

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

PETITIONER,
on behalf of STUDENT,¹

Date Issued: May 10, 2016

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2016-0045

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Date: May 2-3, 2016

Respondent.

Office of Dispute Resolution, Room 2003
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), 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, Petitioner seeks compensatory education relief for Respondent District of Columbia Public Schools’ (DCPS) not timely determining Student’s initial eligibility for special education and alleges that Student’s initial December 3, 2015 Individualized Education Program (IEP) is not adequate to provide him a free appropriate public education (FAPE).

¹ Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on February 29, 2016, named DCPS as respondent. The undersigned Hearing Officer was appointed on March 1, 2016. The parties met for a resolution session on March 10, 2016 and were unable to reach an agreement. My final decision in this case is due by May 14, 2016. On March 2, 2016, I convened a prehearing telephone conference with 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 May 2-3, 2016 at the Office of Dispute Resolution 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 MARYLAND SCHOOL PSYCHOLOGIST, COMP ED PROVIDER, EDUCATIONAL ADVOCATE, NONPUBLIC SCHOOL DIRECTOR, and FATHER. DCPS called as witnesses DCPS SCHOOL PSYCHOLOGIST, SPECIAL EDUCATION TEACHER, PRINCIPAL, and SOCIAL WORKER. Petitioner's Exhibits P-1 through P-67 were admitted into evidence with the exception of Exhibits P-17, P-48 and P-63 which were withdrawn. Exhibits P-23, P-45, P-46, P-47 and P-64 were admitted over DCPS' objections. DCPS' Exhibits R-1 through R-16 were admitted into evidence without objection. Counsel for Petitioner made an opening statement. Counsel for both parties made closing arguments.

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

The following issues for determination were certified in the March 23, 2016

Prehearing Order:

Whether the student should receive compensatory education relief for delays in identifying him as eligible for Special Education services by September 2014 and/or in providing the student with an appropriate IEP;

Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate IEP or placement at the December 3, 2015 IEP meeting - in that the IEP only provided 10 hours of pull-out services and no occupational therapy (OT) services; and

Whether DCPS denied the student a FAPE by failing to provide him with an updated Behavior Intervention Plan (BIP) at the December 3, 2015 IEP meeting or thereafter.

For relief, Petitioner requests that the Hearing Officer order DCPS to immediately convene Student's IEP team to revise his IEP to provide the student with a placement in a full time program and/or setting that can provide a low student/teacher ratio, small group setting and therapeutic interventions to address Student's behaviors in order that he can access his education, and to address his occupational therapy needs; that DCPS be ordered to identify a location of services capable of fully implementing the revised IEP and/or fund private placement of the student with transportation; that DCPS be ordered to conduct an updated FBA and develop a Behavior Intervention Plan for this student; and that Student be awarded compensatory education for delays in identifying him as eligible and in making appropriate special education and related services available to him for the period from September 2014 to present.

At the beginning of the due process hearing on May 2, 2016, DCPS, by counsel, acknowledged its agreement that Student now requires a full-time special education placement.

PRIOR HEARING OFFICER DETERMINATIONS

Petitioner filed two prior due process complaints on behalf of Student which resulted in hearing officer determinations. In September 2014, Petitioner filed a complaint, Case No. 2014-0406, in which she sought an order for DCPS to conduct an initial special eligibility evaluation of Student. Prior to the due process hearing date, DCPS had begun the evaluation. On November 14, 2014, this hearing officer issued a hearing officer determination (November 14, 2014 HOD), denying all relief, without prejudice to Student's rights to be evaluated, to be provided an IEP and to seek compensatory education if determined eligible for special education services. Exhibit P-34. Subsequently, Student's evaluation was completed and he was determined not eligible for special education services. On August 6, 2015, Petitioner filed a second due process complaint, Case No. 2015-0265, in which she alleged that Student had been denied a FAPE by the failure of the DCPS eligibility team to find him eligible. At the prehearing conference for Case No. 2015-0625, the parties stipulated that compensatory education was "not ripe." In the prehearing order, Impartial Hearing Officer NaKeisha Sylver Blount stated that compensatory education was "not a part of this action." *See* September 1, 2015 Prehearing Order in Case No. 2015-0625. On October 20, 2015, Hearing Officer Blount issued a hearing officer determination (the October 20, 2015 HOD), in which she held that Student was eligible for special education and related services as a student with Other Health Impairment (OHI) and Emotional Disturbance (ED) disabilities. Hearing Officer Blount further held that DCPS had denied Student a

FAPE by failing to determine him eligible for special education at eligibility meetings held on December 4, 2014 and June 11, 2015. Exhibit P-33.

