

**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
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PARENT, on behalf of
[STUDENT],¹

Petitioner,

Date Issued: November 21, 2010

Hearing Officer: Peter B. Vaden

v

Case No:

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Hearing Date: November 16, 2010

Student Hearing Office, Room 2008
Washington, D.C.

HEARING OFFICER DETERMINATION

BACKGROUND

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner PARENT (the "Parent"), 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 alleges that District of Columbia Public Schools' ("DCPS") March 23, 2010 Individualized Education Program ("IEP") was deficient for Student because it contained

¹ Personal identification information is provided in Appendix A.

inappropriate goals and objectives, inappropriate or no baselines, insufficient hours of specialized instruction and no provision for Extended Year Services (“EYS”). The Parent’s complaint is limited to the 2009-2010 school year period after Student’s March 23, 2010 IEP was adopted.

The Student, an AGE adolescent, is a resident of the District of Columbia and is eligible for special education services under the primary disability, Specific Learning Disability (“SLD”). The Parent’s Due Process Complaint, filed on September 17, 2010, named DCPS as respondent. The undersigned Hearing Officer was appointed on September 22, 2010. The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

The due process hearing was held before the undersigned impartial hearing officer on November 16, 2010 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 by telephone and was represented by counsel. Respondent DCPS was represented by counsel. The Parent testified and called as witness EDUCATIONAL ADVOCATE. DCPS called as witnesses SPED COORDINATOR and SPEECH PATHOLOGIST. All witnesses testified by telephone. Petitioner Exhibits P-1, P-3 and P-6 and DCPS Exhibits S-1, S-5, S-6, S-7, S-9 and S-10 were admitted into evidence. After DCPS’s objection to Petitioner Exhibit P-5 was sustained, Petitioner proffered the exhibit for the record.

ISSUES

1. Whether the Student’s March 23, 2010 IEP was not reasonably calculated to provide FAPE because it contained inappropriate goals and objectives, inappropriate baselines, insufficient hours of specialized instruction, no EYS, and made an inappropriate placement; and
2. Whether Student is entitled to an award of compensatory education.

FINDINGS OF FACT

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

1. Student is an AGE resident of the District of Columbia. He was last found eligible for specialized instruction and related services in May 2009 as a qualified child with a Specific Learning Disability.
2. Student was enrolled in GRADE at ELEMENTARY SCHOOL ("ES") for the 2009-2010 school year. He is currently enrolled at PUBLIC CHARTER SCHOOL ("PCS").
3. Student's IEP Team met on March 23, 2010 at ES. Parent attended by telephone. All of the IEP team members, including Parent, agreed with the content of the IEP. Parent did not voice any concerns about the IEP or over the appropriateness of the IEP goals and objectives.
4. The IEP was sent home to the Parent to review and sign. Parent signed the IEP and returned it to ES.
5. The IEP provided for Specialized Instruction outside general education for 10 hours per week and for Speech-Language Services for 30 minutes per week. There was no evidence that Student did not receive the services specified in the IEP for the rest of the 2009-2010 school year.
6. The IEP Team decided that ESY services were required for the Student. In the spring of 2010, SPED Coordinator sent Parent an enrollment form for ESY at ESY SCHOOL. Parent did not return the enrollment form and did not communicate further with SPED Coordinator regarding ESY.

7. At the end of the 2009-2010 school year, Parent withdrew Student from DCPS and enrolled him at PCS. Parent does not know what special education services Student is receiving at PCS.

CONCLUSIONS OF LAW

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

The March 23, 2010 IEP

Parent contends that DCPS's March 23, 2010 IEP for Student was inadequate because it contained inappropriate goals and objectives, inappropriate baselines, insufficient hours of specialized instruction, no EYS, and made an inappropriate placement. "To be sufficient to confer a [Free Appropriate Public Education ("FAPE")] upon a given child, an IEP must be 'reasonably calculated to enable the child to receive educational benefits.'" *Suggs v. District of Columbia*, 679 F. Supp.2d 43, 48 (D.D.C., 2010), quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Parent, as the party challenging the IEP, had the burden of proof to show that the plan was inappropriate. *See, e.g., Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); *Hinson ex rel. N.H. v. Merritt Educational Center*, 579 F.Supp.2d 89, 95 (D.D.C., 2008).

While the Parent opined that she thought that Student did not receive educational benefit under the March 23, 2010 IEP, she offered no facts to show that, at the time it was offered, the IEP was not reasonably calculated to enable Student to receive educational benefit at ES. 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).

Educational Advocate, who was qualified as an expert in development of IEPs, opined that the Annual Goals in the March 23, 2010 IEP were not adequate. She testified that the basis for her opinion was that the Present Level of Educational Performance ("PLEP") sections in the IEP stated that Student, a grader, was functioning at third or fourth grade levels in respective academic areas. However the Annual Goals fail to specify at what grade level the goals will be measured. For example, Annual Goal I in Academic-Mathematics states that Student will select and use appropriate operations (addition, subtraction, multiplication and division) to solve problems with 80% accuracy. Educational Advocate's criticism appears to be that this Annual Goal did not specify whether the operations that Student would select and use would be appropriate to third/fourth or to grade.

