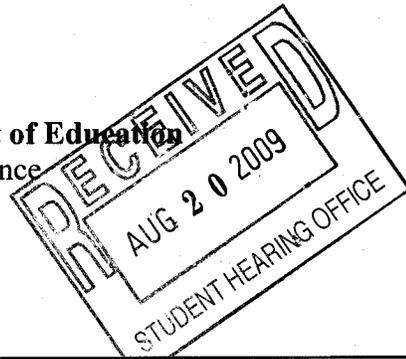


DC Office of the State Superintendent of Education  
Office of Review & Compliance  
Student Hearing Office  
1150 5<sup>th</sup> Street, SE  
Washington, D.C. 20003  
CONFIDENTIAL



<p>[Parent]<sup>1</sup>, on behalf of [Student],</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools,</p> <p>Respondent.</p>	<p>Case</p> <p>HEARING OFFICER'S DETERMINATION</p> <p>August 20, 2009</p> <p><u>Representatives:</u></p> <p>Zachary Nahass, Petitioner</p> <p>Blair Matsumoto, Respondent</p> <p><u>Independent Hearing Officer:</u></p> <p>Jim Mortenson</p>
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**I. PROCEDURAL BACKGROUND**

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 11:00 a.m. on August 6, 2009. The hearing concluded and the record closed on August 10, 2009, upon the filing of post-hearing briefs. The due date for the Hearing Officer's Determination (HOD) is August 20, 2009. This HOD is issued on August 20, 2009.

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.

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

Present at the due process hearing were: Petitioner's Counsel, Zachary Nahass, Esq.; the Petitioner; the Student; and Respondent's Counsel, Blair Matsumoto, Esq.

Five witnesses testified at the hearing:

Petitioner, the Student's Mother (P)

Student, (S)

Shelly Nichols, Educational Advocate (S.N.)

Program Director

Dr. Margaret Mallory, Psychologist (M.M.)

The complaint in this matter was filed on June 26, 2009. The resolution period was waived on July 6, 2009. An untimely response to the Complaint was filed by the Respondent on July 15, 2009, which included a motion to dismiss. The motion was denied in a prehearing order. A prehearing conference was held on July 20, 2009, and a prehearing order was issued on that date.

17 documents were disclosed by the Petitioner on July 29, 2009. (P 1 – P 17) All of the disclosed documents were admitted into the record. The exhibits are:

- P 1 - Administrative Due Process Complaint Notice, December 23, 2008
- P 2 - Administrative Due Process Complaint Notice, June 25, 2009
- P 3 - Prehearing Order, July 20, 2009
- P 4 - Individualized Education Program (IEP), May 30, 2008
- P 5 - IEP team Meeting Notes, May 30, 2008
- P 6 - IEP, January 15, 2009
- P 7 - IEP team Meeting Notes, January 15, 2009
- P 8 - Speech and Language Evaluation, March 1, 2004
- P 9 - Psychoeducational Evaluation, March 19, 2007
- P 10 - Psychological Evaluation, April 13, 2009
- P 11 - Encounter Tracking Forms for Speech and Language, September 2008 – December 2008
- P 12 - IEP Report Card, 6<sup>th</sup> Grade
- P 13 - Report Card, May 7, 2009
- P 14 - Email chain ending from P to Toro, Saturday, June 27, 2009, 9:52 a.m.
- P 15 - Letter from Glassman to Johnson, November 5, 2008

- P 16 - Letter from Nahass to Johnson, April 16, 2009
- P 17 - Letter from Thomas to Glassman, January 2, 2009

Eight documents were disclosed by the Respondent on July 30, 2009. (R 1 – R 8) All of the disclosed documents were admitted into the record. The exhibits are:

- R 1 - Administrative Due Process Complaint Notice, June 25, 2009
- R 2 - DCPS Response Brief, July 14, 2009
- R 3 - Letter from IHO Mortenson to Case Counsel, July 9, 2009
- R 4 - Prehearing Order, July 20, 2009
- R 5 - IEP, January 15, 2009
- R 7 - IEP, February 4, 2008
- R 8 - Speech and Language Evaluation, July 16, 2009

## **II. ISSUES**

- 1) Whether the Respondent failed to timely conduct and review necessary evaluations of the Student in all areas of suspected disability?
- 2) Whether the Respondent failed to develop an appropriate individualized education program (IEP)?
- 3) Whether the Respondent failed to provide special education and related services in conformity with the Student's IEP?
- 4) Whether the Respondent failed to provide the Student with an appropriate placement?