FINDINGS OF FACT

After considering all of 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, where he resides with Mother. Testimony of Mother.
2. In the October 20, 2015 HOD, Student was determined eligible for special education and related services under the disability classifications Other Health Impairment - Attention Deficit Hyperactivity Disorder (OHI-ADHD) and ED. Exhibit P-33.
3. Since May 2014, Student has attended CITY SCHOOL. Testimony of Mother, Exhibit P-20.
4. On May 14, 2014, Petitioner's Counsel made a written request to the City School principal for Student to be evaluated for special education and related services. In the letter, the attorney noted that Student may be eligible as a result of an ADHD diagnosis and also that Mother was concerned about Student's fine motor skills and his "peculiar gait." Exhibit P-45. Petitioner's Counsel sent follow-up requests for Student to be evaluated on June 12, 2014 and on September 8, 2014. Exhibits P-46, P-47. DCPS School Psychologist conducted a comprehensive psychological evaluation of Student in October or November 2014. In her November 13, 2014 report, DCPS School Psychologist reported that on cognitive testing, Student's performance on the Composite Intelligence Index was in the Average range. His score on the Composite Memory Index fell within the Below Average range. On Education testing, Student's achievement score

for Reading was in the High Average range. His scores for Broad Math and Written Language were in the Average range. DCPS School Psychologist also reported that Student displayed symptomology associated with ADHD, that he demonstrated poor impulse control, inattention and hyperactivity, and that when not properly regulated, Student's behavior could escalate to aggression, non-compliance and use of profanity. However, School Psychologist observed that when "controlled by appropriate therapeutic interventions," *i.e.*, prescription medications, Student had demonstrated an ability to successfully access the general education curriculum. Exhibit P-20.

5. In an Occupational Therapy Assessment Report dated November 17, 2014, the DCPS Occupational Therapist reported that Student's neuromotor skills were functional for school-based performance and that he demonstrated delays in fine motor skills, visual-motor integration, motor coordination and visual perception. Exhibit P-22. In a March 16, 2015 IEE OT reevaluation, an independent OT evaluator reported that Student scored in the Very Low range in the areas of Motor Coordination and Motor Free Visual Perception. However, she noted that Student's participation in the evaluation was limited. Exhibit P-23. In a March 8, 2016 OT screening report, the DCPS Occupational Therapist reported that there were no concerns for OT services for Student at the time. Exhibit R-5.

6. At an initial eligibility meeting at City School on December 14, 2014, the City School members of the eligibility team believed that Student did not meet criteria for ED and that while they accepted Student's ADHD diagnosis, the school representatives did not believe there was an adverse impact on Student's educational performance. The eligibility team determined that Student was not eligible for special

education services. Mother and her representative disagreed with the determination.

Exhibit P-43.

7. On November 7, 2014, the City School social worker conducted a Functional Behavior Assessment (FBA) of Student due to concerns that Student displayed ongoing and continuous disruptive, non-compliant, attention seeking behaviors while at school. Exhibit P-19. On December 18, 2014, City School developed a Section 504 Plan for Student (Section 504 of the Rehabilitation Act of 1973). Exhibit P-32. Social Worker developed a Behavior Intervention Plan (BIP) for Student on August 27, 2015, when he had his Section 504 plan. Exhibit R-1, Testimony of Social Worker.

8. After the December 14, 2014 eligibility meeting, DCPS funded an Independent Educational Evaluation (IEE) reevaluation of Student at Mother's request. Maryland School Psychologist conducted an IEE comprehensive psychological evaluation in March and April 2015. Exhibit P-18. An IEE OT evaluation was conducted on in January 2015. Exhibit P-23. Student's City School eligibility committee convened again on June 11, 2015 to review the IEE evaluations. The June 11, 2015 eligibility team found that there was no adverse educational impact on Student from his ADHD condition and that he did not meet criteria for the ED disability. The team determined that Student was not eligible for special education and related services. The parents and Petitioner's Counsel disagreed with this determination. Exhibit P-38.

9. Student's Text Reading and Comprehension (TRC) scores were G (Below Proficient) at the end of the 2013-2014 school year; L (Proficient) at the end of the 2014-2015 school year; and M (Below Proficient) at the middle of the 2015-2016 school year. Exhibit P-27.

10. In the October 20, 2015 HOD, Hearing Officer Blount held that Student was eligible for special education and related services as a student with Other Health Impairment (OHI) and Emotional Disturbance (ED) disabilities and that DCPS had denied Student a FAPE by failing to determine him eligible at the December 4, 2014 and June 11, 2015 IEP meetings. Exhibit P-33. The October 20, 2015 HOD has not been appealed. Representation of counsel.

