DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER, on behalf of [STUDENT],[1]	Date Issued: August 15, 2011
Petitioner,	Hearing Officer: Peter B. Vaden
v	Case No:
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	Hearing Date: July 19, 2011
Respondent.	Student Hearing Office, Room 2006 Washington, D.C.

STUDENT HEARING OFFICE
2011 AUG 15 PM 3:09

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by 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, Parent alleges that Student's January 12, 2011 IEP denied Student a Free Appropriate Public Education ("FAPE") because it lacked updated present levels of performance and omitted a Behavior Intervention Plan ("BIP"). In addition Parent contends that DCPS failed to implement the IEP

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[1] Personal identification information is provided in Appendix A.

by not providing the specified Speech/Language services and by not utilizing a point system behavior program.

Student, an AGE adolescent, is a resident of the District of Columbia. He is eligible for special education services under the primary disability, Multiple Disabilities ("MD"). The Parent's Due Process Complaint, filed on June 3, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on June 7, 2011. The parties met for a resolution session on June 15, 2011 and no agreement was reached. The 45-day timeline for issuance of this HOD started on July 3, 2011. On June 23, 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 due process hearing was held before the undersigned Impartial Hearing Officer on July 19, 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 Parent and Student appeared in person and were represented by counsel. Respondent DCPS was represented by counsel.

The Parent testified and called as witnesses EDUCATIONAL ADVOCATE, SPED PROVIDER, student and COMMUNITY SUPPORT WORKER. DCPS called no witnesses. Parent's Exhibits P-1 through P-33 were admitted into evidence. DCPS's objections to Exhibits P-1, P-5, P-7, P-8, P-9 and P-33 were overruled. DCPS Exhibits R-1 through R-9 were admitted into evidence without objection.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

- Whether Student's January 12, 2011 IEP is deficient because it omits updated present levels of performance;
- Whether Student's January 12, 2011 IEP is deficient because it lacks a Behavior Intervention Plan ("BIP");
- Whether DCPS denied FAPE to Student by not reconvening his IEP team to review the January 12, 2011 IEP after 30 days, and to consider Student's need for Extended School Year ("ESY") services;
- Whether DCPS failed to implement the January 12, 2011 IEP by not providing specified Speech/Language services; and
- Whether DCPS failed to implement the January 12, 2011 IEP by not initiating a point system behavior program.

Parent requests that DCPS be ordered to update and revise Student's IEP and to implement a point system behavior program, and that Student be awarded compensatory education relief.

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 resident of the District of Columbia. Testimony of Parent.

2. Student is eligible for special education services under the disability classification Multiple Disabilities ("MD"). Exhibit R-7.

3. Student has been diagnosed with Dysthymic Disorder, Attention-Deficit/Hyperactivity Disorder and Tic Disorder. Exhibit P-16.

4. During the 2010-2011 school year, Student attended DCPS MIDDLE SCHOOL ("MS") where he was enrolled in the GRADE. Exhibit R-7.

5. In August 2010, PSYCHOLOGIST conducted a Functional Behavior Assessment ("FBA") of Student. Psychologist observed that Student had problem classroom behaviors, including talking out of turn, playfulness, vocalizations, non-participation (placing head on desk), losing materials and inattention/not following directions. Psychologist recommended, *inter alia*, that a Behavior Intervention Plan ("BIP") be created and implemented for Student using a reward system to reduce target behaviors. Exhibit P-16.

6. On October 7, 2010, Parent filed a due process complaint against DCPS in which she alleged failure to implement Student's July 27, 2010 IEP. Following a hearing on December 3, 2010, Hearing Officer Jim Mortenson issued a Hearing Officer Determination (the "December 15, 2010 HOD"), in which he found that DCPS had failed to implement the July 27, 2010 IEP. Hearing Officer Mortenson ordered, *inter alia*, that Student's IEP team meet to review and revise the IEP. Specifically, Hearing Officer Mortenson ordered that the IEP revision may include changing the educational setting to specialized instruction in an inclusion classroom. Hearing Officer Mortenson ordered that the revised IEP be provided to Petitioner to review in draft and that any portion of the IEP, to which Petitioner did not object, would be implemented beginning no later than January 24, 2011. Exhibit P-21.

