

**District of Columbia  
Office of the State Superintendent of Education**

**Student Hearing Office  
810 First Street, N.E., Suite 2001  
Washington, DC 20002**

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STUDENT HEARING OFFICE  
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| <p><b>STUDENT<sup>1</sup></b><br/><b>By and through PARENT,</b></p> <p style="text-align: center;"><i>Petitioner,</i></p> <p>v.</p> <p><b>DISTRICT OF COLUMBIA<br/>PUBLIC SCHOOLS,</b></p> <p style="text-align: center;"><i>Respondent.</i></p> | <p>Impartial Hearing Officer:<br/>Charles M. Carron</p> |
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**HEARING OFFICER DETERMINATION**

**I. 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.*

The Complaint was filed December 19, 2011, on behalf of the Student, who resides in the District of Columbia, by Petitioner, Student's Parent, against Respondent, District of Columbia Public Schools.

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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.

On December 20, 2011, the undersigned was appointed as the Impartial Hearing Officer.

On January 5, 2012, Respondent filed its Response, stating that Respondent has not denied Student a free appropriate public education ("FAPE").

A Resolution Meeting was held on December 29, 2011 but it failed to resolve the Complaint. The statutory 30-day resolution period ended that date.

The 45-day timeline for the Hearing Officer's Determination started to run on December 30, 2011 and will conclude on February 12, 2012.

The undersigned held a Prehearing Conference ("PHC") by telephone on January 9, 2012, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by January 16, 2012 and that the Due Process Hearing ("DPH") would be held on January 23, 2012.

Petitioner filed its five-day disclosures on January 16, 2012. Respondent filed its five-day disclosures on January 17, 2012. Petitioner did not object to the one-day delay.

The DPH was held on January 23, 2012 at the Student Hearing Office, 810 First Street, NE, Room 2003, Washington, DC 20002. Petitioner elected for the hearing to be closed.

At the DPH, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-17

Respondent's Exhibits: R-1 through R-3

Impartial Hearing Officer's Exhibits: HO-1 through HO-9

The following Witnesses testified on behalf of the parties at the DPH:

Petitioner's Witnesses:

Judith Quarrington, educational advocate

Aperna Rao, Psy.D.

Parent

Respondent's Witnesses:

Special Education Coordinator

Teacher

School Psychologist

The parties made oral closing arguments and did not file written closing arguments or briefs.

## II. JURISDICTION

The Due Process Hearing was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA's implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. § 1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures*.

## III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the Complaint are as follows:

The Student is male, Current Age, and attends Current Grade at a public school (the Attending School). As of the date the Complaint was filed, the Student had not been determined to be eligible or ineligible for special education and related services as a child with a disability under the IDEA.

Petitioner claims that Respondent failed timely (a) to conduct and review the Student's evaluations in all areas of suspected disability, (b) to determine the Student's

eligibility for special education and related services and (c) to develop an appropriate Individualized Education Program (IEP) for the Student.

Petitioner asserts that the Student has Attention Deficit Hyperactivity Disorder (ADHD) and bipolar disorder. Petitioner asserts that these conditions constitute disabilities under the IDEA.

Respondent acknowledges that the Student has ADHD, and may have bipolar disorder. However, Respondent denies that the Student has a disability under the IDEA, denies that Respondent has violated any of its obligations under IDEA and further asserts that the Complaint is premature.

#### IV. ISSUES

As confirmed at the PHC, in the Prehearing Order issued January 9, 2012, and in opening statements at the DPH, the following issues were presented for determination at the DPH:

- (a) Did Respondent fail, by December 19, 2011, timely to conduct and review the Student's evaluations in all areas of suspected disability?
- (b) Did Respondent fail, by December 19, 2011, timely to determine the Student's eligibility for special education and related services?
- (c) Did Respondent fail, by December 19, 2011, timely to develop an appropriate IEP for the Student?
- (d) If the answer to (a), (b), and/or (c) above is "yes," what is the appropriate remedy?

