

**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

[Parent] <sup>1</sup> , on behalf of [Student],  Petitioner,  v.  District of Columbia Public Schools,  Respondent.	Case  HEARING OFFICER'S DETERMINATION  August 2, 2009  <u>Representatives:</u>  John Straus, Petitioner  Tanya Chor, Respondent  <u>Independent Hearing Officer:</u>  Jim Mortenson
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**I. PROCEDURAL BACKGROUND**

This matter came before Independent Hearing Officer (IHO), Jim Mortenson, at 9:00 a.m. on June 18, 2009. Additional hearing time was required and the hearing continued at 9:00 a.m. on July 23, 2009. The hearing concluded and the record closed on that date. The due date for the Hearing Officer's Determination (HOD) is August 2, 2009. This HOD is issued on August 2, 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, John Straus, Esq.

Respondent's Counsel, Tanya Chor, Esq.

The Petitioner, Student's Mother (Day 1)

Ida Holman, Education Advocate (Day 1)

Special Education Coordinator (Day 1)

Main, Principal (Day 2)

Five witnesses testified at the hearing:

Petitioner, the Student's Mother (P)

Shelly Nichols, Petitioner's Education Advocate (S.N.)

Dr. Ida Holman, Petitioner's Education Advocate and Special Education Expert  
(I.H.)

Dr. James Ballard, Special Education Evaluation Expert, (J.B.)

Main, Principal

The complaint in this matter was filed on April 17, 2009. The resolution period was waived on April 21, 2009. A prehearing conference was held on April 28, 2009, and a prehearing order was issued on that date. An untimely response to the Complaint was filed by the Respondent on April 30, 2009.

The hearing was to proceed on May 20, 2009, and the Petitioner requested a continuance due to the unavailability of a witness. The continuance was granted and the hearing was re-scheduled to proceed on June 18, 2009. At the end of the time allotted for the hearing on June 18, the Respondent had not yet finished the presentation of its case and requested a continuance on the record. The continuance was granted and the hearing

was scheduled to continue for one additional hour on June 26, 2009. The Respondent requested a second continuance on June 26 because Counsel believed she required more than the scheduled hour to present the remainder of its case. This was compounded by the fact the IHO was delayed by 30 minutes and the Respondent's witnesses were not available past the one hour originally set. The motion was granted and the hearing was re-scheduled to proceed for two hours on July 23, 2009.

20 documents were disclosed and filed by the Petitioner on June 11, 2009. (P 1 – P 20) P 1 through P 7, P 9 and P 10, P 12, P 14, and P 16 through P 18 were admitted into evidence. Those exhibits are as follows:

- P 1 - Administrative Due Process Complaint Notice, April 17, 2009
- P 2 - Answer to Respondent's Notice of Insufficiency of Due Process Complaint, May 8, 2009
- P 3 - Respondent's Notice of Insufficiency and Response to Due Process Complaint, April 30, 2009
- P 4 - Prehearing Order, April 28, 2009
- P 5 - IEP team meeting notes, October 20, 2006
- P 6 - Academic Assessment Summary and Score Report, December 4, 2006
- P 7 - Psychoeducation Evaluation, December 27, 2006
- P 9 - Clinical Psychological Evaluation, December 11, 2007
- P 10 - WISC-IV Test Scores, December 27, 2007
- P 12 - Clinical Evaluation, June 3, 2008
- P 14 - IEP team meeting notes, August 11, 2008
- P 16 - Resume, Dr. James Ballard
- P 17 - Resume, Dr. Ida Jean Holman
- P 18 - IEP team meeting notes, June 9, 2009

Petitioner's disclosed documents not admitted are as follows:

- P 8 - IEP team meeting notes, February 7, 2007
- P 11 - Letter from Gambale to Diesner, February 1, 2008
- P 13 - Letter from Main to Vanderpool, July 14, 2008
- P 15 - Letter from Vanderpool to Main, August 18, 2008
- P 19 - Letter from Proctor to Special Education Coordinator, May 14, 2009
- P 20 - Letter from Straus to Special Education Coordinator, June 8, 2009

30 documents were disclosed by the Respondent on May 14, 2009, and an additional five documents on June 11, 2009. (R 1 – R 35) R 1 and R 2, R 5 through R 9, R 11 through R 13, R 16, R 20 through R 27, and R 29 through R 35 were admitted into evidence. The documents are:

