

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

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STUDENT HEARING OFFICE  
2011 SEP 20 PM 12: 51

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PETITIONER, on behalf of  
[STUDENT],<sup>1</sup>

Date Issued: September 20, 2011

Petitioner,

Hearing Officer: Peter B. Vaden

v

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by MOTHER (the "Petitioner"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, the Petitioner contends that Student's September 30, 2010 IEP provides inadequate special education services for the 2011-2012 school year.

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<sup>1</sup> Personal identification information is provided in Appendix A.

Student, an AGE young woman, is a resident of the District of Columbia. The Petitioner's Due Process Complaint, filed on July 8, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on July 11, 2011. At the July 22, 2011 resolution session, the parties reached agreement on some issues, but did not agree on the content of an appropriate IEP for the 2011-2012 school year. The parties did not agree to curtail the remainder of the 30-day resolution period. On July 29, 2011, a prehearing telephone conference was held with the Hearing Officer and counsel to discuss the hearing date, issues to be determined and other matters. The 45-day time line for issuance of this HOD began on August 7, 2011. On August 24, 2011, Petitioner's unopposed motion for a 10-day continuance was granted, extending the due date for issuance of this HOD to October 1, 2011.

The due process hearing was held before the undersigned Impartial Hearing Officer on September 16, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified and called as witnesses Student and EDUCATIONAL ADVOCATE. DCPS called as witnesses DC HIGH SCHOOL SPED COORDINATOR and DC PUBLIC CHARTER SCHOOL ("DCPCS") SPED COORDINATOR. Petitioner's Exhibits P-1 through P-8 were admitted into evidence without objection. DCPS Exhibits R-1 through R-5 were admitted into evidence without objection. At the conclusion of the taking of evidence, counsel for both parties made oral closing arguments.

## JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

## ISSUE AND RELIEF SOUGHT

WHETHER STUDENT IS BEING DENIED A FAPE BECAUSE HER SEPTEMBER 30, 2010 IEP IS NOT REASONABLY CALCULATED TO PROVIDE EDUCATIONAL BENEFIT FOR THE CURRENT 2011-2012 SCHOOL YEAR.

Petitioner requests that DCPS be ordered, at the upcoming annual review of Student's IEP, to provide increased hours of Specialized Instruction, outside of the general education setting.<sup>2</sup>

## FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is an AGE adolescent. Student resides with Mother and a sister in the District of Columbia. Testimony of Mother, Testimony of Student.
2. Student is eligible for special education and related services under the Primary Disability classification, Specific Learning Disability ("SLD"), due to deficits in, *inter alia*, verbal reasoning, complex problem solving, and abstract thinking. Exhibit R-1, P-3.
3. For the 2010-2011 school year, Student was enrolled in GRADE at DCPCS. Under her September 30, 2010 Individualized Education Plan ("IEP"), Student received 8 hours per week of Specialized Instruction in the General Education setting and one hour per week of Behavioral Support Services. Exhibit P-3.

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<sup>2</sup> Counsel for Petitioner reported that compensatory education issues were fully resolved prior to the due process hearing.

4. For her 2010-2011 school year at DCPCS, Student received failing marks in English III, U.S. History, Algebra II, Spanish II and Journalism. She received B's and C's in her other four courses. DCPCS retained Student in GRADE. Exhibit P-4.

5. Toward the middle of the 2010-2011 school year, Petitioner asked the SPED Coordinator at DCPCS for more help for Student. After the 2010-2011 school year, Petitioner took Student out of DCPCS because she believed Student was not getting a proper education there. Testimony of Petitioner.

6. Petitioner enrolled Student at DC High School ("DCHS") for the 2011-2012 school year, because DCHS was close to her home and because DCHS received good ratings on the internet. At DCHS, Student is doing fine. Her teachers say she is doing a good job and she has not had behavior problems. Student is talkative in class, but is otherwise an excellent student. Petitioner still believes that Student needs smaller class size for core courses. Testimony of Petitioner.

7. All of Student's classes at DCHS are currently taught in an inclusion setting, except Learning Lab, which is provided in a self-contained classroom with some 15 students. Testimony of Student. Student's U.S. History and English III classes are co-taught with a special education teacher. Testimony of DCHS SPED Coordinator. Student's educational goal is to attend college to study pharmacy. Testimony of Student.

8. DCHS has scheduled an IEP team meeting on September 26, 2011 to review and revise Student's IEP. Petitioner has been invited to the IEP meeting. Testimony of Petitioner.

9. On July 20, 2011, DCPS authorized Petitioner to obtain, at DCPS expense, Independent Educational Evaluations ("IEE") for Student, including a Comprehensive Psychological Evaluation, a Functional Behavioral Assessment and a Vocational Assessment.

Exhibit R-4.

**CONCLUSIONS OF LAW**

Based upon the above Findings of Fact, the argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

**DISCUSSION**

**Burden of Proof**

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

IS STUDENT BEING DENIED A FAPE BECAUSE HER SEPTEMBER 30, 2010 IEP IS NOT ADEQUATE FOR THE 2011-2012 SCHOOL YEAR?