Petitioner seeks the following relief:

- (a) a declaration that Respondent violated IDEA;
- (b) a determination that the Student is eligible for special education and related services as a qualified child with a disability;
- (c) an order requiring Respondent to convene a Multidisciplinary Team (MDT) meeting within 10 days to:
  - (i) review available evaluations and assessments;
  - (ii) develop an appropriate IEP for the Student; and
  - (iii) discuss and determine appropriate remedial services; and
- (d) an order of attorney's fees and costs.<sup>2</sup>

#### V. FINDINGS OF FACT

1. Student is a male, Current Age. HO-2.
2. Student resides in the District of Columbia. *Id.*
3. In January 2008, the Student was diagnosed with ADHD by Dr. Joel Ganz.

P-6-6.<sup>3</sup>

4. The Student has been prescribed medication for ADHD since January 2008. *Id.*; testimony of Dr. Rao; testimony of Parent. He does not always take his medication. Testimony of Teacher; testimony of Parent; testimony of Special Education Coordinator.

5. Respondent evaluated the Student in June 2008 and determined him not to be eligible for special education and related services. P-6-7, -10; testimony of Dr. Rao.

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<sup>2</sup> The undersigned lacks the authority to award attorney's fees or costs.

<sup>3</sup> When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 6.

6. In August 2010, Dr. Rama Pravage of Scruples Corporation conducted a “diagnostic assessment” of the Student. P-1. Dr. Pravage diagnosed the Student as having ADHD and ODD (oppositional defiant disorder). *Id.* There is no evidence that this assessment was shared with Respondent until this litigation.

7. During the 2010-11 school year, the Student was obedient, serious and reserved, but sometimes failed to give close attention to details or made careless mistakes. P-4-2. He often failed to follow through on instructions and failed to finish his work. *Id.* He gave up easily when confronted with difficult tasks. *Id.* He lost personal belongings. *Id.* He was easily distracted. *Id.* He demonstrated some uncooperative behavior and aggressiveness. *Id.*

8. During the 2010-11 school year, despite some scores of “below basic” in reading in January and March of 2011 (P-3), the Student’s academic achievement was in the average range for his age (P-4-3; testimony of Special Education Coordinator).<sup>4</sup> The Student’s fluency with academic tasks was within the average range. *Id.*

9. In May 2011, the Special Education Coordinator was requested by the Principal to conduct an educational evaluation of the Student to determine whether he would be retained in his then-current grade or promoted to the next grade. Testimony of Special Education Coordinator.

10. The Special Education Coordinator tested the Student on June 1, 2011 and met with the Parent and the Principal to review her report (P-4) and her finding that the

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<sup>4</sup> Petitioner asserts that the scores of “2” on the Student’s report cards (P-12, P-13, and P-14) demonstrate a failure to achieve at grade level. However, the legend on those report cards defines “2” as “Approaches the Standard (Basic): Student shows a basic working knowledge of skills/concepts; produces satisfactory work; usually applies skills/concepts correctly.” *Id.*

Student was ready for promotion to the next grade. Testimony of Special Education Coordinator. This was not a psychological evaluation. *Id.* The Special Education Coordinator did not make a determination of the Student's eligibility or ineligibility for special education based upon her educational evaluation; that was not the purpose of the evaluation. *Id.* However, if a child is evaluated for special education eligibility, an educational evaluation is one of the documents that the team will review. *Id.*

11. On August 3, 2011, Petitioner filed an Administrative Due Process Complaint Notice asserting that Respondent had failed timely to conduct and review evaluations of the Student in all areas of suspected disability. HO-8.

12. On August 29, 2011, Respondent agreed to authorize an independent comprehensive psychological evaluation of the Student, and Petitioner withdrew the Complaint that had been filed on August 3, 2011. HO-9.

13. Dr. Rao conducted the independent comprehensive psychological evaluation of the Student on September 9 and 16, 2011, and issued a report on September 24, 2011, diagnosing the Student with ADHD (P-5), confirming Dr. Ganz's 2008 diagnosis (P-6-10). The undersigned finds that the Student has ADHD.