## **III. FINDINGS OF FACT**

1. The Student is a     year old learner with a disability determined eligible for special education and related services under the definition of mental retardation.<sup>2</sup>  
  
His cognitive ability is variable and is not consistent with the profile of a child

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<sup>2</sup> P 6/R 5.

with mental retardation.<sup>3</sup> The Student was enrolled in Kelly Miller Middle School for the 2008-2009 school year (SY).<sup>4</sup>

2. P requested, through her counsel, a “comprehensive psychological reevaluation and a screener to rule out Attention Deficit Hyperactivity Disorder” in November 2008.<sup>5</sup> The Respondent treated the request as one for an independent educational evaluation (IEE) and authorized the IEE on January 2, 2009.<sup>6</sup> The authorization letter (no copy of any other notice, pursuant to 34 C.F.R. § 300.503 was offered into evidence) stated the Respondent would pay for a psychological evaluation which included “cognitive, educational, and clinical components as well as a social history” and requested the IEE be completed within 45 days.<sup>7</sup>
3. The IEE was completed on April 13, 2009, over 100 days later.<sup>8</sup> The reevaluation was relatively comprehensive and included a review of records, a classroom observation, interviews with both the Student and his mother, and the use of several testing instruments, with the Student, his mother, and his teacher.<sup>9</sup> The assessment report includes thorough findings and a comprehensive list of

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<sup>3</sup> Testimony (T) of M.M.

<sup>4</sup> T of P.

<sup>5</sup> P 15.

<sup>6</sup> P 17.

<sup>7</sup> Id.

<sup>8</sup> P 10, R 7.

<sup>9</sup> Id.

programming recommendations.<sup>10</sup> Two recommendations were for additional assessments, one for a speech and language assessment “to gain updated information on [Student’s] language processing skills” and a psychiatric assessment “to further assess [Student’s] thought process and determine whether psychopharmacological intervention is warranted.”<sup>11</sup>

4. The Petitioner, through her counsel, requested the recommended psychiatric and speech and language testing be provided for the Student on April 16, 2009.<sup>12</sup> The speech and language assessment was completed in July 2009.<sup>13</sup> The assessment report indicates the Student has below average speech and language skills which are “consistent with individuals with cognitive delays.”<sup>14</sup> The report included recommendations for: the modification of the presentation of material; for memory, retrieval, and processing; and for improving vocabulary.<sup>15</sup>
5. The Respondent “concedes the evaluations were not done immediately.”<sup>16</sup> No evidence of a psychiatric evaluation was provided.

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<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> P 16.

<sup>13</sup> R 8.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Respondent’s Closing Brief at 1.

6. The IEP was last revised on January 15, 2009.<sup>17</sup> The IEP lacks statements of the Student's present levels of academic achievement that describe how the Student's disability affects his involvement and progress in the general education curriculum.<sup>18</sup> The IEP does include statements of the Student's present levels of functional performance that describe how his disability affects his involvement and progress in the general education curriculum.<sup>19</sup> The IEP lacks statements of measurable annual academic goals designed to meet his needs that result from his disability to enable him to be involved in and make progress in the general education curriculum.<sup>20</sup> In all, the academic performance information on the IEP includes little, if any, meaningful information about the Student's baseline or projected performance on academic content standards.<sup>21</sup> The IEP includes no statement of when periodic reports on the progress the Student is making toward the annual goals will be provided.<sup>22</sup>
7. The May 2009 "Report to Parents on Student Progress" does not contain any information on the progress the Student is making toward the annual goals, nor

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<sup>17</sup> P 6/R 5.

