

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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<b>Parent, on behalf of Student,<sup>1</sup></b>	)	<b>Room: 2004</b>
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>Case No.: 2015-0263</b>
	)	
<b>District of Columbia Public Schools,</b>	)	<b>Hearings: 10/6 and 10/8 (2015)</b>
	)	
<b>Respondent.</b>	)	<b>Hearing Officer: Michael Lazan</b>

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving a [REDACTED] year old male student who is eligible for services as a Student with a Specific Learning Disability. (the “Student”)

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on August 5, 2015 in regard to the Student. On August 13, 2015, Respondent filed a response. A resolution meeting was held on August 15, 2015. The resolution period expired on September 4, 2015.

**II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of

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<sup>1</sup>Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### **III. Procedural History**

On September 10, 2015, this Hearing Officer held a prehearing conference. Jocelyn Franklin, Esq., counsel for Petitioner, appeared. Maya Washington, Esq., counsel for Respondent, appeared.

A prehearing conference order issued on September 15, 2015, summarizing the rules to be applied in this hearing and identifying the issues in the case.

Two hearing dates followed, on October 6, 2015, and October 8, 2015. This was a closed proceeding. Petitioner was represented by Jocelyn Franklin, Esq. Respondent was represented by Maya Washington, Esq. Petitioner moved into evidence Exhibits 1-49. Respondent objected to Exhibits 1, 3, 4, 8, 9, 10, 11, 12, 14, 30, 34, 35-37, 38, 41-42, and 48-49 on relevance, hearsay and authentication grounds. All objections were overruled except for with respect Exhibit 35, which was withdrawn. Exhibits 1-34 and 36-49 were admitted. Respondent moved into evidence Exhibits 1, 2, 3, 5, 6, 7, 8, 11, 12, 14, 15, and 16-22. Petitioner objected to Exhibits 5 and 7 as undated, but these objections were overruled. Exhibits 1, 2, 3, 5, 6, 7, 8, 11, 12, 14, 15, and 16-22 were admitted.

The parties presented closing statements orally, on the record, after completion of testimony on October 8, 2015.

Petitioners presented as witnesses: Petitioner; the Student; Witness A, an occupational therapist (expert: occupational therapy with expertise in assistive technology); Witness H, a service provider; Witness B, a school psychologist (expert:

school psychology); Witness C, an advocate; Witness D, a legal assistant; Witness I, an advocate. Respondent presented as witnesses: Witness E, a psychologist (expert: school psychology, specifically, special education evaluation and educational recommendations); Witness F, a clinical social worker; Witness G, a compliance case manager, and Witness J, a special education coordinator.

#### **IV. Credibility.**

I found all the witnesses had some credibility in this proceeding. Both Witness A, Petitioner's expert on assistive technology, and Witness B, Petitioner's expert in school psychology, were thoughtful and analytical. I also found the Student to be credible, though a ■ year old with a learning disability cannot be expected to testify as would an adult. Other witnesses had no material inconsistencies, and presented their testimony with reasonable candor.

#### **V. Issues**

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issues to be determined are as follows:

1. Did DCPS fail to evaluate the Student, after multiple parental requests, between January, 2014 and March, 2015? If so, did DCPS violate 34 CFR Sect. 300.303(a)(2)? If so, did DCPS deny the Student a FAPE?
2. Did DCPS fail to recommend reasonably calculated educational services in the IEPs dated October 10, 2014 and March 30, 2015, and fail to provide a BIP in connection to such IEPs? If so, did DCPS act in contravention of 34 CFR 300.320, 5- E DCMR Sect. 3007.3, and Hendrick Hudson Bd. Of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the Student a FAPE?

3. Did DCPS fail to implement the assistive technology recommendations in the Student's March, 2015 IEP? If so, did DCPS act in contravention of precedent such as Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did DCPS deny the Student a FAPE?

As relief, Petitioner seeks two classes in credit recovery (history and biology) and compensatory education.