14. In Dr. Rao's test setting, the Student's ADHD caused him to be "hypervigilant." Testimony of Dr. Rao. Being hypervigilant can preclude the Student from accurately assessing social cues and make it difficult for him to initiate and develop relationships. *Id.*

15. In Dr. Rao's test setting, the Student's ADHD caused him to "overincorporate," taking in more information than he could efficiently integrate, thereby slowing his work and exhausting him mentally. *Id.*

16. In Dr. Rao's test setting, the Student exhibited heightened alertness to environmental stimuli, which affected his performance by distracting him, causing him anxiety, and making it difficult for him to focus. *Id.*

17. Dr. Rao did not concur with the Student's other prior diagnosis of bipolar disorder and saw no need to assess the Student for that condition. *Id.* The Student has been prescribed medication for bipolar disorder but does not take that medication. *Id.* The undersigned finds that the Student does not have bipolar disorder.

18. Dr. Rao recommended that the Student receive accommodations at school for extra time (time and one half) to complete in-class assignments, tests and examinations. Testimony of Dr. Rao; P-5-12.

19. Dr. Rao recommended that the Student receive individual and group therapy. *Id.*

20. Although Dr. Rao testified that Student needed additional accommodations—minimizing distractions to allow him to focus more on his school work, smaller class setting, and breaking down his assignments into smaller “chunks”—these recommendations were not included in her report that was provided to Respondent, nor did she attend the January 12, 2012 eligibility meeting or otherwise communicate these recommendations to Respondent prior to the DPH. *Id.*

21. Dr. Rao's report did not recommend special education services. *Id.*

22. The Student does not lack strength, vitality or alertness. P-6-7.

23. The Student does not have limited alertness with respect to the educational environment. *Id.*<sup>5</sup>

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<sup>5</sup> Dr. Rao testified that she was “not sure” whether the Student had limited alertness to

24. The Student does not have an inability to learn. P-6-7, -8; P-13-3 (with regard to the 2010-11 school year, "Antonio has had a challenging year, but has finished out strong"); testimony of Teacher (with regard to the 2011-12 school year to date).

25. The Student does not exhibit inappropriate types of behaviors or feelings under normal circumstances. P-6-7.

26. The Student is sometimes happy (P-5-3), but often unhappy (P-4-1, -2). He exhibits self-criticism and poor self-regard which make him vulnerable to episodes of depression. P-5-11. However, his scores on various tests of depression are in the normal range (P-5-9, -10) and he does not exhibit a general pervasive mood of unhappiness or depression (P-6-10; testimony of Dr. Rao). The undersigned finds that the Student is not clinically depressed.<sup>6</sup>

27. The Student likes to come to school. P-7 (citing the Parent).

28. The Student is fearful of certain situations, particularly being around other children who do not accept him. Testimony of Dr. Rao.

29. The Student lacks friends at school, although he does have two or three close friends in his neighborhood that he sees three or more times a week outside of school hours. P-5-2, -3, -8.

30. The Student participates in three sports and belongs to two social organizations. P-5-9.

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the educational environment.

<sup>6</sup> Dr. Rao testified that the Student showed some signs of depression and a low self perception related to social issues (lack of friends at school). However, she did not refer him to a psychiatrist or other medical professional to evaluate depression and determine whether medication or other treatment was required. Given the negative results of Dr. Roa's testing for depression, the weight of the evidence supports the conclusion that the Student does not have clinical depression.

31. When the Student takes his medication for ADHD, he sits quietly and does not engage in outbursts at school or otherwise exhibit inappropriate behavior. Testimony of Judith Quarrington; testimony of Dr. Rao; testimony of Teacher; testimony of School Psychologist.