- R 1 - Respondent's Notice of Insufficiency and Response to Due Process Complaint, April 30, 2009
- R 2 - Administrative Due Process Complaint Notice, April 17, 2009
- R 5 - Hearing Officer's Decision (HOD), November 9, 2007
- R 6 - Scheduling Memorandum, February 4, 2008
- R 7 - Letter from Gambale to Diesner, February 1, 2008
- R 8 - HOD, May 2, 2008
- R 9 - Administrative Due Process Complaint Notice, August 8, 2008
- R 11 - Closing Order, November 3, 2008
- R 12 - Administrative Due Process Complaint Notice, August 19, 2008
- R 13 - HOD/SA/SAR timeliness determination worksheet
- R 16 - IEP team meeting notes, January 30, 2008
- R 20 - Clinical Psychological Evaluation Report, December 11, 2007
- R 21 - Physical Therapy Evaluation Report, November 27, 2007
- R 22 - Letter from Vanderpool to Main, August 19, 2008
- R 23 - District of Columbia Child Health Certificate, October 2, 2006
- R 24 - School Health Program Pupil's Health Record
- R 25 - Department of Health School Health Certificate, February 5, 2004
- R 26 - School Health Program Pupil's Health Record, January 15, 2004
- R 27 - Well Child Certificate, October 13, 2006
- R 29 - Report Card, 2008 School Year
- R 30 - Attendance Summaries: August 18, 2008 to April 22, 2009; August 24, 2007 to June 9, 2008; and August 25, 2006 to June 12, 2007
- R 31 - Letter from Straus to Special Education Coordinator, June 8, 2009
- R 32 - Letter from Diesner to Straus, June 1, 2009
- R 33 - Fax confirmations for Respondent's disclosures, May 13, 2009
- R 34 - Letter from Diesner to Straus, May 18, 2009
- R 35 - Letter from Proctor to Special Education Coordinator, May 14, 2009

Respondent's disclosed documents not admitted are as follows<sup>2</sup>:

- R 3 - Letter from Diesner to Gambale, January 14, 2008
- R 4 - Letter from Diesner to Straus, May 11, 2009
- R 14 - Letter from Gambale to Diesner, February 1, 2008
- R 15 - Prior to Action Notice, February 7, 2007

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<sup>2</sup> There is no document marked R 10.

- R 17 - Confirmation of Meeting Notice, January 25, 2008
- R 18 - Confirmation of Meeting Notice, January 9, 2007
- R 19 - Letter of Invitation, January 8, 2008
- R 28 - Letter from Vanderpool to Main, August 18, 2008

## II. ISSUES

- 1) Whether the Respondent failed to timely evaluate the Student? Specifically, whether the Student should have provided a psycho-educational assessment following a clinical assessment during the summer of 2008?
- 2) Whether the Respondent failed to identify the Student as a child with a disability? Specifically, whether there was sufficient data absent the requested psycho-educational assessment in the summer of 2008 to determine the Student was a child with a disability?

## III. FINDINGS OF FACT

1. The Student is     year old learner who was enrolled at  
School from the fall of 2004 when he was in     grade through the 2008-2009  
school year,     grade.<sup>3</sup> The Student repeated fourth grade.<sup>4</sup>
2. The Parent completed a "Child Health Certificate" on October 2, 2006, which was  
also signed by a doctor on November 6, 2006, which stated the Student had no  
"[s]ignificant health history, conditions, communicable illness, or restrictions that

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<sup>3</sup> Testimony (T) of P, T of     P 7.

<sup>4</sup> T of     P 14.

may affect school, childcare, camp, or sports activity.”<sup>5</sup> The Student has a chronic condition, dermatomyocitis, which can cause fatigue and lethargy, and which has been in remission for several years.<sup>6</sup>

3. During the Student’s second year of fourth grade he was given the Woodcock-Johnson III (WJ III) Tests of Achievement.<sup>7</sup> An assessment report was created December 8, 2006.<sup>8</sup> The report concluded the Student had average academic skills compared to students at his grade level.<sup>9</sup> His reading and writing skills were at low average compared to these students.<sup>10</sup>
4. A Psychoeducational Evaluation was conducted during December 2006, and a report written December 27, 2006.<sup>11</sup> That report, conducted by the Respondent, concluded the Student had needs in social/emotional areas, attention/concentration, and academics.<sup>12</sup>

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<sup>5</sup> R 23.

<sup>6</sup> T of P, R 24, R 25.

<sup>7</sup> P 6.

<sup>8</sup> *Id.*

<sup>9</sup> *Id. at 3.*

<sup>10</sup> *Id.*

<sup>11</sup> P 7.