11. On December 3, 2015, Student's City School IEP team convened to develop his initial IEP. Mother, Father, Petitioner's Counsel and Educational Advocate participated in the meeting. The resulting IEP provided annual goals for Mathematics, Reading and Emotional, Social and Behavioral Development areas of concern. For special education and related services, the IEP provided 10 hours per week of Specialized Instruction outside of general education and 240 minutes per month of Behavioral Support Services, of which 120 minutes would be provided outside of general education. Exhibit P-1. At the December 3, 2015 meeting, Mother and Petitioner's attorney requested that Student be provided full-time services in small group setting in a therapeutic environment. Special Education Teacher responded that since Student had never had an IEP or been provided Specialized Instruction, the school representatives wanted to put the initial IEP in place and add additional services, if needed, at or before a 30-day review meeting. Mother and her representatives disagreed with this decision. Exhibits R-4, P-3.

12. On March 10, 2016, DCPS convened a resolution session meeting (RSM), subsequent to Petitioner's filing her due process complaint in the present case. The RSM was preceded by a meeting of Student's IEP team to update his December 3, 2015 IEP. A draft BIP was tabled at the IEP meeting. Exhibits R-13, P-11. Petitioner's

Counsel continued to request a full-time placement for student in a small group, therapeutic, setting. The school representative maintained that Student was receiving the services he needed at City School. The IEP team decided to increase the hours of Specialized Instruction on Student's IEP from 10 hours to 15 hours per week, all outside of general education. The team also decided that Student was eligible for Extended School Year (ESY) services. Exhibits R-6, P-7.

13. Student has been accepted for immediate admission to Nonpublic School. Nonpublic School is a full-time special education day school in suburban Maryland. It's current enrollment is 6 students in the elementary program, 16 students in middle school and 27 students in high school. The school is able to serve students with Learning Disability (LD), ADHD and Autism Spectrum (ASD) disabilities. At Nonpublic School, Student would be placed in a classroom of no more than 8 students, taught by a special education teacher and a teaching assistant. Two of the current students in the classroom have dedicated aides. The school has on staff two social workers, a behavior specialist and a part-time psychologist. Nonpublic School has a robust program to provide behavioral support to its students, including a behavior modification system, supports for transitions and a time-out room. There are no nondisabled students who attend Nonpublic School. Nonpublic School holds a current Certificate of Approval issued by the D.C. Office of the State Superintendent of Education (OSSE). Testimony of Director.

CONCLUSIONS OF LAW

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

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, § 3030.14. *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).

Analysis

A.

Should Student receive compensatory education relief for DCPS' delays in identifying him as eligible for special education services by September 2014 and/or in providing him with an appropriate IEP?

Petitioner first requested that Student be evaluated for special education eligibility on May 14, 2014. DCPS only began its initial evaluation of Student in late October 2014. DCPS' eligibility teams determined that Student was not eligible for special education at meetings on December 3, 2014 and June 11, 2015. In the October 20, 2015 HOD, Hearing Officer Blount determined that Student was eligible for special education under the OHI-ADHD and ED disability classifications and that Student had been denied a FAPE by the eligibility teams' determinations to the contrary on December 3, 2014 and June 11, 2015. In the prior due process proceeding, Petitioner and DCPS agreed that Student's entitlement to compensatory education was not then ripe for determination.² Petitioner now seeks compensatory education for DCPS' failure to find Student eligible and provide him an IEP prior to December 3, 2015.

The D.C. Circuit recently discussed the compensatory education remedy in *B.D. v. District of Columbia*, 2016 WL 1104846 (D.C.Cir. Mar. 22, 2016):

² While this hearing officer makes no finding as to whether Student's right to compensatory education was, or was not, ripe for determination in the prior case, I will respect the parties' agreement as a binding stipulation.

When a hearing officer or district court concludes that a school district has failed to provide a student with a FAPE, it has broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education. *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015) (internal quotation marks omitted). As [this Court] held in *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C.Cir.2005), an award of compensatory education “must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” 401 F.3d at 524. In other words, compensatory education aims to put a student . . . in the position he would be in absent the FAPE denial.

B.D., 2016 WL 1104846 at 4. The burden of proof is on the Petitioner to produce sufficient evidence demonstrating the type and quantum of compensatory education that is appropriate. *See, e.g., Cousins v. District of Columbia*, 880 F.Supp.2d 142, 143 (D.D.C.2012).