32. The Student's interactions with his family sometimes lead to outbursts and other inappropriate behavior by the Student, typically at the beginning of the school day. Testimony of Judith Quarrington (regarding the Student's argument with his brother that caused the Student to be removed from being a lunch worker); testimony of Special Education Coordinator (regarding the Student's fight with his brother after being pushed and yelled at by his siblings on the way to school); testimony of Special Education Coordinator (regarding the Student's disappointment when his father did not visit him as expected); testimony of School Psychologist. Once calmed down, the Student is fine for the rest of the day. Testimony of School Psychologist (summarizing her conversations with Special Education Coordinator, the Student's counselor and the Student's social worker).

33. The Student does not misbehave unless he is seriously provoked. Testimony of Judith Quarrington (citing statements by the community counselor who participated in the Student's eligibility determination meeting on January 12, 2012).

34. During the 2011-12 school year, the Student has been functioning at his Current Grade level, is a fluent reader, and is not behind in any subject. Testimony of Teacher.

35. The Student has misbehaved in class two times during the 2011-12 school year to date. *Id.* The Teacher maintains a behavior chart on all the students in the

classroom, with students who misbehave progressing from “green” to yellow” to “orange” to “red.” *Id.* With the exception of the two incidents this school year, the Student “remains on green daily.” *Id.*

36. Even when the Student misbehaves, he does not exhibit rage, nor act out, nor disrupt the class. Testimony of School Psychologist.

37. The Student is respectful and acts appropriately with peers and adults. P-6-7 (citing Special Education Coordinator).

38. As of December 19, 2011, the date the instant Complaint was filed, the Student had not been determined to be eligible or ineligible for special education and related services under the IDEA as a child with a disability.

39. The Special Education Coordinator wrote to the Parent on December 28, 2011, stating, *inter alia*, that Respondent had not yet reviewed educational and behavior data to determine whether to proceed with an evaluation. R-1-2. That correspondence included a Letter of Invitation to the eligibility meeting on January 12, 2012. R-1-3.<sup>7</sup>

40. On January 10, 2012<sup>8</sup>, School Psychologist issued a Review of Independent Psychological Evaluation. P-6.

41. At the eligibility meeting held January 12, 2012, Respondent determined that the Student is not eligible, with the Parent and Ms. Quarrington dissenting. Testimony of Parent; testimony of Ms. Quarrington; testimony of School Psychologist; P-11; P-15.

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<sup>7</sup> Respondent asserted in its Response that an eligibility meeting was scheduled “prior to the Winter Break in December 2011.” HO-3-1. However, the record is devoid of any evidence of an eligibility meeting having been scheduled for a date in December 2011.

<sup>8</sup> Although the report (P-6) is dated “1/10/11,” counsel for the parties agreed at the DPH that the correct date is “1/10/12.”

42. At the January 12, 2012 eligibility meeting, Respondent offered several accommodations of the Student's ADHD through the vehicle of a "504 Plan," including smaller group instruction, strategies for the classroom teacher to assist the Student in maintaining focus, and assistance from a social worker. Testimony of Ms. Quarrington; testimony of School Psychologist.

## VI. BURDEN OF PROOF

In a special education due process hearing, the burden of persuasion is on the party seeking relief. DCMR 5-E3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also, N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

The opinion testimony of an educational advocate who has not been qualified and admitted as an expert witness is "inadmissible to prove anything." *Gill v. District of Columbia*, 770 F. Supp. 2d 112 (D.D.C. 2011). In the instant case, educational advocate Judith Quarrington was not qualified or admitted as an expert witness. The undersigned therefore did not allow her to testify as to her opinions and disregarded the opinions in her letter challenging Respondent's conclusion that the Student is not eligible under the IDEA (P-15). Because Ms. Quarrington had not observed the Student at school and had no contact with him, his teachers or social worker prior to the eligibility meeting on January 12, 2012, her testimony was considered only as to what was discussed at that meeting.

## VII. CREDIBILITY

The undersigned found the Parent's testimony to be unreliable. Her responses to questions—even on direct examination from her own attorney—were halting. She had persistent memory failures. For example, she could not recall the name of the Student's classroom teacher from the 2010-11 school year and she could not recall with whom she had spoken about the Student's possible retention in his then-current grade. She testified that the Special Education Coordinator had evaluated the Student in December 2011, when in fact it was in June 2011. The Parent could not recall whether the Student's test scores indicated that his classroom performance should be higher, or *vice versa*.