<sup>12</sup> *Id. at 5-7.*

5. Both reports above stated the Student was well adjusted socially, stating, for example, that he was “confident,” “motivated,” and had “typical conversation proficiency[.]”<sup>13</sup>
6. A due process hearing was held during the Student’s fifth grade year and an HOD was issued on November 9, 2007.<sup>14</sup> One of the findings of fact in that case was<sup>15</sup>:

Lafayette’s principal Ms. Main participated in the MDT meeting. The MDT concluded the student was not eligible because he had average intelligence, his scores were within normal limits and there were other factors that contributed to the student’s poor academic performance including tardiness during SY 2006-07, not wearing glasses in the classroom and not completing homework. The MDT believed the student’s medical condition was in remission. (Ms. Main’s testimony)

7. The IEP team met on January 30, 2008, and found that while the Student required supports for academics and had “some improvements” in functional performance, he did not “meet eligibility criteria as neither a student with Emotional Disturbance, nor Other Health Impairment.”<sup>16</sup> There was no explanation or analysis of the definitions for these disability categories documented, but the meeting notes did state that the Student “continues to be tardy numerous times each month, which has an impact on his educational performance.”<sup>17</sup>
8. A clinical evaluation was conducted by Interdynamics, Inc. in May, 2008, and a report written on June 3, 2008.<sup>18</sup> The report included a diagnosis of Anxiety

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<sup>13</sup> P 6, P 7.

<sup>14</sup> R 5.

<sup>15</sup> *Id.* at FF 19.

<sup>16</sup> R 16.

<sup>17</sup> *Id.*

<sup>18</sup> P 12.

Disorder for the Student.<sup>19</sup> This was consistent with a clinical psychological assessment done by Respondent in December 2007 which noted elevated anxiety.<sup>20</sup> The report included a recommendation to further asses for specific learning disability (SLD) a result of concerns about the Student's reading ability.<sup>21</sup>

9. A team, including the Petitioner, met on August 11, 2008, to review the recent clinical assessment, and others, and make an eligibility determination.<sup>22</sup> The only documentation of the eligibility determination were "MDT Eligibility" meeting notes and a prior notice dated August 11, 2008.<sup>23</sup> The two documents include the following information<sup>24</sup>:

1) A statement by the parent that the student has "dermatomyocitis, which causes fatigue and other symptoms that impact him academically."

2) A statement that both "math and reading resource teachers reported working with [Student]. He made 3 years of growth in reading, according to STAR diagnostic testing."

3) A statement that the school psychologist:

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<sup>19</sup> *Id.* at 11, P 14.

<sup>20</sup> R 20 at 3.

<sup>21</sup> P 12 at 12.

<sup>22</sup> P 14.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

reviewed the independent clinical evaluation of 5/16/08. The diagnosis of Anxiety Disorder, NOS, is consistent with the previous clinical evaluation of 12/11/07, which found some elevated anxiety that does not rise to clinical significance of Emotional Disturbance. Dr. Gray also reviewed the results of the cognitive and educational testing of 12/2006 and found no significant discrepancies or areas of weakness. He reported that [Student] is not below his peer group<sup>25</sup>.

4) A statement that the Student “does not meet eligibility criteria for special education and related services” without further explanation or analysis of the definitions for any disability category under IDEA.

5) A list of two team recommendations<sup>26</sup>:

1. Participation in social skills counseling/individual counseling through the general education school counselor.
2. After-school tutoring in reading, as available.

6) A statement that the school “maintains that [Student’s] chronic tardiness (60+ days in previous school years) has contributed to his anxiety-like behaviors and some academic difficulties.”

7) A list of assessment procedures considered and used as a basis for making an eligibility determination, including: a Wechsler Intelligence Scale for Children-III (WISC-III) from December 2006; a Woodcock-Johnson Psycho-Educational Battery from December 2006; a physical therapy evaluation; and two clinical evaluations from December 2007 and May 2008. There was no

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<sup>25</sup> There appears to be conflicting evidence about whether the Student was “below” his peers or not. A preponderance of evidence in these findings indicates the Student was and is, in fact, behind his same-age peers academically.

<sup>26</sup> Both of these recommendations show team concern about the functional and academic needs of the Student.

statement about the results of those procedures and whether the assessment procedures were valid for the purposes intended and valid for the child.