Educational Advocate testified that DCPS should have completed Student’s initial special education eligibility evaluation by September 2014. I agree. *See, e.g., Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C. 2011). (“DCPS must conduct initial evaluations to determine a child’s eligibility for special education services ‘within 120 days from the date that the student was referred [to the LEA] for an evaluation or assessment.’ D.C. Code § 38–2561.02(a).” *Id.*) Student was referred to DCPS on May 14, 2014. Under District law, DCPS was required to determine Student’s eligibility by September 11, 2014 (within 120 days). However, given the need for Student to have an IEP in place at the beginning of the school year, Student should have been determined eligible and offered an appropriate IEP by the beginning of the 2014-2015 school year. *See, e.g., Leggett v. District of Columbia*, 793 F.3d 59, 63 (D.C.Cir 2015) (“IDEA requires that school districts have an IEP in place for each student with a disability ‘[a]t the beginning of each school year.’” *Id., citing* 20 U.S.C. § 1414(d)(2)(A) (emphasis in

original omitted.) I find that Student was denied a FAPE and is entitled to compensatory education for DCPS' failure to provide him an IEP from the beginning of the 2014-2015 school year until December 3, 2015.

Comp Ed Provider testified that as of November 2015, Student was performing one grade level below his actual grade level in Reading. He was also performing below his classmates in Math. She opined that given Student's average cognitive ability, if Student had been provided special education and related services from September 2014 forward, there was no reason why he should not now be performing at grade level. Comp Ed Provider opined that to put Student in the position he would be in, absent the FAPE denial, Student would need at least 2 hours of individual tutoring, three times per week, for 40 to 50 weeks. This amounts to 240 to 300 hours of compensatory education tutoring. Comp Ed Provider has some 14 years experience teaching special education students and drafting and implementing compensatory education plans. Her recommendation was not rebutted by DCPS' witnesses. DCPS' counsel argued that Student's academic progress could also have been affected by his inconsistent school attendance. (In the 2014-2015 school year, Student missed 15 days of school, of which 6 days were unexcused. Exhibit P-31.) However, DCPS offered no evidence that these absences were excessive or affected his academic progress. Moreover, it is speculative to assume that Student's school attendance would not have been better, had he been timely provided the Specialized Instruction and Behavior Support Services ultimately included in the December 3, 2015 IEP. Accordingly, I find credible Comp Ed Provider's testimony that Student requires at least 240 hours of tutoring to compensate him for not being determined eligible for special education by the beginning of the 2014-2015 school year, and I will order DCPS to provide these services.

B.

Did DCPS deny Student a FAPE by failing to provide him with an appropriate IEP at the December 3, 2015 IEP meeting – in that the IEP only provided 10 hours of pull-out services and no OT services?

At the December 3, 2015 initial IEP meeting for Student, Petitioner sought a full-time IEP for Student that would place him in a therapeutic setting with a low student to teacher ratio. The DCPS representatives stated that because this would be Student's first IEP, it was appropriate to place him in a general education classroom, with 10 hours of pull-out services, and to revisit his needs at the 30-day review meeting. As of the May 2-3, 2016 due process hearing date, DCPS had come around to agreeing that Student requires a full-time special education placement. Petitioner contends that the IEP team's offering Student only 10 hours of pull-out services at the December 3, 2015 IEP meeting was a denial of FAPE. DCPS responds that the level of services was appropriate at the time the IEP was offered.

To determine whether an IEP is adequate to provide a FAPE, a hearing officer must determine “[f]irst, has the [District] complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the [District] has complied with the obligations imposed by Congress and the courts can require no more.” *A.M. v. District of Columbia*, 933 F. Supp. 2d 193, 203-04 (D.D.C. 2013), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (*Rowley*). Petitioner has not raised an IDEA procedural issue with respect to the development of the December 3, 2015 IEP. Therefore, I turn to the second prong of the *Rowley* inquiry: Was the December 3, 2015 IEP reasonably

calculated to enable Student to receive educational benefits?

In *K.S. v. District of Columbia*, 962 F.Supp.2d 216 (D.D.C.2013), U.S. District Judge Boasberg reviewed case law precedents on the requirements for an appropriate IEP:

The IEP must be formulated in accordance with the terms of IDEA and “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 204, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). IDEA also requires that children with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. See [20 U.S.C.] § 1412(a)(5)(A). . . . IDEA provides a “basic floor of opportunity” for students, *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, rather than “a potential-maximizing education.” *Id.* at 197 n. 21, 102 S.Ct. 3034; *see also Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) (inquiry is not whether another placement may be “more appropriate or better able to serve the child”) (emphasis in original); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir.2009) (IDEA does not guarantee “the best possible education, nor one that will maximize the student’s educational potential”; instead, it requires only that the benefit “cannot be a mere modicum or de minimis; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.”) (quoting *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir.1997)). Consistent with this framework, “[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.” *Houston Indep. Sch. Dist.*, 582 F.3d at 590.