The Parent also demonstrated a persistent lack of recollection of dates, frequency of events, and other details, rendering her version of occurrences far less credible than the testimony of other witnesses and the documentary evidence. The Parent testified that she has four other children, two of whom have been found eligible for special education and have IEPs. She testified that she was certain she was not confusing discussions with Attending School staff concerning the Student with discussions concerning her other children; however, given the Parent's poor recall of events, the undersigned gives little weight to this assurance.

Although the undersigned does not infer any dishonest intent on the part of the Parent, where the testimony of the Parent is in conflict with other evidence, the undersigned has credited the latter.

For example, the Parent testified that the Principal, the vice principal, the Special Education Coordinator, or the Teacher call the Parent weekly (at least 20 times so far in the 2011-12 school year) to pick up the Student because he had been pulled out of class

for misbehavior, and that he was in fact sent home at least ten times. The Parent further testified that “a couple of times a month,” Attending School staff asked her not to bring the Student to school for several days, as informal suspensions, resulting in the Parent repeatedly keeping the Student home for up to three days at a time. None of this testimony was supported by the Student’s attendance calendars. P-12-2, P-13-2, P-14-3. Moreover, the Special Education Coordinator testified that she did not call the Parent about the Student’s behavior, and the Teacher testified that she had only called the Parent once, in September 2011.

Similarly, there was no documentary evidence supporting the Parent’s testimony that sometime during the 2010-11 school year, she submitted a form to “Mr. Edwards,” the (now deceased) secretary in the Attending School office, specifically requesting evaluation of the Student for special education.

The Parent’s testimony that the Principal recommended to her that she have the Student admitted to a psychiatric hospital—including stating that if the Parent signed a form, the hospital could come to the school and pick up the Student—was not credible because there was no testimony by the Parent or any other witness, nor any exhibit, even suggesting that the Student ever engaged in any behavior requiring inpatient mental health care.

To the extent Dr. Rao relied upon the Parent’s description of the frequency and severity of the Student’s asserted misbehavior (*e.g.*, “[The Parent] reported more problems than are typically reported by parents of boys aged 6 to 11, particularly withdrawn or depressed behavior, problems in social relationships, attention problems, rule-breaking behavior, and problems of an aggressive nature” (P-5-9)), Dr. Rao’s

conclusions are compromised by the unreliability of the Parent as an "historian" of the Student's symptoms. The undersigned therefore discounts those of Dr. Rao's opinions that are based upon information provided by the Parent unsubstantiated by other sources or testing.

The undersigned found all of the other witnesses to be credible, to the extent of their first hand knowledge or professional expertise.<sup>9</sup>

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<sup>9</sup> Respondent's counsel challenged the qualification of Dr. Rao as an expert, specifically because she is licensed as a psychologist only in Maryland (*i.e.*, not in the District of Columbia) and that until her licensure in Maryland in November 2011, she worked as a psychology associate under the supervision of clinical psychologists. Regardless of whether State licensure of the provider is required for Respondent to pay the cost of an independent educational evaluation, State licensure is not a requirement for qualification of an expert witness. The undersigned accepted Dr. Rao as an expert in clinical psychology, and also allowed her to testify regarding recommendations she made based on the Student's psychological condition(s). The undersigned did not accept Dr. Rao as an expert on special education, *i.e.*, on what constitutes a disability under the IDEA and what a school district's educational programming obligations are under the IDEA. As for the weight accorded to Dr. Rao's testimony, the undersigned did not discount her testimony due to her status as a psychology associate for the following reasons: (1) Dr. Rao testified that she has years of experience administering and interpreting the customary tests that are utilized in comprehensive psychological evaluation of children, having conducted 30 to 45 such evaluations. (2) Dr. Rao's supervising psychologist signed the evaluation of the Student (P-5-13). (3) Dr. Rao's testimony was very candid, even when it did not support Petitioner's case (*e.g.*, Dr. Rao disagreed with the Student's prior diagnosis of bipolar disorder).

