEP, then DCPS must promptly convene an MDT/IEP Team meeting [8] to place the Student in an alternative special education

[8] The Hearing Officer notes that the LRE Site Committee (which appears to be an internal staff unit of DCPS) may make recommendations concerning placement, but cannot assume the functions of the IEP Team regarding educational placement decisions. The IDEA requires that parents have meaningful participation in the placement decisions involving their children. *See* 20 U.S.C. 1414(e); 34 CFR 300.116(a) (1), 300.327. Specifically, each public agency must "ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child." *Id.,* 1414(e); 34 CFR 300.327. Meaningful participation generally includes being part of the discussion of appropriate and available schools, as well as the ultimate team placement determination. *See, e.g., Paoella v. District of Columbia,* 210 F. Appx. 1 (D.C. Cir. 2006) (DCPS' designation of a particular public school conformed with IDEA's placement requirements where record showed that parents "had a meaningful opportunity to participate" and "placement suggested by DCPS was not predetermined"); *T.T. v. District of Columbia,* 48 IDELR 127 (D.D.C. 2007) ("The IDEIA requires that the parents of a student with a disability be members of any group making a decision regarding the student's placement"; DCPS placement recommendations are "offer[ed] to the parent during an MDT placement meeting.").

school or program that can meet those requirements – whether public, private D.C. facilities, or facilities outside of D.C. *See* D.C. Code §38-2561.02 (b), (c).

Finally, as both parties recognize, the Student has experienced excessive class absences that adversely affect her ability to learn and to derive educational benefit from her special education program.[9] This pattern must change in order for her to make progress toward achieving her IEP goals and earning a high school diploma, regardless of the school she attends.

Issue 2: Failure to Evaluate (Psychiatric)

As part of either an initial evaluation or re-evaluation, DCPS must ensure that the child "is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." 34 C.F.R. §300.304 (c) (4). DCPS must also ensure that the evaluation is "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." *Id.,* §300.304 (c) (6). *See also Harris v. DC,* 561 F. Supp. 2d 63, 67-68 (D.D.C. 2008). Thus, evaluations are to be conducted to determine both a child's disabilities and the content of the child's IEP. 34 C.F.R. §300.304 (b) (1). Moreover, where an IEP team determines that additional data is not needed, parents have a right to request particular assessments to determine whether their child has a disability and the child's educational needs. *See, e.g.,* 34 C.F.R. 300.305 (d); *see also Herbin v. District of Columbia,* 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005).

In this case, Petitioner claims that DCPS should have conducted a psychiatric assessment, in response to her requests, in order to determine whether the severity of the Student's depression warrants placement in a residential treatment facility. *See P-42.* Based on the evidence adduced at hearing, I conclude that Petitioner did not prove that DCPS has denied the Student a FAPE by failing to conduct such assessment at this time.

DCPS has already funded an independent comprehensive psychological evaluation, which is barely one year old. *See P-10* (08/03/2011 Evaluation by Parker Diagnostics). That evaluation recommended consultation with a psychiatrist for "pharmacological interventions that

[9] *Cf. Garcia v. Board of Educ. of Albuquerque Public Schools,* 520 F.3d 1116 (10th Cir. 2008) (discussing effect of student's severe truancy); *Hinson v. Merritt Educ. Ctr.,* 579 F. Supp. 2d 89, 104 (D.D.C. 2008) (student "was not 'availing himself of educational benefit' due to extended absences").

may be used with behavioral interventions" (*P-10, p. 18*), which Petitioner concedes has already occurred. *See Parent Test.* (cross examination). The Student has also been recently examined by psychiatrists at Children's National Medical Center, with reports provided to her IEP Team. *See, e.g., P-13; P-24.* Moreover, Petitioner agrees with the contents of the Student's IEP, which are based on the evaluations conducted to date. DCPS does not appear to have acted unreasonably in failing to conduct or authorize a further psychiatric evaluation for residential placement purposes at this time.[10]

VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. Petitioner's requests for relief in her Due Process Complaint filed May 29, 2012, are hereby **DENIED;** and

2. The Complaint is **DISMISSED, With Prejudice.**

Dated: August 10, 2012

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).

[10] Assuming *arguendo* that Petitioner has shown a procedural violation of 34 C.F.R. §300.305(d) in DCPS' declining Petitioner's request for this specific assessment, Petitioner has not shown that the Student has suffered any resulting educational harm, or that such procedural inadequacy has had one or more of the substantive effects listed in 34 C.F.R. §300.513 (a) (2). *See also Lesesne v. District of Columbia,* 447 F.3d 828 (D.C. Cir. 2006).