I discount the opinion of Educational Advocate. Although she has a distinguished background in special education, in this case Educational Advocate has not conducted evaluations, reviewed records or otherwise sufficiently informed herself regarding this Student to form a basis for a persuasive opinion. She did not meet Student or interview Parent. She did not observe Student in his classroom. She did not review Student's school records, except for an attendance record. She did not meet with Student's teachers or the SPED Coordinator at ES or at PCS. The entire basis for her opinion is her reading of the March 23, 2010 IEP. I find that an

expert opinion, unsupported by reasonable inquiry and investigation, is entitled to little weight.²

Cf., e.g., Logsdon v. Baker, 366 F.Supp. 332, 336 (D.D.C. 1973)

While the courts will give wide latitude to the reception of expert opinion evidence, we think it is axiomatic that it must be based upon conceded or proved facts, and that a naked opinion, based obviously on mere speculation and conjecture, does not rise to the dignity of evidence, . . .

Id. (citation omitted).

With regard to the sufficiency of the Annual Goals in the IEP, the controlling U.S. Department of Education regulation is 34 CFR § 300.320(a)(2)(i). The IEP must include

A statement of measurable annual goals, including academic and functional goals, designed to—

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) meet each of the child's other educational needs that result from the child's disability.

Id. In its guidance issued upon promulgating this regulation, the Department of Education rejected requiring more specific content:

Section 300.320(a)(2)(i), consistent with section 614(d)(1)(A)(i)(II) of the [IDEA], requires the IEP to include measurable annual goals. Further, Sec. 300.320(a)(3)(i), consistent with section 614(d)(1)(A)(i)(III) of the Act, requires the IEP to include a statement of how the child's progress toward meeting the annual goals will be measured. The Act does not require goals to be written for each specific discipline or to have outcomes and measures on a specific assessment tool. Furthermore, to the extent that the commenters are requesting that we mandate that IEPs include specific content not in section 614(d)(1)(A)(i) of the Act, under section 614(d)(1)(A)(ii)(I), we cannot interpret section 614 to require that additional content. IEPs may include more than the minimum content, if the IEP Team determines the additional content is appropriate.

71 Fed. Reg. 46662 (Analysis of Comments and Changes 2006).

² I sustained DCPS's objection to Educational Advocate's opining on the Student's need for compensatory education because Educational Advocate had not evaluated the Student, had not reviewed his educational records or otherwise obtained a basis for an opinion as to any specific educational deficits that resulted from Student's alleged loss of FAPE under the March 23, 2010 IEP. *See Reid ex rel. Reid v. District of Columbia.*, 401 F.3d 516, 526 (D.C.Cir. 2005).

Student's March 23, 2010 IEP includes clear Annual Goals in Mathematics, Reading, Written Expression and Speech and Language. The Student's Present Levels of Performance all indicate that Student is functioning on the third or fourth grade levels in Academic areas of concern. Each Annual Goal includes a measurable standard, *e.g.*, solve problems with 80% accuracy, and appears to be designed to address the Student's Present Level of Performance and "Needs" identified on the IEP. I find that the Annual Goals stated in the March 23, 2010 IEP meet the requirements of 34 CFR § 300.320(a)(2)(i).

Petitioner also contends that the IEP is deficient because it lacks "Baseline" data for two annual goals in Speech and Language. However, the IDEA does not explicitly mandate such Baseline data. The Speech and Language section did include a detailed statement of Student's PLOP, including how the child's disability affects his involvement and progress in the general curriculum, as required by the IDEA. *See* 20 U.S.C. § 1414(d)(1)(A); *Lathrop R-II Sch. Dist. v. Gray*, 09-3428 (8th Cir. July 2, 2010) (Where IEP contained detailed present level statements and measurable goals, lack of baseline data not a procedural deficiency.) Moreover, Speech Pathologist testified that her practice, which is customary with speech pathologists, is to obtain the Baselines when she completes her assessment of a child in his first S/L session after the IEP is implemented. I find that the absence of Baselines for two of the S/L goals in Student's IEP does not establish an IDEA violation.

Lastly, the IEP is not deficient for failing to offer ESY services. The IEP Team provided in the IEP that ESY services were required for Student. Later, SPED Coordinator spoke to Parent by telephone regarding ESY and sent the ESY Enrollment Form to Parent. Parent did not return the form and did not enroll Student in ESY.

SUMMARY

In summary, I find that Parent has not met her burden of proof to establish that the Student's March 23, 2010 was not reasonably calculated to provide a free appropriate public education, that the IEP placement was inappropriate or that Student is entitled to an award of compensatory education.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

The relief requested by the Petitioner in her Complaint for Due Process is denied.

Date: November 21, 2010



Peter B. Vaden, Hearing Officer

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).