## VIII. CONCLUSIONS OF LAW

### A. Summary

1. Respondent did not meet its obligations regarding timely evaluation of the Student.
2. Respondent did not meet its obligations regarding timely determination of the Student's eligibility for special education and related services.
3. The Student is not eligible for special education and related services because his ADHD<sup>10</sup> does not rise to the level of a disability under the IDEA.
4. Petitioner's assertion that Respondent failed timely to develop an IEP for the Student is premature, as well as moot due to the Student's ineligibility.

### B. Purpose of the IDEA

5. The IDEA is intended "(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected..." 20 U.S.C. § 1400(d)(1). *Accord*, DCMR 5-E3000.1.

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<sup>10</sup> ADHD *may* qualify as a disability under either the "Emotional Disturbance" or "Other Health Impairment" category of IDEA, depending upon the adverse effect of the condition on the specific child's educational performance, as discussed *infra*.

### C. Whether Respondent Violated Its Child Find Obligations

6. The IDEA imposes an affirmative obligation on the states that receive federal funding (including the District of Columbia, which is a state for these purposes) to ensure that “all children with disabilities residing in the State, including ... children with disabilities attending private schools ... and who are in need of special education and related services, are identified, located, and evaluated ...” 20 U.S.C. § 1412(a)(3)(a). *See also*, 34 C.F.R. § 300.111(a)(1)(i) and DCMR 5-E3002.3(a).

7. During the 2010-11 school year, Respondent was not on notice of substantial evidence that the Student may have qualified for special education such that he should have been (re)evaluated. Although the Student was known to have ADHD, and possibly bipolar disorder, he had been determined in 2008, without challenge by Petitioner, to be ineligible for special education or related services. During the 2010-11 school year, the Student did not exhibit signs that his condition(s) had worsened into a disability adversely affecting his academic performance or his social-emotional development. Despite some concerns expressed by the Parent and the teacher regarding inattentiveness and occasional uncooperativeness, the Student’s academic achievement and fluency tested as average for his age. Unlike cases where a school district was found to have overlooked a disability and to have been negligent in not evaluating a child, in the instant case the Student was not failing academically, had not attempted suicide, had not been hospitalized, had not been disciplined, and did not have a pattern of refusing to turn in homework or classroom assignments. In these circumstances, Respondent’s Child Find

obligations were not triggered during the 2010-11 school year.<sup>11</sup> *C.f., N.G. v. District of Columbia, supra, and Clay T. v. Walton County Sch. District*, 952 F. Supp. 817 (M.D. Ga. 1997).

8. Petitioner's filing of a due process complaint on August 3, 2011, requesting evaluation of the Student, did put Respondent on notice that Petitioner believed the Student's condition had worsened, adversely affecting his academic performance, and thereby triggered Respondent's Child Find obligation even without a formal written referral form having been signed by the Parent.<sup>12</sup>

#### D. Whether Respondent Timely Evaluated the Student

9. An initial evaluation must be conducted within 60 days of receiving parental consent for evaluation unless the State establishes a different timeframe within which the evaluation must be conducted. 34 C.F.R. § 300.301(c)(1).

10. The District of Columbia, which is a State for purposes of IDEA (20 U.S.C. § 1401(31)), has established its own timeframe. Under DC ST § 38-2561.02(a), "DCPS shall assess or evaluate a student who may have a disability and who may require special education services within 120 days from the date that the student was referred for an evaluation or assessment." The 120 days runs from referral, not consent.

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<sup>11</sup> Even if Respondent should have initiated an evaluation of the Student at the end of the 2010-11 school year, as discussed *infra*, the Student is not eligible for special education and related services; accordingly, the Student was not denied a FAPE and no remedy is warranted. 20 U.S.C. § 1414(f)(3)(E)(ii). *See also*, 34 C.F.R. § 300.513(a). *Accord, Lesesne v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 2006).