10. The teachers reported at the IEP team meeting on August 11, 2008, that the Student was not performing academically at grade level, was “sinking” academically, and had functional problems such as being “very slow to start each day,” “low motivation,” and having poor organizational skills.<sup>27</sup> The reading teacher advised she was using a “scientifically researched” reading strategy - Phono-Graphix - with the Student and that she saw the Student three times per week for 50 minutes per session. Another teacher used the Houghton Mifflin Reading strategy which, according to the reading teacher is also a “scientifically researched based reading program.”<sup>28</sup>
11. The school psychologist told the team at the August 11, 2008, meeting, that he did not examine the Student’s response to reading interventions, but rather only looked at data “from IQ tests and educational assessments to determine eligibility” for specific learning disability (SLD).<sup>29</sup>
12. The Principal, at the August 11, 2008, meeting stated that the Student did not have a disability and that he did not meet the definition for other health impaired (OHI) because there was no evidence the Student had dermatomyocitis.<sup>30</sup> The

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<sup>27</sup> P 14 (this evidence comes from the portion of P 14 that are notes created at the IEP team meeting, apparently by S.N.).

<sup>28</sup> *Id.* There are no studies of these reading strategies showing that either one meets evidence standards according to the U.S. Department of Education’s What Works Clearinghouse.

<sup>29</sup> P 14.

<sup>30</sup> *Id.*

Student has this disease and the Parent maintains that it impacts his educational performance.<sup>31</sup> The disease, however, is in remission.<sup>32</sup>

13. The Student remains one year behind his grade level peers at this time.<sup>33</sup>
14. The IEP team met on June 9, 2009, and determined that additional cognitive and psychological assessments will be done.<sup>34</sup> The Student's teacher reported at the team meeting that she is concerned about the Student's reading comprehension.<sup>35</sup>

#### IV. CONCLUSIONS OF LAW

1. An assessment is a component of an evaluation of a child with a disability. *See*, D.C. Mun. Regs. tit. 5, § 3006 (2003).
2. District of Columbia Municipal Regulations at Title 5, Section 3006.5 provides:

As the result of any evaluation or reevaluation, whether or not the procedures in addition to those already available are conducted, the IEP team will prepare a written evaluation (reevaluation) report, including the following:

- (a) information provided by the parent(s);
- (b) results of assessment procedures considered and used as a basis for making an eligibility determination;
- (c) a statement whether the assessment procedures were valid for the purposes intended and valid for the child;
- (d) whether the child is a child with a disability;

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<sup>31</sup> T of P, R 24, R 26.

<sup>32</sup> R 24.

<sup>33</sup> T of G.M.

<sup>34</sup> P 18.

<sup>35</sup> *Id.*

- (e) whether the child needs special education and related services; and
- (g) if the child was suspected of having SLD, in addition to (a)-(f):
  - (1) a statement of whether the child has SLD;
  - (2) the basis for making the determination;
  - (3) the relevant behaviors noted during the observation of the child;
  - (4) the relationship of the behaviors to the child's educational performance;
  - (5) educationally relevant medical findings, if any;
  - (6) a statement whether there is a severe discrepancy between achievement and ability that is not correctable without special education and related services;
  - (7) the determination of the IEP team concerning the effects of environmental, economic, or cultural disadvantage; and
  - (8) the written certification of each IEP team member as to whether the written report reflects the member's conclusions. If the written report does not reflect a member's conclusion, the team member shall submit a separate statement presenting the team member's conclusion. This separate statement will be included as part of the evaluation report.

3. An emotional disturbance is defined as:

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 child'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; or
- (e) A tendency to develop physical symptoms or fears associated with personal or school problems.

"Emotional disturbance" includes schizophrenia.

"Emotional disturbance" does not include a child who is socially maladjusted, unless it is determined that the child has an emotional disturbance.

D.C. Mun. Regs. tit. 5, § 3001.1 (2003)

4. The only evidence of a written evaluation report concerning the evaluation conducted in the summer of 2008 was the team meeting notes and prior notice of August 11, 2008. P 14. Assuming these notes and the prior notice constitute the written evaluation report, the report includes: 1) information provided by the parent (that the student has dermatomyocitis which causes fatigue and other symptoms that impact him academically); 2) a list of assessment procedures considered and used as a basis for making an eligibility determination, but not the results of those procedures; and 3) a statement that the Student has a disability (anxiety disorder) but that he is not a child with a disability under the definition of emotional disturbance under the Individuals with Disabilities Education Improvement Act (IDEA) because he does not require special education and related services. The documents do not include a statement whether the assessment procedures were valid for the purposes intended and valid for the child. Thus, assuming the meeting notes and prior notice can be treated as an evaluation report, they do not include all the required information. It is not reasonable to treat meeting notes as a written evaluation report. The Respondent did not comply with D.C. Mun. Regs. tit. 5, § 3006.5, making a challenge and review of the eligibility determination more difficult, and possibly impacting the Parent's due process rights.
5. The Respondent could have conducted an additional assessment to determine whether the Student had a specific learning disability, but this was not necessary because the IEP team should have found the Student was eligible for special education and related services in August 2008. Multiple evaluations were