<sup>18</sup> Id. (For example, under "Mathematics" the IEP states the Student can add two digit numbers, needs remediation to improve math skills, and that the Student is unable to perform on grade level. Similar statements are made for reading and written expression.)

<sup>19</sup> Id.

<sup>20</sup> Id. (All of the three academic goals for reading, math, and writing, propose the measurement of the Student's progress by accomplishment of short-term objectives, which are required because the IEP team determined the Student's academic growth would be assessed using alternate assessments, and the IEP does not state what the short-term objectives are.)

<sup>21</sup> Id.

<sup>22</sup> Id.

progress toward the academic content standards for seventh grade, the Student's grade level for the 2008-2009 SY.<sup>23</sup> The Respondent offered no evidence countering this lack of progress data.

8. Prior to the January 2009 revision, the IEP was revised in May 2008.<sup>24</sup> That IEP revision required one hour per week of speech and language services.<sup>25</sup> From the start of the 2008-2009 SY through the winter break, approximately 15 weeks of school, the Student received a total of approximately 8.6 hours of speech and language services.<sup>26</sup> The Student was absent four times the provider was available to deliver services, or for four hours of entitled service.<sup>27</sup>
9. The Petitioner advised the Respondent she was unhappy with the Student's school and wanted another school at the IEP team meeting on January 15, 2009.<sup>28</sup> The Respondent advised the Petitioner as late as June 24, 2009, that the Student could be sent to alternative schools, but there is no evidence other proposals were ever made.<sup>29</sup>

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<sup>23</sup> P 13.

<sup>24</sup> P 4.

<sup>25</sup> Id.

<sup>26</sup> P 11.

<sup>27</sup> Id.

<sup>28</sup> P 7.

<sup>29</sup> P 14, T of P.

10. The \_\_\_\_\_ in Virginia has been proposed by the Petitioner as a school to send the Student.<sup>30</sup> It is a private school serving 135 children with disabilities.<sup>31</sup> The Program Director at \_\_\_\_\_ reviewed the Student's records and interviewed the Student prior to determining he was an eligible candidate for success at the School.<sup>32</sup> The School is designed for and has experience working successfully with children similar to the Student.<sup>33</sup>

#### IV. CONCLUSIONS OF LAW

1. A reevaluation of a Student with a disability “[m]ust occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.” 34 C.F.R. § 300.303(b)(2), D.C. Mun. Regs. tit. 5, § 3005.7 (2007).
2. Evaluations must be “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.” 34 C.F.R. § 300.304(c)(6). Furthermore, evaluations must include “Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child[.]” 34 C.F.R. § 300.304(c)(7). *See also*, D.C. Mun. Regs. tit. 5, § 3005.9 (2007).
3. Federal regulations, at 34 C.F.R. § 300.305(d), require:

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<sup>30</sup> T of P.

<sup>31</sup> T of L.S.

<sup>32</sup> T of L.S.

<sup>33</sup> T of L.S.

If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of

(i) That determination and the reasons for the determination; and

(ii) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.

*See also*, D.C. Mun. Regs. tit. 5, § 3005.6 (2007).

4. A re-evaluation of a Student must be conducted within a reasonable time and “a delay in responding to a reevaluation request can be reasonable when no exigencies are present.” Herbin v. District of Columbia 362 F.Supp.2d 254, 261 (D.D.C.,2005).
5. An IEP requires that special education and related services, supplementary aids and services, and program modifications or supports for school personnel necessary to enable the child to advance toward attaining the annual goals, to be involved in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate with other children with disabilities and children without disabilities in all of these activities stated, and also to include the projected date for the beginning of these services and modifications and the anticipated frequency, location, and duration of these services and modifications. 34 C.F.R. § 300.320(a)(4) & (7), D.C. Mun. Regs. tit. 5, § 3009.1(c) (2005).
6. Public agencies “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.” 34 C.F.R. § 300.327, *see also*: 34 C.F.R. § 300.501(c). “The Department’s

longstanding position is that placement refers to the provision of special education and related services rather than a specific place, such as a specific classroom or specific school.” Fed. Reg. Vol. 71, No. 156, Monday, Aug. 14, 2006, p. 46687.