<sup>12</sup> The undersigned therefore rejects Respondent's assertion that the time period for evaluating the Student began on November 7, 2011, when Respondent claims to have received a formal referral. R-1-2.

11. In this case, the Complaint filed August 3, 2011 was the equivalent of a formal referral, and Respondent therefore had 120 days, until December 1, 2011, to evaluate the Student. Respondent authorized an Independent Educational Evaluation, which was conducted by Dr. Rao, who issued her report on September 24, 2011.<sup>13</sup> As of December 28, 2011, Respondent had not determined whether to proceed with any other evaluation. The School Psychologist did not issue her report, relying upon Dr. Rao's report, until January 10, 2012. Accordingly, the Student's evaluation was untimely.

E. Whether Respondent Timely Determined the Student's Eligibility

12. Once a child has been evaluated,

a group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (c) of this section and the educational needs of the child ....

34 C.F.R. §300.306(a)(1).

13. There is no statutory or regulatory time limit on the school district making an eligibility determination. However, the U.S. District Court for the District of Columbia has interpreted the 120-day period for evaluation as the period for evaluation and determination of eligibility. *D.L. v. District of Columbia*, 111 LRP 71487 (05-1437 (RCL), November 16, 2011), at paragraph 40. In the instant case, the 120-day period ended December 1, 2011. Respondent did not make an eligibility determination until

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<sup>13</sup> Petitioner did not provide the report to Respondent until November 11, 2011. HO-3-1. Respondent still had 20 days to complete its evaluation of the Student, which apparently would only have required the School Psychologist to review Dr. Rao's evaluation and write her own report. There is no evidence in the record that Respondent sought to obtain Dr. Rao's evaluation report earlier or sought to conduct other evaluations of the Student.

January 12, 2012. R-2. Accordingly, as of the date the instant Complaint was filed, December 19, 2011, Respondent had failed timely to determine the Student's eligibility.<sup>14</sup>

**F. Whether Respondent's Procedural Violations of IDEA Denied the Student a FAPE**

14. Procedural violations of IDEA do not necessarily equate to a denial of FAPE.

Rather, a hearing officer's determination of whether a child received a FAPE must be based on substantive grounds:

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies -

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

20 U.S.C. § 1414(f)(3)(E)(ii). *See also*, 34 C.F.R. § 300.513(a). *Accord*, *Lesesne v.*

*District of Columbia*, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 2006).

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<sup>14</sup> Respondent asserted in its Response that an eligibility meeting was scheduled "prior to the Winter Break in December 2011." HO-3. However, any date in December other than December 1<sup>st</sup> would have been past the deadline. Moreover, the record is devoid of any evidence of an eligibility meeting having been scheduled for a date in December 2011. Rather, the record demonstrates that the Special Education Coordinator contacted the Parent on December 1, 2011 to advise her that the eligibility meeting would be held on January 12, 2012 (R-1-1) and wrote to the Parent on December 28, 2011, inviting her to the January 12, 2012 meeting (R-1-3) and stating, *inter alia*, that Respondent had not yet reviewed educational and behavior data to determine whether to proceed with an evaluation (R-1-2).

15. To determine whether Respondent's procedural violations of IDEA—a 42-day delay in evaluating the Student and determining his eligibility—denied the Student a FAPE, the undersigned must make an independent determination of whether the Student is eligible for special education and related services under the IDEA.

G. Whether the Student is Eligible

16. The IDEA defines a child with a disability as a child—

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. § 1401(3)(A).

17. “Child with a disability” is further defined in 34 C.F.R. § 300.8(a) as a child evaluated—

as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

18. In the instant case, the Student does not have mental retardation, a hearing impairment, a speech or language impairment, a visual impairment, an orthopedic impairment, autism, traumatic brain injury, a specific learning disability, or deaf-blindness. Accordingly, the Student is eligible as a “child with a disability” only if he has

an "emotional disturbance," an "other health impairment" or "multiple disabilities" and if, by reason thereof, he needs special education and related services.<sup>15</sup>

19. "Emotional disturbance" is defined in 34 C.F.R. § 300.8(c)(4) as

(i) ... 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 behaviors or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

*Accord*, DCMR 5-E3001.1.