7. The December 15, 2010 HOD does not address Student's need for a BIP. Exhibit P-21.

8. On about December 8, 2010, Petitioner filed another due process complaint against DCPS, in which she asserted claims for reimbursement of Student's school transportation expenses. The parties settled this dispute and entered into a Settlement Agreement dated December 22, 2010 (the "Settlement Agreement"). In the Settlement Agreement, the parties agreed that the agreement was "in full satisfaction and settlement of all the claims contained in the [December 8, 2010] Complaint, including those claims under IDEA and § 504 the Parent now asserts or could have asserted within the statute of limitations as of the date of the signed Settlement Agreement." In the Settlement Agreement, Petitioner affirmed that she was unaware of any other issues that DCPS could immediately address for the benefit of child. Exhibit R-2.

9. Pursuant to the December 15, 2010 HOD, Student's IEP team at MS met on January 12, 2011. The January 12, 2011 IEP team developed a revised IEP for Student which provided for 13 hours per week of Specialized Instruction in the general education setting, and Related Services, consisting of 120 minutes per month of Speech-Language ("S/L") Pathology and 240 minutes per month of Behavioral Support Services.

10. At the January 12, 2011 meeting, Parent and Educational Advocate expressed the need for a point reward system to motivate Student. Exhibit P-3. SCHOOL SOCIAL WORKER stated that she would institute a "How am I Doing Teacher Progress Worksheet" which Student would take to his teachers to sign on a weekly basis. School Social Worker stated that the work sheet is a point/reward system that would assist Student and allow him to earn incentives and achieve identifiable goals. Exhibit R-8. A Point/Reward system was not identified in the IEP as a Special Education Service or Related Service for Student. Exhibit R-7

11. Parent accepted the IEP and signed the IEP to affirm that she agreed to the implementation of the services specified. Exhibits P-4, R-7, R-8.

12. In the January 12, 2011 IEP, the IEP team deferred a decision on Extended School Year ("ESY") services for Student, reporting that, "[Student] received ESY for the 2009/2010 school year. ESY will be reviewed again for the 2010/2011 school year." Exhibit R-7.

13. In the January 12, 2011 IEP, the Present Levels of Performance ("PLOP") are unchanged from Student's July 27, 2010 IEP. Exhibits R-7, P-11.

14. Parent alleges that the IEP team agreed at the January 12, 2011 IEP meeting to reconvene in 30 days to discuss Student's progress. Educational Advocate testified that Parent wanted to set up a follow-up meeting because Parent had reservations over changing all of Student's Specialized Instruction services to an inclusion setting. This allegation is not supported by the record. The respective contemporaneous notes from the January 12, 2011 IEP meeting, recorded by COMPLIANCE CASE MANAGER and by Educational Advocate, show that the MS Assistant Principal recommended that a telephone conference call be held during the 2nd week of February to review progression of IEP Services. Exhibits R-8, P-3.

15. During the month of April 2011, Student received S/L services from DCPS on April 5, 2011 for 60 minutes and on April 12, 2011 for 60 minutes. Exhibit R-5. In May 2011, Student received S/L services on May 24, 2011 for 60 minutes. S/L SERVICES PROVIDER reported that Student was absent on May 3, 2011 and May 9, 2011. Exhibit R-6.

16. On May 31, 2011, Educational Advocate wrote DCPS COMPLIANCE CASE MANAGER that Parent was not in agreement with Student's January 12, 2011 IEP because (i) the PLOP section needed to be updated, (ii) Student needed more out-of-general education

support and (iii) the IEP did not contain at BIP. Exhibit P-27. On June 3, 2011, Parent filed the present due process complaint.

17. Student's grades in English and mathematics declined dramatically over the 2010-2011 school year. In English, his grades declined from A- for the first grading period to F for the last period. In mathematics, his grades declined from A for the first grading period to D for the final period. In world history and in science, Student scored consistent F's or D's over the entire school year. Exhibit R-1.

18. On June 24, 2011, three weeks after the latest due process complaint was filed, Educational Advocate wrote the MS SPED COORDINATOR to ask when the IEP team could assemble to determine whether Student was eligible for ESY. On the same date, SPED Coordinator wrote back to coordinate available dates for the meeting. On July 7, 2011, Compliance Case Manager wrote Educational Advocate to offer several dates in July for the MDT team to meet to "Discuss issues related to 6/3/11 DPC (e.g. IEP present levels of performance, BIP, ESY and other parental's [*sic*] concerns." Exhibit P-29.