## **VI. Findings of Fact**

1. The Student is a [REDACTED] year old who is eligible for services as a student with a Specific Learning Disability. (P-29)

2. He has difficulties with his handwriting, which is not always legible. When he writes, his wrists start hurting. Writing issues can make it hard for him to keep up with the teacher. (Testimony of parent; Testimony of Student)

3. Still, his writing is considered to be sufficient in the classroom. (Testimony of Witness E)

4. The Student is easily distracted. (Testimony of parent)

5. He has trouble staying organized. (Testimony of parent)

6. The Student requires breaks during instruction to get himself back on track. (Testimony of Student)

7. His primary problem is his attendance. (Testimony of Witness G)

8. The Student uses television and electronics in his room late at night, has difficulty getting to sleep in the evening, and has been diagnosed with behaviorally induced insufficient sleep syndrome, circadian rhythm disorder, and sleep apnea NOS. (P-30-3)

9. The Student will get tired and put his head down in class. (Testimony of Witness E)

10. He will come to class late, and then leave class early. (Testimony Witness E)

11. Since the Student has a difficult time with writing, he would benefit from assistive technology, such as word prediction software or a program that helps read words back to the Student so he could “hear” his written work and then realize it is incorrect. (Testimony of Witness A)

12. The Student would also benefit from programs to work on his organizations skills, such a program designed to help him organize his life through his phone. (Testimony of Witness A)

13. The Student requires interventions in regard to attendance, including an attendance goal. (Testimony of Witness B)

14. As tested in November, 2012, the Student had a Full Scale IQ or 89, with a low 68 score in processing speed. This score is characterized by the test publisher as “extremely low” and falls in the 2<sup>nd</sup> percentile rank. (P-6-6)

15. WIAT-III testing, also from November, 2012, found that the Student scored in the average range in reading comprehension and fluency, at the 46<sup>th</sup> percentile. However, the Student was below average in written expression, at the sixth percentile rank. Other scores were at the low end of the average range, with percentile ranks ranging from 45th (math fluency) to 16th (total achievement). Basic reading was at the 21<sup>st</sup> percentile. (P-6-8)

16. BASC-2 testing was also conducted in November, 2012. The testing only included responses from the Student. (P-6-11-12)

17. Other testing in November, 2012 included a Rorschach test and a Roberts Apperception Test for Children. (P-6)

18. The November, 2012 testing report noted that the Student has a tendency to fall asleep in class “very quickly” and “frequently.” (P-6-15)

19. The evaluator diagnosed the Student with a Reading Disorder because he demonstrated clinically significant deficits in reading accuracy and had a failing grade in English. The evaluator pointed out that the Student needed instructional services to improve grammar, syntax, and spelling. (P-6-17)

20. The evaluator also found that the Student has “emotional difficulties” and was experiencing a fair amount of distress. He was diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood. (P-6-18)

21. The evaluator also recommended behavioral support services, an occupational therapy evaluation, that class instruction be “paced” to his level of ability, and that an evaluation be conducted to determine whether a sleep disorder may be present that was contributing to his tendency to fall asleep during the day. (P-6-21)

22. For the 2013-2014 school year, the Student attended School C and engaged in a variety of behavioral difficulties. The Student was very impulsive/hyperactive in class which affected his attention and his ability to follow directions. He was unable to maintain social relationships because of his inability to read social cues. He had trouble staying awake in class, completing classroom assignments, and attending. (P-28-11)

23. A letter from Petitioner's counsel dated January 24, 2014 to DCPS, requested comprehensive evaluations of the Student, including a comprehensive psychological evaluation, a functional behavioral assessment, and a behavior intervention plan. This request was followed up by a letter dated June 4, 2014. (P-8-1; P-9-1)

24. An educational evaluation of the Student through the Woodcock-Johnson III Tests of Achievement on August 21, 2014 indicated that the Student was well below grade level in all areas. (P-5-3)

25. At this time, his percentile rank ranged from a 31<sup>st</sup> percentile in academic skills to a 6<sup>th</sup> percentile in academic applications. Broad reading was measured at the 28<sup>th</sup> percentile rank, at the 7.4 grade level equivalent. Writing was tested at the 24<sup>th</sup> percentile rank, and broad math language was tested at the 16<sup>th</sup> percentile rank. (P-5-3)