20. The Student does not have an "emotional disturbance" within the meaning of IDEA. He does not have an inability to learn. Although he has difficulty making and keeping friends at school, he does have friends in his neighborhood and relates satisfactorily with peers and teachers at school. He participates in three sports and belongs to two social organizations. His occasional inappropriate behavior in school typically is the result of unusual family pressures or his failure to take his medication. Although he has good days and bad days, he does not have a general pervasive mood of unhappiness or depression. There is no evidence of physical symptoms. To the extent

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<sup>15</sup> The fact that the Student is advancing from grade to grade does not preclude a finding that the Student needs special education and related services. *See*, 34 C.F.R. § 300.101(c).

the Student demonstrates symptoms of ADHD—including anxiety about interpersonal relationships—at school, he does not do so to a “marked degree,” and these symptoms do not adversely affect his educational performance.

21. “Other health impairment” is defined in 34 C.F.R. § 300.8(c)(9) as

having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder ... and

(ii) Adversely affects a child’s educational performance.

22. The Student does not have an “other health impairment.” He does not lack strength, vitality or alertness. Although he demonstrated heightened alertness to environmental stimuli in a test setting, there is no evidence that he lacks alertness with respect to the educational environment. Moreover, to the extent the Student may exhibit these symptoms of ADHD, there is insufficient evidence that these symptoms adversely affect his educational performance.

23. Respondent’s offer to accommodate the Student’s ADHD under Section 504 of the Rehabilitation Act does not constitute an admission that the Student has a disability under the IDEA because the legal standards are different.

24. “Multiple disabilities” is defined in 34 C.F.R. § 300.8(c)(7) as

concomitant impairments (such as mental retardation-blindness or mental retardation-orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments....

25. Because the Student does not have even one impairment under the IDEA, he does not have “multiple disabilities” under the IDEA.

26. The preponderance of the evidence in this case supports Respondent's finding that the Student is not eligible for special education and related services. To the extent the evidence is conflicting, Petitioner has not satisfied her burden of persuasion, *i.e.*, that it is more likely than not that the Student has a disability under the IDEA.

27. Because the Student is not eligible, Respondent's procedural violations in failing timely to evaluate and determine his eligibility do not constitute a denial of FAPE.

#### H. Whether Respondent Violated Its Obligation to Develop an IEP for the Student

28. The "primary vehicle" for implementing the goals of the IDEA is the individualized education program ("IEP") which the IDEA "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)).

29. The requirement of an IEP applies once "a determination is made that a child has a disability and needs special education and related services ...." 34 C.F.R. §300.306(c)(2). *See also*, DCMR 5-E3007.1 ("The IEP team shall meet and develop an IEP for a child with a disability within thirty days of a determination that a child needs special education and related services.")

30. Because the Student in the instant case does not have a disability within the meaning of the IDEA, Respondent had no obligation to develop an IEP for him.

31. Even if the Student were eligible, in the instant case the deadline for determining eligibility was December 1, 2011; accordingly, the deadline to develop an IEP was December 31, 2011, which was after the filing date of the DPC. Thus, even if the Student were eligible, the DPC is premature with regard to the alleged failure to

develop an IEP, providing an independent basis for dismissal of that claim. *Jones ex rel. A.J. v. District of Columbia*, 646 F. Supp 2d 62 (D.D.C. 2009) (“DCPS still had 95 days left . . . when Jones filed her administrative action. Therefore, Jones’ administrative complaint was premature, and this Court affirms that complaint’s dismissal, albeit on different grounds.”).

#### IX. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED this 30<sup>th</sup> day of January, 2012, that Petitioner’s Due Process Complaint dated December 19, 2011, is dismissed in its entirety, with prejudice.



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Charles M. Carron  
Impartial Hearing Officer

## **NOTICE OF APPEAL RIGHTS**

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial 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).