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:

DISCUSSION

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Parent 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).

1. WAS JANUARY 12, 2011 IEP DEFICIENT BECAUSE IT OMITTED UPDATED PRESENT LEVELS OF PERFORMANCE AND A BEHAVIOR INTERVENTION PLAN?

Parent alleges that Student's January 12, 2011 IEP was not adequate because it repeated the PLOP from Student's July 27, 2010 IEP and omitted a Behavior Intervention Plan ("BIP"). Under the U.S. Supreme Court's decision in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), when considering the adequacy of an IEP, the Hearing Officer must address two questions that are aimed at DCPS's paralleling responsibilities to comply with the procedural and substantive requirements of the IDEA: First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Rowley*, 458 U.S. at 206-07, 102 S.Ct. 3034. *See, also, e.g., Suggs v. District of Columbia*, 679 F. Supp.2d 43, 47-48 (D.D.C. 2010). Parent does not allege any procedural deficiencies in her due process complaint. Accordingly, my inquiry must be whether the IEP was reasonably calculated for Student to receive sufficient educational benefits to meet the requirements of a FAPE. *See, e.g., N.S. v. Dist. of Columbia*, 709 F. Supp. 2d 57, 60, 54 IDELR 188 (D.D.C. 2010).

(i) Present Levels of Performance

The IDEA mandates that an IEP shall include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum (*i.e.*, the same curriculum as for nondisabled children). 34 C.F.R. § 300.320(a) (1). The IEP team must review

the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revise the IEP, as appropriate, to address any lack of expected progress toward the annual goals. 34 C.F.R. § 300.324(b).

In this case, when the Student's IEP team met on January 12, 2011, the purpose was to comply with the December 15, 2010 HOD directive "to review and revise the [July 27, 2010] IEP to ensure that it is designed to meet the educational and functional needs of the Student." The Hearing Officer did not order the IEP team to revise the annual goals from the July 27, 2010 IEP or to update the PLOP section. Furthermore, the HOD required that the Parent object to any portion of the IEP with which she did not agree no later than January 20, 2011. Parent has not shown that she objected to the PLOP section of the IEP or requested that it be updated until she filed her due process complaint on June 3, 2011. I find that neither the IDEA nor the December 15, 2010 HOD required that Student's PLOP be updated at the January 12, 2011 IEP meeting. DCPS prevails on this issue.

(ii) Omission of BIP

Parent contends that the January 12, 2011 IEP was inadequate because it did not include a BIP. It appears that this claim is barred under the doctrine of prior adjudication. "'*Res judicata* bars re-litigation not only of matters determined in a previous litigation but also ones a party could have raised.'" *Owens v. Dist. of Columbia*, 631 F. Supp. 2d 48, 55 (D.D.C. 2009) (citing *Capitol Hill Group v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 491 D.C. Cir. 2009)). Hence, "claim preclusion precludes the litigation of claims, not just arguments." *Theodore v. District of Columbia,* Civil Action No. 09-0667 (D.D.C. March 28, 2011) (citation and internal quotation omitted.) Parent filed prior due process complaints for this Student on October 7, 2010 and December 8, 2010. Parent could have raised the issue of incorporating a

BIP into Student's IEP in either proceeding. Parent may, therefore, be barred under the doctrine of prior adjudication from litigating in this proceeding whether the January 12, 2011 IEP should have contained a BIP.

Even if the claim were not precluded, I find that Parent has not established that the omission of a BIP in the January 12, 2011 IEP resulted in a denial of FAPE to Student. The IDEA requires, in the case of a child whose behavior impedes the child's learning or that of others, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *See* 20 U.S.C. § 1414(d)(3); 34 CFR § 300.324(a)(2)(i). However, the IDEA does not require that a BIP be incorporated into a child's IEP. *See School Bd. School Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006). Moreover, the December 15, 2010 HOD required Parent to notify DCPS of any objections to the January 12, 2011 IEP no later than January 20, 2011. Parent has not shown that she objected to the omission of a BIP in the January 12, 2011 IEP as required by the HOD. I find that the evidence does not establish that the omission of a BIP in the January 12, 2011 IEP resulted in an IEP not reasonably calculated for Student to receive educational benefits. DCPS prevails on this issue.