26. In or about August, 2014, the parent asked the District for a Woodcock-Johnson assessment for the Student. (P-12-2)

27. The Student's IEP dated August 13, 2014 recommended that he receive 240 minutes per week of behavioral support services, with 240 minutes per week of speech and language pathology, and 120 minutes per week of occupational therapy. Thirteen hours of specialized instruction were recommended within general education. This IEP contains goals in Mathematics, Written Expression, Communication/Speech and Language, Emotional, Social and Behavioral Development, and Motor Skills/Physical Development. It states that the Student is very impulsive and hyperactive, and that these behaviors affect his ability to attend class and follow classroom rules. It states that he has difficulty with social interactions, staying awake in class, completing classroom assignments, and with attendance. (P-28)

28. For the 2014-2015 school year, the Student first attended School B.  
(Testimony of parent; P-11-1)

29. During his time at School B, the Student got into a few conflicts but some teachers felt there were no serious behavioral concerns. There were no attendance concerns, though the school noted that the Student had very recently missed some days at the October, 2014 IEP meeting. There were positive reports by the English teacher, and he exhibited self-control when he was involved in an incident with another student. (P-11-1; P-24)

30. An IEP meeting was held for the Student in October, 2014. (P-29)

31. At the meeting, a speech and language evaluation was reviewed, an educational assessment was reviewed, and it was agreed that an assistive technology evaluation should be conducted independently. (Testimony of Witness F)

32. Also at the meeting, the team reduced the Student's behavioral support services because some reports from the school indicated that the teachers were not seeing any behavioral outbursts. The team also terminated his speech and language services.  
(Testimony of Witness C)

33. The October, 2014 IEP provided the Student with 120 minutes per month of behavioral support services, and broke up the Student's academics to include 8 hours per week of specialized instruction in reading outside general education and 5 hours a week of specialized instruction inside general education. There was no reference to assistive technology on this IEP, which also recommended a location with minimal distractions. (P-29-13, 15)

34. The October, 2014 IEP again states that the Student is very impulsive and hyperactive, and that these behaviors affect his ability to attend class and follow classroom rules. It states that he has difficulty with social interactions, staying awake in class, completing classroom assignments, and with attendance. (P-29-10-11)

35. A Behavior Intervention Plan (“BIP”) was also written for the Student in October, 2014. (Testimony of Witness F)

36. The BIP was based on an interview with the student and meetings with the parent. (Testimony of Witness F)

37. An assistive technology evaluation was conducted of the Student on December 4, 2014. The assistive technology evaluation of Douglas and Roberts discussed a wide range of interventions that would help the Student including use of a slant board, graphic organizers, being provided handouts of notes and printouts of assignments, a dictation machine, and assistive technology training for and access to word processing software, word prediction software, editing programs, speech recognition software and access to a text to speech reader. A visual schedule and personal organization programs for his phone were also suggested, as were books on tape or CD, visual manipulatives in math and intentional keyboarding training. (P-33-11-12)

38. In March, 2015, the parent requested an independent educational evaluation for the Student. (IEE) (Testimony of Witness C)

39. An IEP meeting was held for the Student in March, 2015. At this meeting, the team met to review the assistive technology evaluation that was conducted through the IEE. Evaluator A of the District reviewed the report and gave recommendations for the team. Evaluator A felt that many of the recommendations in

the report were already available to the Student. He felt that the only assistive technology that had to be added to the IEP was the voice recorder. (Testimony of Witness J)

40. Accordingly, the March, 2015 IEP only added a voice recorder out of all the interventions recommended. (Testimony of Witness J)

41. The Student's BIP, dated 3/30/15, was revised at this time. (Testimony of Witness F)

42. The BIP noted that the Student often struggles to re-focus and makes comments or talks out of town in the classroom. (P-43-1)

