

DC Office of the State Superintendent of Education
 Office of Review & Compliance
 Student Hearing Office
 1150 5th Street, SE
 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 #2009-1376</p> <p style="text-align: center;">HEARING OFFICER'S DETERMINATION</p> <p>December 17, 2009</p> <p><u>Representatives:</u></p> <p>Sarah Tomkins, Petitioner</p> <p>Harsharen Bhuller, 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 9:00 a.m. on December 7, 2009, and continued at 9:00 a.m. on December 8, 2009. The hearing concluded on December 8, 2009, and the record closed on December 11, 2009, following receipt of written closing statements. The due date for the Hearing Officer's Determination (HOD) is December 21, 2009, in accordance with Standard Operating Procedure (SOP) § 1003.

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, Sarah Tomkins, Esq.

Respondent's Counsel, Harsharen Bhuller, Esq.

Petitioner, Student's Parent (Day 1)

Eight witnesses testified at the hearing: the Student's Parent, Petitioner (P); Dr.

██████████ Clinical Psychologist (D.I.)¹; ██████████ Guardian Ad Litem (M.M.);
Student's Foster Parent (F.P.); Dr. ██████████ Educational Consultant (S.I.)²;
██████████ Teacher (F.R.); ██████████ Special Education Coordinator
(P.M.); and Dr. ██████████ School Psychologist (D.D.).

The complaint in this matter was filed on October 7, 2009. A response to the complaint was filed by the Respondent on October 16, 2009, asserting that no request for an evaluation made been made during the 2008-2009 school year and that the Student is making academic progress. A prehearing conference was held on October 21, 2009, and a prehearing order was issued on that date.

22 documents were disclosed and filed by the Petitioner on November 30, 2009. 18 of the documents were entered into the record as exhibits (P 1 – P 18). Petitioner's exhibits are as follows:

- P 1 - Letter from Tomkins to Student Hearing Office (SHO), with attached Due Process Complaint Notice, October 6, 2009
- P 2 - SHO Due Process Hearing Notice
- P 3 - Letter from Tomkins to Vick, with attached Family Court Order, August 11, 2009
- P 4 - Letter from Tomkins to Special Education Coordinator, August 13, 2009
- P 5 - Letter from Tomkins to Special Education Coordinator, August 17, 2009
- P 6 - Email re: MH from Donna Wulkan (Sarah Tomkins) to chioma.ahaghotu@dc.gov, dated Tue 10/20/09 5:14 p.m.

¹ Dr. Ice was qualified to provide an expert opinion on matters concerning child and clinical psychology.

² Dr. Iseman was qualified to provide an expert opinion on special education matters.

- P 7 - Letter from Tomkins to McClain, November 6, 2009
- P 8 - Letter from Tomkins to McClain, November 23, 2009
- P 9 - Discipline Referral(s) (three), November 19, 2008
- P 10 - Student Support Team (SST) Request Form, Teacher Version, November 20, 2008; Student Support Team (SST) Request Form, Parent Version, November 21, 2008; SST Academic and/or Behavioral Instructional Strategies Planning and Implementation Form, November 21, 2008; Student Support Team (SST) Request Form, Teacher Version, November 20, 2008; Student Support Team (SST) Initial Meeting Report-Recorded to Complete, November 21, 2008
- P 11 - Functional Academic/Behavior Management Plan, November 25 – December 9, 2008
- P 12 - Student Support Team (SST) Ongoing/Final Meeting Report, March 17, 2009
- P 13 - Psychoeducational Evaluation, May 21, 2009 (See R 4)
- P 14 - [Student name] (Petitioner's proposed IEP)
- P 15 - Social Work Intake, October 14, 2009
- P 16 - Psychological Review, October 14, 2009
- P 17 - Psychiatric Evaluation, October 14, 2009
- P 18 - Curriculum Vitae, Deborah Lynn Ice, PsyD

The Petitioner's documents disclosed and not entered into the record are:

- P 19 - Curriculum Vitae, Dr. S [REDACTED]
- P 20 - Curriculum Vitae, [REDACTED]
- P 21 - Curriculum Vitae, [REDACTED]
- P 22 - Curriculum Vitae [REDACTED]

10 documents were disclosed by the Respondent on December 1, 2009³. All of the disclosed documents were admitted into the record. (R 1 - R 10). Respondent's exhibits are as follows:

- R 1 - [Student] Resolution Meeting, October 22, 2009 (hand written notes)
- R 2 - Review of Independent Assessment, October 20, 2009
- R 3 - Analysis of Existing Data (Draft), October 22, 2009
- R 4 - Psychoeducational Evaluation, May 21, 2009 (See P 13)

³ The documents were disclosed after 5:00 p.m. on November 30, 2009, five business days prior to the hearing. The Petitioner moved that the documents be excluded from the record as an untimely disclosure. While the disclosure was technically untimely, arriving after 5:00 p.m. as ordered by the IHO, there was no evidence or assertion of prejudice to the Petitioner as a result of this technical violation. Thus, the documents were not excluded.