2. DID DCPS DENY STUDENT A FAPE BY FAILING TO PROVIDE THE SPEECH/LANGUAGE SERVICES SPECIFIED IN THE JANUARY 12, 2011 IEP?

In her complaint for due process, Parent alleges that Student was not provided with speech and language therapy from April 24, 2011 through May 31, 2011. "[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the

IEP." *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 68 (D.D.C. 2008); *See, also, Catalan ex rel. E.C. v. District of Columbia*, 478 F.Supp.2d 73, 75 (D.D.C. 2007).

The January 12, 2011 IEP provides that Student is to receive 120 minutes per month of Speech-Language Pathology. S/L Service Provider's Service Tracker records indicate that Student received 120 minutes of S/L services in April, but only 60 minutes of S/L services in May. Service Provider reported that Student was absent from class on two days in May when she offered S/L services and that school was closed for parent-teacher conferences on another day. I find that DCPS's failure to provide one hour of S/L services in May 2011 was not a material deviation from the January 12, 2011 IEP and does not constitute a denial of FAPE. *See Catalan, supra*, 478 F.Supp.2d at 76 (Therapist's missing a handful of sessions not substantial enough to constitute a FAPE deprivation.) DCPS prevails on this issue.

3. DID DCPS FAIL TO IMPLEMENT STUDENT'S IEP BY NOT UTILIZING A POINT SYSTEM BEHAVIOR PROGRAM?

Parent also contends that DCPS failed to implement the January 12, 2011 IEP by failing to implement a point system behavior program – allegedly agreed to by the IEP team. The January 12, 2011 IEP does not contain a provision for a point system to be used for Student. The evidence does establish that at the January 12, 2011 IEP meeting, School Social Worker stated that she would initiate a "How am I Doing Teacher Progress Worksheet," which she described as a point/reward system that would assist Student and allow him to earn incentives and achieve identifiable goals. However, the worksheet was not an element or provision of the IEP. Assuming the Social Worker did not carry through on her commitment to initiate the worksheet system, her omission would not constitute a failure by DCPS to implement an element or provision of the IEP. DCPS prevails no this issue.

4. DID DCPS DENY STUDENT A FAPE BY NOT RECONVENING IEP TEAM TO REVIEW THE JANUARY 12, 2011 IEP AFTER 30 DAYS, AND TO CONSIDER STUDENT'S NEED FOR EXTENDED SCHOOL YEAR ("ESY") SERVICES?

Under the IDEA, the IEP team must review the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved. 34 CFR § 300.324(b)(i). Parent alleges that the IEP team agreed at the January 12, 2011 IEP meeting to reconvene in 30 days to discuss student's progress. Educational Advocate also testified that there was no discussion of Student's need for ESY services at the January 11, 2011 IEP meeting and that she believed that ESY services would be discussed at the 30 day IEP review. The January 11, 2011 IEP reports "Don't know yet" whether ESY services were required for Student and that ESY would be reviewed again for the 2010-2011 school year.

In my findings of fact, I concluded that the written evidence does not establish that DCPS agreed to reconvene the IEP team after 30 days. The evidence does establish that Educational Advocate requested a follow-up IEP review meeting on June 24, 2011, to which request DCPS immediately agreed. Upon receipt of Educational Advocate's email request, SPED Coordinator acted expeditiously to convene Student's MDT team to consider ESY[2] and other issues related to the present due process complaint. I find therefore that DCPS did not deny Student a FAPE by not convening a 30 day IEP review meeting of his IEP/MDT team. DCPS prevails on this issue.

ORDER

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

All relief requested by the Parent in her Due Process Complaint is denied.

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[2] The evidence in this case does not establish whether Student would have been eligible for ESY services in summer 2011. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp. 2d 56, 68-69 (D.D.C. 2008), *citing MM v. Sch. Dist. of Greenville County, 303 F.3d 523, 537-38* (4th Cir. 2002) ("ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months.")

Date: August 15, 2011

s/ Peter B. Vaden
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).