43. The BIP recommended that teachers to calmly and quietly make the Student aware of his comments; give him explicit instruction for desired behavior and then a short break from the classroom if necessary; the establishment of a motivational plan to track positive and negative behaviors which will result in computer time, outside food for school lunch, and out of school field trip privileges if progress is made. The plan further states that the Student will lose opportunities to participate in extra-curricular activities or rewards if he does not behave. (P-43-1)

44. The BIP did not change much from the BIP that was written in October, 2014, and Steps 1 and 2 stayed entirely the same. (Testimony of Witness F)

45. During the entirety of the 2014-2015 school year, the Student was "in and out of" the classroom. He often missed first period, and then left early from school. (Testimony of Witness F; Testimony of parent)

46. He had difficulties with writing, behavior, and social skills. He had difficulty focusing. He became withdrawn in class and withdrew from school.

(Testimony of parent; Testimony of Student)

47. The Student was suspended during this school year for roaming the halls. He was engaged in disruptive behavior in class, was late to class, had poor attendance, and walked out of class during the 2014-2015 school year at School A.

(Testimony of Witness F; Testimony of parent; P-24)

48. During counseling, the Student worked on arriving at school on time, being in classes for the full period, completing assignments, and on his relationships with peers and adults. (Testimony of Witness F)

49. The counseling was not provided in individual sessions in a counseling room. Rather, the counseling was provided in the hallway or during classroom observations. (Testimony of Witness F)

50. For the 2014-2015 school year, the Student did not receive the voice recorder which was promised to him. (Testimony of parent)

51. During the school year, the Student's classroom was sometimes chaotic. Students did such things as stand on desks, and teachers were not always able to control students' conduct. (Testimony of parent)

52. The school started writing an Functional Behavior Assessment ("FBA") for the Student toward the end of the 2014-2015 school year. (Testimony of Witness F)

53. It was difficult to do an FBA for the Student because he would not stay in the classroom and there were not enough work samples. The FBA was completed on the Friday prior to the hearing date. (Testimony of Witness F)

54. At School A on the Thursday before the hearing, a new IEP was developed for the Student and the 240 minutes per week of counseling was placed back on the IEP. (Testimony of Witness C)

55. The Student is still in the [REDACTED] grade, though he is half a credit from [REDACTED] grade. He has to make up biology, which he failed last year. (Testimony of Student)

56. Currently, he is passing every class except a business class because he is usually late. (Testimony of Student)

57. The Student is currently having issues with peers in some classes. (Testimony of Witness F)

58. The Student has an opportunity to make up his science class through credit recovery at School A. (Testimony of Witness J)

## **VII. Conclusions of Law**

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

The burden of proof in a special education due process hearing lies with the party seeking relief. 5-EDCMR 3030.3; Schaffer v. Weast, 546 U.S. 49 (2005).

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or "FAPE"). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005).

Pursuant to the Supreme Court's decision in Board of Education of the Hendrick

Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit. 34 CFR Sect. 300.513(a).

1. Issue # 1: Evaluation Requests.

The IDEA states that a local educational agency ("LEA") shall ensure that a reevaluation of each child with a disability is conducted if: 1) the LEA determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or 2) if the child's parents or teacher requests a reevaluation. 28 U.S.C. §1414(a)(2); 34 C.F.R. §300.303; see also 5 DCMR Sect. 3005.7. Reevaluations must be conducted in accordance with the basic IDEA provisions governing evaluations. 28 U.S.C. §1414(a)(2)(A); 34 C.F.R. §300.303(a). An LEA is accordingly required to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability; and (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate

in appropriate activities. The LEA should not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child, and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 28 U.S.C. Sect.1414(b)(2); 34 CFR Sect. 300.304(b).

However, as stated by the D.C. Circuit: “(a)n IDEA claim is viable only if those procedural violations affected the student’s substantive rights.” Lesesne ex rel. B.F. v. D.C., 447 F.3d 828,834 (D.C. Cir. 2006); see also Kruvant v. District of Columbia, 99 Fed. App’x. 232, 233 (D.C. Cir. 2004).