- R 5 - Memo from McClain to Tomkins, November 17, 2009, with attached Letter of Invitation, November 17, 2009
- R 6 - Letter from Tomkins to McClain, November 23, 2009
- R 7 - Letter of Invitation, November 25, 2009
- R 8 - Functional Academic/Behavior Management Plan, March 17, 2009
- R 9 - Functional Academic/Behavior Management Plan, March 9, 2009
- R 10 - Teacher Comments, November 5, 2008, January 23, 2008(sic), April 3, 2009, June 12, 2009.

II. ISSUES

- 1) Whether the Respondent should have and failed to identify the Student as a child with a disability?
- 2) Whether the Respondent failed to respond to a request, in August 2009, for an occupational therapy (OT) assessment of the Student?

FINDINGS OF FACT

1. The Student is a [REDACTED] old kindergartner at an elementary in the District (School 2).⁴ The Student has been diagnosed with Attention Deficit Hyperactivity Disorder, Combined Type (ADHD) and Adjustment Disorder.⁵
2. The Student was placed in foster care during the summer of 2008 after he was removed from his biological parent due to neglect of other children in the household.⁶ The Student remains in foster care at present, and has been with his current foster parent since February 2009.⁷

⁴ Testimony (T) of F.P., T of P, P 13/R 4, P 15, P 16, P 17.

⁵ T of D.I., P 13/R 4.

⁶ T of M.M., T of P, P 13/R 4.

⁷ T of F.P., T of P.

3. The Student attended a pre-kindergarten program at School 1 during the 2008-09 school year.⁸ During that school year, the Student exhibited some significant behavior problems at school, the most egregious being throwing furniture and defecating in the classroom.⁹ This behavior was consistent with the Student's diagnosis of Adjustment Disorder.¹⁰ The Student's behaviors improved toward the end of the 2008-09 school year, following placement with F.P., and implementation of a behavior management plan at school.¹¹
4. The Student has exhibited behaviors consistent with ADHD during the current school year, both at home and at school.¹² The Student's behaviors have been managed by the teacher at School 2 and he is making academic progress consistent with his peers.¹³
5. While the Student Support Team at School 1 did develop a behavior management plan for the Student in the fall of 2008, neither they, nor any subsequent District

⁸ T of F.P., T of M.M.

⁹ T of F.P., P 9, R 8, R 9.

¹⁰ T of D.I., T of D.D.

¹¹ T of F.P., T of M.M., P 9, P 10, P 11, R 8, R 9, R 10.

¹² T of F.P., T of M.M., T of S.I., T of F.R., T of P.M., T of D.D.

¹³ T of F.R., T of P.M., T D.D. (There was also testimony from others about the Student's academic progress this year, most importantly from F.P. F.P. attributed the Student's performance to F.P. assisting him. Whether the Student was assisted by a parent is not itself a material fact, because parents are typically expected to assist their children in order to achieve academic success. The material fact here is that the Student is progressing in the general curriculum.)

staff, referred the Student to an IEP team for consideration of an initial evaluation to determine eligibility for special education.¹⁴

6. In a letter dated August 11, 2009, the Petitioner, through Counsel, requested copies of the Student's education records.¹⁵ The request did not include a referral to an IEP team.¹⁶ On August 13, 2009, the Petitioner, through Counsel, provided the Respondent with a copy of the May 21, 2009, Psychoeducational Evaluation completed by D.I. for the Child and Family Services Agency (CFSA) of the District of Columbia.¹⁷ The CFSA evaluation report noted that the Student "would qualify for [special education] services under the classification of Other Health Impaired (OHI)[,]" but did not include a referral of the Student to an IEP team.¹⁸ The August 13, 2009, letter sent to the Respondent also requested the authorization for an independent occupational therapy evaluation of the Student, but did not include a referral for special education services.¹⁹ The August 13 letter and the CFSA evaluation were sent to School 1, and then sent to School 2 on August 17, 2009, with the same request, but no referral to an IEP team.²⁰

¹⁴ T of P.M., P 10, P 11, P 12, R 8, R 9, R 10. (This finding is also based on the fact that no evidence was offered indicating that a referral had been made by staff, and so it is logical, in light of the evidence presented in P.M's testimony that while the Respondent had not made a final determination of eligibility at or before the October 22, 2009, resolution meeting, it did not believe the Student required special education.)

¹⁵ P 3.

¹⁶ P 3.

¹⁷ P 4.

¹⁸ P 13/R 4.

¹⁹ P 4.