In her complaint for due process, Petitioner alleged that Student's September 30, 2010 IEP and school placement were inappropriate. For relief, she requested, *inter alia*, that DCPS be ordered to convene Student's MDT/IEP team to revise and update Student's IEP and that Student be placed at a suitable school that would be able to implement the revised IEP. *See* Prehearing Order, July 29, 2011. In the weeks before the hearing in this case, Student enrolled in DCHS, and both Petitioner and Student are pleased with this school. DCHS has scheduled Student's annual IEP review meeting for September 26, 2011, where, pursuant to the IDEA, DCPS must revise the September 30, 2010 IEP to address, *inter alia*, Student's lack of expected progress toward her annual goals, the results of reevaluations and information about the Student provided to, or by, the Petitioner, and Student's anticipated needs. *See* 34 CFR 300.324(b).

At this early stage of the school year, according to Petitioner and Student, Student is doing fine at DCHS. Petitioner contends that, notwithstanding her satisfaction with Student's

current school and the imminence of the upcoming IEP meeting, the Hearing Officer should determine that the September 30, 2010 IEP was not appropriate for Student and direct the IEP team to provide more specialized instruction, outside of general education, in the next IEP. For two reasons, I find that this relief is not warranted or appropriate. First, the evidence does not establish that the September 30, 2010 IEP was inappropriate when it was developed. Petitioner argues that, based upon Student's failing grades at DCPCS for the 2010-2011 school year, the IEP program was not a success for her. However, a child's success or lack of success under an IEP is not the correct measure of its appropriateness. The well-established standard for determining the adequacy of an IEP is whether the individualized educational program developed through the IDEA's procedures was reasonably calculated to enable the child to receive educational benefits. See *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 3051 (1982). See, also, e.g., *Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C. 2004) (Whether or not the IEP was reasonably calculated to provide some educational benefit.) Generally, an IEP is reviewed prospectively – not in hindsight. As the U.S. District Court for the District of Columbia has observed, “[b]ecause the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child's placement.” *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008), quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008). Therefore, under *Rowley, supra*, the issue for the Hearing Officer is

whether the IEP was reasonably calculated to convey educational benefit to Student when it was developed – not whether the IEP was successful for Student.

The Petitioner has failed to establish that the September 30, 2010 IEP was not adequate at the time it was offered to Student. The only evidence offered regarding the appropriateness of the IEP, when it was developed, was Educational Advocate's testimony. However, Educational Advocate had not reviewed Student's educational records (except the hearing exhibits), had not met with Student's teachers or school administrators, had not observed Student in an educational setting, and had only met Petitioner and Student a few minutes before the due process hearing commenced. Therefore, I sustained DCPS' objection to Educational Advocate's testimony on this issue because her opinion was not based on sufficient facts or data. *Cf.* Federal Rules of Evidence, Rule 702 (Expert testimony reliable if, *inter alia*, based upon sufficient facts or data.)<sup>3</sup>

The second reason for denying prospective relief in this case is that a Hearing Officer must "afford some deference to the expertise of the . . . school officials responsible for the child's education." *See, e.g., JN v. District of Columbia*, 677 F. Supp.2d 314, 322 (D.D.C. 2010) (citations omitted). "To that end, the parents or legal guardians, teachers, school district and other professionals (collectively, the 'IEP team') meet annually to design a comprehensive individualized education program ('IEP') tailored to each disabled child's needs. 20 U.S.C. § 1414(d). *Alston v. District of Columbia*, 439 F.Supp.2d 86, 90 (D.D.C. 2006) Here, Student's IEP team members at DCHS have not yet had the opportunity to meet to review Student's current IEP needs, or to consider her alleged lack of expected progress at DCPCS, the results of

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<sup>3</sup> To the extent that Educational Advocate's opinion testimony was received without objection from DCPS, I discount such opinions because the opinions are not based upon sufficient facts or data.

reevaluations<sup>4</sup> and other information. *See* 34 CFR 300.324(b). When Student's IEP team does meet later this month, there is no indication that the team will not follow the IDEA's requirements for review and revision of Student's IEP and I find there is no basis for the Hearing Officer to determine which services the Student must be provided. *Cf. e.g., O'Donnell Const. Co. v. District of Columbia*, 762 F. Supp. 354, 761-762 (D.D.C. 1991) (To obtain injunctive relief, a party must show that they can reasonably expect to encounter the same or similar injury in the future.)

Finally, at the hearing, Petitioner did not offer competent evidence on Student's specific educational goals and requirements which must be addressed in her next IEP. It would be wholly speculative for the Hearing Officer to determine the services Student will need in her next IEP in the absence of such evidence. In summary therefore, I find that Petitioner has not established that the September 30, 2010 IEP was not reasonably calculated to provide Student a FAPE or that grounds exist for the Hearing Officer to prescribe the content of Student's next IEP.

#### **ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED that all relief requested by Petitioner herein is denied.

Date: September 20, 2011

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

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<sup>4</sup> In July 2011, DCPS authorized IEEs for Student, including a Comprehensive Psychological Evaluation, to include cognitive, educational, and clinical components as well as a social history.

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(I).