Here, Petitioner established that she requested evaluations for the Student going back to January 24, 2014. In evidence is the letter that was sent to DCPS on that date (P-8) and the fax confirmation for the letter. Petitioner also presented supporting testimony from a legal assistant of Petitioner’s counsel’s office. The letter specifically requested a Functional Behavior Assessment, a social history, and a comprehensive psychological evaluation. A follow up to this letter was faxed on June 4, 2014. DCPS did not present any witness to contest this testimony and evidence.

This evaluation request was reasonable. As is clear from the August, 2014 IEP, the Student was struggling in class during the 2013-2014 school year at School C. The Student was impulsive and hyperactive in class, which affected his attention and his ability to follow directions. He was unable to maintain social relationships because of his inability to read social cues. He had trouble staying awake in class, completing

classroom assignments, and attending. Additional information was necessary to assess the Student, as the IEP itself clearly states.

DCPS points to a previous evaluation from 2012, arguing that this information was sufficient for it to develop an educational program at the time. This evaluation included BASC-2 testing, which measures a Student's behaviors in class. However, as pointed out by Petitioner, this testing scale was finished by the Student only. No BASC-2 testing was completed by the Student's teachers. Rare is the teenager who is a reliable narrator about their own issues, and there is nothing in the record to suggest that the Student was able to self-assess with any particular keenness.

Moreover, as pointed out by Witness B, there was no Functional Behavioral Assessment of the Student at this time to determine what the antecedents to the Student's behaviors were. After the Student continued to misbehave, DCPS needed to continue to explore why the Student was behaving inappropriately and then attempt a different or modified approach to learning so that he could be more successful in the classroom. While not required under the law, as DCPS points out, an FBA is one way for a school District to assess how a Student's behavioral difficulties affect him/her at school.

At this time, no additional testing, such as an updated BASC-2 test, was completed with respect to the Student's behavior. Nor was a Functional Behavior Assessment conducted to determine the "function" of the Student's behavior (one was finally completed on the Friday before the hearing). The result was that the Student continued to engaged in disruptive behavior in class, kept coming late to class, had poor attendance, and sometimes just walked out of class during the 2014-2015 school year at School A.

I find that this procedural violation caused a deprivation of educational benefit. DCPS denied the Student a FAPE when it failed to reevaluate the Student after Petitioner's January, 2014 request.

2. Issue #2: October, 2014 IEP.

Petitioner contends that the October, 2014 IEP resulted in an inappropriate reduction in the Student's behavioral support services. Petitioner also contends that a BIP was not provided for the Student in connection to the October, 2014 IEP.

The District is required to "consider the use of positive behavioral supports and other strategies" if the student's behavior impedes the student's learning. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i). District of Columbia courts have held it is "essential" for the LEA to address behavioral issues. Long v. Dist. of Columbia, 780 F. Supp.2d 49 (D.D.C. 2008)(in ruling the District failed to provide an FBA/BIP for a Student, court stated that "the quality of a student's education is inextricably linked to the student's behavior"); Shelton v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008)(FBA/BIP required where learning disabled student was suspended) . However, that behavior must be linked to a Student's disability. S.S. v. District of Columbia, 68 F.Supp.3d 1 (D.D.C. 2014)(student's absences not due to reluctance to go to school).

The record reveals that the Student's behavioral support hours were halved during the October, 2014 IEP meeting. Additionally, no BIP was attached to the IEP, as is required by the applicable regulations in the District of Columbia. 5-E DCMR Sect. 5-3007.3. Indeed, no BIP from October, 2014 was ever presented to this IHO by DCPS at the hearing.

Respondent argues that there were positive reports about the Student's behavior during his brief tenure at School B, which is true as conceded by Witness C. Respondent also points out that there is testimony in the record that they did, in fact, write a BIP at this time. However, Issue #1 is inextricably linked to issues relating to the validity of the October, 2014 IEP. The school district is required to rely on a *variety of assessment tools* in determining an appropriate IEP for the Student. In reducing the Student's behavioral support hours, DCPS reacted solely by relying on oral teacher reports. DCPS's own IEP underscores the importance of additional data for this Student. As pointed out by the August, 2014 IEP and also the October, 2014 IEP, the Student required "additional assessments" in order to determine the impact of the Student's social and emotional issues on his educational performance. No such assessments were conducted in connection to the October IEP. Indeed, none were completed until the week before the hearing in this case.