²⁰ P 4, P 5.

7. The Complaint was subsequently filed via a letter dated October 6, 2009.²¹ The Complaint made clear for the first time that the Petitioner believed the Student was eligible for special education and related services.²²
8. The Petitioner presented a draft IEP at the hearing which did not include a statement of the Student's present levels of academic achievement and functional performance including how his disability impacts his involvement and progress in the general education curriculum.²³

IV. CONCLUSIONS OF LAW

1. Federal Regulations at 34 C.F.R. § 300.111, Child find, requires States to:
 - (a) . . . have in effect policies and procedures to ensure that —
 - (i) All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated;
2. The District of Columbia's policies and procedure for child find include, at D.C. Mun. Regs. tit. 5, § 3004.1(2005):
 - (a) A child with a suspected disability who may need special education and is at least two years, eight months of age and less than twenty-two years of age, shall be referred, in writing, to an IEP team.
 - (b) A referral, which shall state why it is thought that the child may have a disability may be made by the following:
 - (1) A child's parent or person in a parental relationship; or

²¹ P 1.

²² P 1.

²³ P 14.

- (2) A child (self-referral) who is between the ages of eighteen (18) and twenty-two (22) years of age or an emancipated minor who is eligible to attend the LEA; or
 - (3) A professional staff employee of the LEA; or
 - (4) A staff member of a public agency who has direct knowledge of the child.
- (c) If the child to be referred attends a D.C. public school or is enrolling in a D.C. public school at the time this referral is made, this referral shall be submitted by his or her parent to the building principal of his or her home school, on a form to be supplied to the parent by the home school at the time of the parent's request.
 - (d) If the child to be referred does not attend a D.C. public school and the parent does not register the child to attend a D.C. public school at the time the referral is made, this referral shall be submitted by the parent to a site designated by the Superintendent on a form to be supplied to the parent by that site at the time of the parent's request.
 - (e) Following a referral, an IEP team shall meet to review:
 - (1) Existing Data;
 - (2) Information from the parent;
 - (3) Pre-referral interventions and strategies;
 - (4) Current classroom-based assessments; and
 - (5) Observations by teachers and related service providers.

3. Prior written notice is required whenever a local education agency (LEA) proposes or refuses “to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child[.]” 34 C.F.R. § 300.503(a), D.C. Mun. Regs. tit. 5, § 3024.1(2003).

4. Under D.C. Mun. Regs. tit. 5, § 3001.1 (2005), a child with a disability is

a child who satisfies District registration and residency requirements and who has been evaluated in accordance with §§ 3005-3006 of this Chapter as having one of the following conditions and who, as a result of the impairment, needs special education and related services:

- (a) Autism;
- (b) Deaf-blindness;
- (c) Deafness;

- (d) Developmental Delay;
- (e) Emotional disturbance;
- (f) Hearing impairment;
- (g) Mental retardation;
- (h) Multiple disabilities;
- (i) Orthopedic impairment;
- (j) Visual impairment, including blindness;
- (k) Traumatic brain injury;
- (l) Other health impairment;
- (m) Learning disability; and
- (n) Speech or language impairment.

If it is determined, after an appropriate evaluation under the provisions of this Chapter, that a child has one of the disabilities identified in this section, but only needs a related service and not special education instruction, the child is not a child with a disability under this Chapter.

5. In this case, the Petitioner alleges the Student is a child with a disability under the categories of emotional disturbance, other health impairment, and, as a result, multiple disabilities. The Student does not meet the definition of any of these categories because while he may require related services, such as a positive behavior intervention plan, he does not require special education. The qualifications of the Student under each specific category is analyzed below.
6. The definition of emotional disturbance (ED) is:

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 (2005). The Student does not meet the definition of ED because his ADHD is not inhibiting his ability to learn, to build or maintain satisfactory interpersonal relationships with peers and teachers. It is not causing inappropriate types of behavior or feelings under normal circumstances because his challenging behaviors in the classroom are manageable with supports or related services and do not require special education. Also, it is arguable that because the Student is in foster care, the current circumstances are not "normal." Furthermore, his disability is not resulting in a general, pervasive mood of unhappiness or depression, or resulting in a tendency to develop physical symptoms or fears associated with personal or school problems.

7. The definition of other health impairment (OHI) is:

- having limited strength, vitality, or alertness, including a heightened alertness to environment stimuli, resulting in limited alertness with respect to the educational environment, and adversely affecting a child's educational performance, due to chronic or acute health problems such as:

...

- (b) Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder[.]

D.C. Mun. Regs. tit. 5, § 3001.1 (2005). While the list of chronic or acute health problems in the list is not exhaustive, this Student has ADHD and so that is focused on here. The Student's ADHD, and resulting symptoms, do not adversely

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. § 1415(i)(2).