7. Notice that meets the requirements of 34 C.F.R. § 300.503(b) and D.C. Mun. Regs. Tit. 5 § 3025 must be provided whenever a school district proposes or refuses to initiate or change the evaluation of a child. 34 C.F.R. § 300.503(a), D.C. Mun. Regs. Tit. 5 § 3024.1.

8. A free appropriate public education (FAPE) is provided when special education and related services are:

- (a) . . . 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.

34 C.F.R. § 300.17.

9. “[A]n IEP that focuses on ensuring that a child is involved in the general education curriculum will necessarily be aligned with the State’s content standards.” Fed. Reg. Vol. 71, No. 156, Monday, August 14, 2006, p. 46662. “Academic content standards are statements of the knowledge and skills that schools are expected to teach and students are expected to learn.” *Modified Academic Achievement Standards*, Non-Regulatory Guidance, USDOE, July 20, 2007, p. 12. “IEP goals based on grade-level academic content standards are goals that address the skills specified in the content standards for the grade in which a student is enrolled.” *Id.* at 29 “[T]he IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act

and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” Board of Educ. V. Rowley, 458 U.S. 176, 203-04 (1982).

10. It took nearly five months for the reevaluation requested in November 2008 to be completed. The Respondent “concedes that the evaluations were not done immediately.” The question is whether the delay of five months was reasonable. This is compounded by the fact the assessment report created in April included recommendations for two additional assessments, indicating that the reevaluation was not comprehensive enough to identify all of the child’s special education and related services needs and there is no evidence a proper notice of the evaluation proposal was sent to the Parent. (The request was treated as one for an IEE even though an IEE was not requested.) Additionally, since the request to complete the additional assessments in April, one was completed in mid-July, three months later, and the other remains pending. The Petitioner asserts, correctly, that the lack of current or accurate data about the Student and his needs has contributed to preventing the IEP team from putting together an IEP reasonably calculated to provide educational benefit. The extent of the impact on the Student cannot be readily determined because the Respondent has failed to sufficiently or accurately track and document the Student’s academic performance which deprives the IEP team the much more necessary data to put together an appropriate program for him. It is impossible for the IHO to specify how the IEP should be corrected, or award compensatory education, when this data is missing. As an alternative, the

Student is entitled to attend Leary School for the 2009-2010 school year so that his academic and functional performance can be accurately measured and, in combination with the recent assessment data, an IEP reasonably calculated to provide educational benefit can be constructed for the remainder of the year and, when the time comes, for the following year.

11. While the Respondent failed to implement the IEP with regard to measuring and reporting progress, there is not sufficient evidence to show the IEP was not implemented with regard to speech and language services. Records for the first fifteen weeks of the 2008-2009 SY were provided, so the review is limited to that period. Of those fifteen weeks, the Student received over eight and a half of the 15 hours of speech and language service he was entitled to. He was absent another four sessions, or four hours worth, leaving the Respondent with the responsibility for failing to provide about two and a half hours worth. The Petitioner has not shown that the Student was harmed as a result of the Respondent's failure to provide two and a half hours of fifteen hours of entitled service.
12. Because "placement refers to the provision of special education and related services rather than a specific place, such as a specific classroom or specific school[.]" and the violations concerning the evaluation, appropriateness of the IEP and implementation of the IEP are all directly linked to the provision of special education and related services, it can only be concluded that the Student's placement was not appropriate for the 2008-2009 SY. The award of is not made because the Student requires a more restrictive setting, however. It is

made because the Petitioner has shown, and the Respondent has not successfully refuted, the multiple violations concerning the Student at [redacted]. Furthermore, [redacted] was the only alternative placement proposed by either party to the IHO, and will be appropriate for the Student. Finally, other than the recommendations in assessment reports, there was not sufficient data reported on the Student's academic progress to permit a more complete revision to the IEP by the IHO. Thus, the combination of putting the Student in a new and desired school, while revising the IEP in accordance with the assessment reports and other data obtained from [redacted] staff and staff at [redacted] will put the Student on track to be involved in and make progress in the general education curriculum, hopefully by the 2010-2011 SY.