It is noted that, after DCPS reduced the Student's counseling hours, the Student began to misbehave with greater frequency, suggesting that the Student may have in fact required at least the 240 minutes that he was receiving previously. Shelby v. Holder, 133 S.Ct. 2612 (2013)(discarding programs that are working can be like "throwing an umbrella away in a rainstorm because you are not getting wet")(Ginsburg, J., dissenting). It is also worth pointing out that, in the week before the hearing, DCPS reinstated the Student's 240 minutes per month of behavioral support services.

It is also noted that there are no other sections of the IEP that provide any behavioral interventions for the Student. In sum, I agree with Petitioner that the October, 2014 was defective since it reduced the Student's behavioral support hours

without sufficient evaluative data. This deprived the Student of educational benefit and thereby denied the Student a FAPE.

3. Issue # 2: March, 2015 IEP.

Petitioner makes the same allegations relating to the March, 2015 IEP as she did with respect to the October, 2014 IEP. Again, there is an allegation was that there was no BIP. Again there is an allegation that the behavioral support services were insufficient. Additionally, there is an allegation that DCPS failed to appropriately provide the Student with assistive technology per the December, 2014 assistive technology evaluation.

The record is clear that there was a March, 2015 IEP. However, as DCPS points out, the March, 2015 IEP is not in the record. Moreover, as DCPS points out, a March BIP was written for this Student, and the March BIP is in fact in the record.

Without an IEP in the record, it is impossible to determine whether there were appropriate behavioral supports provided for the Student in March, 2015. It is incumbent on the IHO to look at the whole IEP in determining whether the school district has created an appropriate behavioral plan for a student. A.C. v. Chappaqua Central School Dist., 553 F.3d 165 (2d Cir. 2009)(FBA not needed where IEP provided interventions that would address behavioral needs). I cannot assume that the IEP did not contain other behavioral supports beyond the counseling which was recommended. Petitioner has not met her burden with respect to this issue.

I note that the BIP here is suspect given that it was based on the reportage of the Student himself, as well as the parent. As noted, there is nothing in the record to suggest that the Student (or the parent) were capable of providing enough objective

information about the Student's performance in the classroom to allow for a BIP to be written. While it can of course be helpful to glean information from the Student and parent in this connection, more objective data is necessary before a school district can write a reasonable BIP for a Student. Still, without an IEP in the record, I find it is impossible to gauge the appropriateness of the BIP in context. As stated in A.C., a hearing officer must also look to the IEP to determine the appropriateness of the overall behavioral plan for the Student. Petitioner's allegations relating to behavioral supports in the March, 2015 BIP must fail.

For the same reason, Petitioner's allegations regarding assistive technology must also fail. Without an IEP in the record, I cannot determine whether the assistive technology recommendations in the IEP were appropriate. Moreover, there is testimony that Evaluator A from DCPS did in fact consider the assistive technology evaluation at this meeting – and accordingly recommended that a voice recorder be added to the Student's IEP.

In sum, I find that Petitioner did not meet her burden on these claims relating to the March, 2015 IEP.

4. Issue # 3: Failure to Implement.

Petitioner contends that Respondent failed to provide the Student with the assistive technology recommendations that were referenced on his March, 2015 IEP.

“Failure to implement” claims are actionable if the school district cannot materially implement an IEP. A party alleging such a claim must show more than a de minimis failure, and must show substantial or significant portions of the IEP could not be implemented. Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012)(holding

no failure to implement where District's school setting provided ten minutes less of specialized instruction per day that was on the IEP); see also Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9<sup>th</sup> Cir. 2007).

While there is no March IEP in the record, there is no dispute that there was a recommendation on the March, 2015 IEP for a voice recorder. There is also no dispute that this voice recorder was not provided. There is no argument from DCPS that this failure was de minimis, and the record is clear that DCPS took the position that a voice recorder was important to the Student during the March, 2015 IEP meeting.