conducted over a two year period that were considered in the summer of 2008, including: a Wechsler Intelligence Scale for Children-III (WISC-III), which was done as part of a psychoeducational evaluation in December 2006; a Woodcock-Johnson Psycho-Educational Battery from December 2006; a physical therapy evaluation; and two clinical evaluations from December 2007 and May 2008. The Principal ignored the Student's anxiety disorder, identified in both clinical assessments, and stated at the meeting that the Student did not have a disability. The teachers reported that the Student made three years growth in reading. This was based on school staff providing instruction through interventions including the Phono-Graphix and Houghton Mifflin Reading programs. Yet, there was agreement that the Student could not keep up with his peers, who were a year younger than him due to his retention in fourth grade. The Student's inability to keep up with elementary education, particularly reading, clearly existed over a long period of time. The school staff dismissively attributed this to the Student's tardiness and being tired due to his long commute to school. While these factors are important, they do not override an analysis of the definition of ED which should have been done by the team in its determination process. Instead, the team relied on the opinion of the School Psychologist that the Student's "elevated anxiety. . . does not rise to the clinical significance of Emotional Disturbance." "Clinical significance," whatever that is, is not part of the definition of ED under Title 5 of the District of Columbia Municipal Regulations or the IDEA. The Student suffered academically. He was retained in the fourth grade and the teachers were attempting to intervene with him using different instructional

strategies. The Principal testified that the Student is, currently, still one year behind his grade level peers (who are a year younger than he). Thus, the Student is exhibiting an inability to learn to the extent that he is unable to be involved in and progress in the same curriculum as his same-age peers. There is no convincing explanation that this is the result of intellectual, sensory, or health factors<sup>36</sup>. The evidence shows the student is adjusted well socially. Thus, the Student clearly met the definition of ED last August when the IEP team met.

6. Whether the Student is eligible under any other definition is irrelevant. The services to be provided to the Student must be based upon his educational needs, not his disability category, and it is clear he has needs in reading and some functional skills dealing with anxiety and organization. The Student's IEP must be designed to address all of these needs, and any others identified in assessment reports. Compensatory education is not required because the IEP must be designed to enable the Student to be involved in and progress in the general education curriculum, the same curriculum as his peers. 34 C.F.R. § 300.320.

## **V. DECISION**

1. The Respondent did not fail to timely evaluate the Student because it had sufficient data to identify the Student in June 2008.

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<sup>36</sup> The School Psychologist opined that the Student did not have a specific learning disability (SLD), although it is not clear this was supported by an appropriate analysis. If it is later determined the Student has a SLD, then the Student's "label" may be changed, but this would not necessarily impact his IEP. The Petitioner, likewise, asserts the Student is impacted by a health condition, dermatomyocitis which causes him to be lethargic and fatigued. The disease has been in remission and it is not affecting him now or at any time since at least 2006.

2. The Respondent failed to identify the Student as a child with a disability when the team met in August 2008.

## **VI. ORDER**

1. The IEP team must meet to develop an IEP that is designed to address the Student's educational needs in both academic and functional areas, as indicated in assessment reports from the last 18 months. The IEP must be designed, in accordance with law, to enable the Student to be involved in and progress in the general education curriculum, the same curriculum as his same aged peers. This will require aggressive academic goals and the necessary services to reach them.
2. The IEP must be in place, and consent obtained, by the start of the 2009-2010 school year. The Respondent must offer the Petitioner no less than three alternate times and dates to convene the IEP team meeting, with at least one week's notice before the soonest date, and advise the Petitioner of the date and time the IEP team will meet if the Petitioner fails to respond or choose one of the offered times to meet. The proposed IEP must be accompanied by a written notice containing the content required by 34 C.F.R. § 300.503. Because this is an initial IEP, it will not go into effect until the Petitioner has provided written informed consent.
3. The Respondent must provide to the Petitioner and her Counsel, no later than August 31, 2009, a copy of its policies and procedures for evaluation reports under D.C. Mun. Regs. tit. 5, § 3006.5 that are to be provided to special education staff who worked with the Student at his prior school and those who will be working with the Student at his school for the upcoming school year.

**IT IS SO ORDERED.**

Dated this 2nd day of August, 2009.

A handwritten signature in black ink, appearing to be 'Jim Mortenson', written over a horizontal line.

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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).