#### **V. DECISION**

1. The Respondent failed to timely conduct and review a reevaluation of the Student. This failure resulted in educational harm to the Student because the IEP lacked the necessary information to ensure the Student received a free appropriate public education.
2. The Respondent failed to offer or provide the Student with an IEP reasonably calculated to provide educational benefit.
3. The Respondent failed to provide the Student special education and related services in conformity with his IEP when it did not measure and report on progress toward the annual goals.

4. As a result of the failures to provide an IEP reasonably calculated to provide educational benefit and provide the Student special education and related services in conformity with the IEP, the Respondent did not provide the Student with an appropriate placement.

## **VI. ORDER**

1. The Student's IEP must be corrected to include the following:
  - a. A statement of the Student's present levels of academic achievement in reading, mathematics, and written expression, as determined by the most recent data available on his progress toward meeting the grade level standards for seventh grade, the most recent grade level completed by the Student. The statement of the Student's present levels of academic achievement must clearly indicate the affect the Student's disability has on his involvement and progress in the general education curriculum. The statement of present levels of academic achievement must show the reader where the Student is, at the time of writing the statement, in relation to the academic content standards for eighth grade in the District of Columbia.
  - b. A statement of measurable annual academic goals designed to meet his academic needs.
  - c. A description of how the Student's progress toward meeting the annual goals will be measured and when periodic written reports on the Student's progress will be provided to the Student's parents.

d. A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided, which must include, at a minimum, those recommended in the April 13, 2009 assessment report under:

- i. "Programming Recommendations" (Numbers 1, 2 and 5);
- ii. "General Instructional Strategies" (Numbers 1 through 12);
- iii. "To Improve Attention" (Numbers 1 through 3);
- iv. "To Improve Reading" (Numbers 1 and 2);
- v. "To Facilitate Reading Comprehension via Imagery" (Numbers 1 through 4);
- vi. "To Improve Written Language" (Numbers 1 through 3); and
- vii. "To Improve Social-Emotional Functioning (Numbers 1 and 2).

The recommendations from the July 2009 Speech and Language assessment must also be incorporated into the IEP.

This IEP must begin no later than September 8, 2009, and must continue through August 1, 2010, unless the parties agree to change it sooner based on data collected about the Student.

2. The IEP team must meet and revise the IEP, in accordance with this order no later than September 4, 2009. Three alternate times for an IEP team meeting must be provided to the Petitioner including the time the IEP team will meet if she does not respond or is unable to attend any of the proposed times.

3. Any disagreement over the IEP thus required may be resolved by filing a complaint with the SEA, pursuant to 34 C.F.R. §§ 300.151 – 300.153, or any other appropriate dispute resolution mechanism.
4. The Student must be placed and transported to Leary School for the remainder of the 2009-2010 SY, beginning no later than August 24, 2009, or the first day of school at which ever is later. While at Leary, the Student's special education program must remain under public supervision, pursuant to 34 C.F.R. § 300.17 and this order.
5. All other due process required under IDEA and DCMR must be followed in the completion of this order.

**IT IS SO ORDERED.**

Dated this 20th day of August, 2009.



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Jim Mortenson, Esq.  
Independent Hearing Officer

## **NOTICE OF APPEAL RIGHTS**

The decision issued by the Independent Hearing Officer is final, except that any party aggrieved by the findings and decision of the Independent 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. § 1415(i)(2).