K.S., 962 F.Supp.2d at 200-221. The measure and adequacy an IEP placement is determined as of the time it was offered to the student, not by the effectiveness of the program in hindsight. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66-67 (D.D.C. 2008).

Special Education Teacher testified that for Student’s initial IEP, increasing Student’s behavioral support services from what he had been provided in his prior Section 504 Plan and providing 10 hours per week of Specialized Instruction was “a

good place to start” for Student. DCPS School Psychologist opined that the December 3, 2015 IEP was appropriate for Student. She explained that at the December 3, 2015 IEP meeting, the school representatives were concerned to educate Student in the least restrictive environment and felt that Student could continue to grow academically with support inside and outside of the general education setting. Petitioner’s expert, Maryland School Psychologist, testified that he found that the IEP team’s decision to provide Student only 2 hours per day of Specialized Instruction was “surprising,” considering the severity of Student’s behaviors. However, Maryland School Psychologist did not endorse Student’s need for a full-time special education program and recommended that Student be placed outside of the general education setting for the “majority” of his school week, in order for Student to receive behavior and education support in a smaller group setting.

“Mainstreaming” of students with disabilities is required by the IDEA, unless education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *See, e.g., DeVries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir.1989) (“Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act.”) DCPS is now proposing a full-time placement for Student. Notwithstanding, as to the appropriateness of Student’s initial placement at the time the December 3, 2015 IEP was offered, I found the opinions of DCPS’ witnesses to be persuasive. I find Petitioner has not met her burden of proving that Student’s educational placement in the December 3, 2015 IEP was not reasonably calculated to provide him educational benefits.

Petitioner also contends that the initial IEP was inadequate for want of OT services. It is the duty of the IEP team to ensure that a student with a disability is offered all of the related services, including OT, that he requires in order to benefit from special education. *See* 34 CFR §§ 300.34(a), 300.320(a)(4). In an Occupational Therapy Assessment Report dated November 17, 2014, the DCPS Occupational Therapist reported that Student's neuromotor skills were functional for school-based performance and that he demonstrated delays in fine motor skills, visual-motor integration, motor coordination and visual perception. In a March 16, 2015 IEE OT reevaluation, an independent OT evaluator reported that Student scored in the Very Low range in the areas of Motor Coordination and Motor Free Visual Perception. However, she noted that Student's participation in the evaluation was limited. In a March 8, 2016 OT screening report, the DCPS Occupational Therapist reported that there were no concerns for OT services for Student at the time. Petitioner did not offer expert testimony from an OT specialist at the due process hearing. I conclude that Petitioner did not meet her burden of proving that Student required OT related services in the December 3, 2015 IEP in order to benefit from education.

C.

Did DCPS deny Student a FAPE by failing to provide him with an updated Behavior Intervention Plan at the December 3, 2015 IEP meeting or thereafter?

Social Worker developed a Behavior Intervention Plan (BIP) for Student on August 27, 2015, when he had his Section 504 plan. DCPS proposed a revised BIP at the March 10, 2016 IEP meeting. Petitioner argues that DCPS denied Student a FAPE by not ensuring that his BIP was revised at the December 3, 2015 IEP meeting. DCPS counters that the IDEA did not require that Student's BIP be updated at the initial IEP

meeting.

The IDEA requires that, in the case of a child whose behavior impedes his learning or that of others, 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). The DCPS December 3, 2015 IEP provided goals for Emotional, Social and Behavioral Development and 240 minutes per month of Behavioral Support Services. There was no evidence at the due process hearing that the August 27, 2015 BIP was inappropriate by the date of the December 3, 2015 IEP meeting or that the IEP was inadequate for want of additional behavioral interventions and supports. I find that Petitioner has not shown that Student was denied a FAPE by the failure to provide an updated BIP prior to the March 10, 2016 IEP meeting.

ORDER

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

ORDERED:

1. As compensatory education for the denial of FAPE to Student by not providing him an IEP from August 2014 until December 2015, DCPS shall provide Student 240 hours of individual academic tutoring by a qualified DCPS or independent tutor. These tutoring services must be used by the end of the 2016-2017 regular school year or shall be forfeited; and

2. All other relief requested by the Petitioner herein is denied.

Date: May 10, 2016

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).

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE Division of Specialized Education
DCPS Resolution Team