DCPS stated they ordered the voice recorder but that it had not arrived. However, there is no good reason why there should be such a delay in providing a voice recorder that was promised to a Student. There is nothing in the record to suggest that voice recorders are difficult to obtain or that such recorders are unavailable at retail stores in the District of Columbia. The voice recorder should have been provided to the Student within a few weeks of the IEP meeting at worst. I agree with Petitioner that DCPS's failure to provide the Student with a voice recorder after the March, 2015 IEP meeting caused a deprivation of educational benefit and thereby denied the Student a FAPE.

### **VIII. Relief**

As a remedy, Petitioner asserts that appropriate relief in this matter is to order compensatory education in the form of 160 hours of tutoring, online credit recovery classes geared for students with disabilities, and 40 hours of behavioral support services.

When school districts deny Students a FAPE, courts have wide discretion to insure that students receive a FAPE going forward. As the Supreme Court stated:

The statute directs the court to “grant such relief as [it] determines is appropriate.” The ordinary meaning of these words confer broad discretion on the court. The type of relief is not further specified, except that it must be “appropriate.” Absent other reference, the only possible interpretation is that the relief is to be “appropriate” in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with “a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.

School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985).

One of the equitable remedies available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA, is compensatory education. Under the theory of compensatory education, courts and hearing officers may award “educational services to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award 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. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student'").

A Petitioner need not "have a perfect case" to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011) Under the IDEA, if a Student is denied a FAPE, a hearing officer may not “simply refuse” to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010) Some students

may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioner has submitted a compensatory education plan and testimony from Witness H and Witness I in support of that proposal.

Petitioner seeks one hundred sixty hours of individualized reading, writing, and math tutoring. This is an amount of hours that is considerably less than the amount of educational hours contained in the period of FAPE denial. While Witness I did not align this plan perfectly within the Reid standard, it is a reasonable award for a Student with a year long period of FAPE deprivation.

Given the Student's attendance history, however, I will condition the award on regular attendance at tutoring. Additionally, given the Student's deficits, I will require that all hours be directly provided by a certified special education teacher.

Petitioner also seeks credit recovery courses to make up for this FAPE deprivation. DCPS put on testimony to the effect that these credit recovery courses are available at DCPS, but Witness H testified that the credit recovery course arranged through her agency included individualized instruction that would help the Student finish the course. Given this testimony, I will order that the Student benefit from one credit recovery course from Witness H's organization.

Petitioner also seeks behavioral support services, but did not call any witness qualified in providing such services. Though I did find that the Student should have received more behavioral support services in 2014-2015 than he received, I will deny this request because there is insufficient foundation in the record.

Additionally, I will order that the Student's voice recorder be provided to him within ten business days of the issuance of this order.

### **IX. Order**

As a result of the foregoing:

1. Respondent is hereby ordered to provide the Student with one hundred sixty hours of 1:1 individualized tutoring, services to be completed by 12/31/16;
2. All tutoring shall be directly provided by a certified special education teacher who shall be paid at a reasonable and customary rate;
3. The Student shall be required provide a medical note or a note from his parent to DCPS for every scheduled tutoring session missed;
4. Such note must be presented to DCPS within 10 business days of the missed session;
5. Upon three missed sessions without an accompanying note presented to DCPS in timely fashion, DCPS may suspend payment on all tutoring sessions until appropriate documentation is received by DCPS;
6. Petitioner is awarded one credit recovery course from the organization run by Witness H;
7. DCPS shall provide the Student access to a voice recorder in all classes within ten business days of the issuance of this order;
8. Petitioner's other requests for relief are hereby denied.

Dated: October 19, 2015

*Michael Lazan*  
Impartial Hearing Officer

cc: Office of Dispute Resolution

Jocelyn Franklin, Esq.  
Maya Washington, Esq.  
OSSE Division of Specialized Education  
[Contact.resolution@dc.gov](mailto:Contact.resolution@dc.gov)  
Chief Hearing Officer

## **X. Notice of Appeal Rights**

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 USC §1415(i).

Date: October 19, 2015

*Michael Lazan*  
Impartial Hearing Officer