

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

Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

OSSE
STUDENT HEARING OFFICE
2012 APR 11 AM 8:54

Date Issued: April 10, 2012

Student,¹ by and through the
Petitioner,

Hearing Officer: Michael Lazan

Petitioner,

v.

District of Columbia Public Schools,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION

This matter comes before the undersigned Hearing Officer on Petitioner's Notice of Due Process Complaint ("Complaint") received by Respondent on January 26, 2012 (IHO Exh. 1). This IHO was appointed to hear this matter shortly thereafter, on January 30, 2012. Respondent filed a Response to the Complaint on February 8, 2012. A resolution meeting was held on February 7, 2012. The parties, however, were not able to reach an agreement. The resolution period expired on February 25, 2012. The HOD was due on April 10, 2012.

A Prehearing Conference was held on March 2, 2012. A Prehearing Conference Summary and Order was issued on March 7, 2012. A second Prehearing Conference was held

¹ Personal identification information is provided in Appendix A.

FAPE by failing to conduct a comprehensive psychological evaluation for the Student in connection with the IEP reflecting the meeting dated October 7, 2011. There is also a request for a finding that DCPS failed to include a Behavior Intervention Plan in connection to the IEPs reflecting the meetings of November 29, 2010 and October 7, 2011. As relief, Petitioner seeks: 1) placement at an appropriate school that can implement the IEP; 2) a comprehensive psychological evaluation within 30 calendar days of the HOD, with a copy of the written report provided to counsel; 3) revision of the IEP including a detailed behavior plan for the Student; 4) a reconvened MDT team meeting, with appropriate revisions to the Student's program; 5) compensatory education.

ISSUES

The issues to be determined are as follows:

- a. Did DCPS deny the Student a FAPE because DCPS failed to provide the Student with an appropriate school where the IEP reflecting the meeting dated October 7, 2011 can be implemented?
- b. Did DCPS deny the Student a FAPE because the IEP team in connection to the IEP reflecting the meeting dated October 7, 2011 did not conduct a psychological evaluation of the Student?
- c. Did DCPS deny the Student a FAPE because the IEP team in connection to the IEP reflecting the meeting dated October 7, 2011 failed to include a Behavioral Intervention Plan (BIP)?
- d. Did DCPS deny the Student a FAPE because the IEP team in connection to the IEP reflecting the meeting dated November 29, 2010 failed to include a BIP?

FINDINGS OF FACT

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

1. The Student was born on (P-3-1)
2. The Student is currently eligible for services as a student with a specific learning disability. (P-2-2)
3. The Student is diagnosed with asthma and muscular dystrophy. (P-10-3)
4. The Student limps and will mask his physical disability with bravado and aggressive behaviors. He often experiences pain and exhaustion because of his illness. He feels badly about the way he walks. It is hard for him to walk up steps. (P-10-4-5; Testimony of parent)
5. The Student will lay down in class because it is more comfortable for him that way. (P-11-2)
6. The Student's physical condition is deteriorating. (P-10-5)
7. The Student wants to be in school. (Testimony of Trowers; Testimony of parent; Testimony of Student)
8. A psychological evaluation was conducted of the Student by Dr. William Byrd in February 26, 2006. (P-14-1)
9. The psychological evaluation indicated that, on the WISC-IV, the Student's Full Scale IQ was 71, with a verbal comprehension index of 73 and a Perceptual Reasoning Index of 75. (P-14-2-4)
10. The evaluation indicated that the Student may experience great difficulty in keeping up with his peers in a variety of areas, including in regard to "cause and effect." He will

have great difficulty with school assignments relating to organization, categorizing and sequencing skills. He will have severe weakness in terms of short-term memory and tasks that require mental control. (P-14-2-3)

11. The evaluation indicated that the Student scored a 74 on the Beery-Buktencia Developmental Test of Visual-Motor Integration, which is indicative of visual motor delay. (P-14-4)

12. Dr. Byrd also conducted Connors' Teacher and Parent scales. These scales indicated that the Student's scores were in the significant range in terms of oppositional behavior, cognitive problems, hyperactivity. The Attention Deficit Hyperactivity Index was significant for Attention Deficit Hyperactivity Disorder. (P-14-4)

13. Dr. Byrd indicated that the Student should be referred for a psychiatric consult to rule out the need for medication; should be taught strategies to assist him with inputting, processing, retaining and expressing information; receiving instructions in an age appropriate classroom, be provided with extended time on tests and homework; be introduced to the computer; receive a consistent routine. (P-14-5)

14. Dr. Byrd described the Student as impulsive, inattentive, having low frustration tolerance, being easily distracted. (P-14-3)

15. According to a WRAT test administered in February, 2009, the Student was reading at a K.8 level. (P-2-2; P-3-3)

16. The Student has a desire to learn how to read. (Testimony of parent; testimony of Student)

17. According to a Woodcock Johnson III administered in March, 2009, the Student was performing at the 1.4 level in written expression and at the second grade level with accommodations and modified content. (P-3-4)
18. The Student began attending School A in October, 2008. (P-12-1)
19. A Clinical Update from School A dated August 31, 2009 indicated that the Student used inappropriate language, ignored redirections, created safety concerns. The report suggests that the family consider an alternate placement. (P-12-2)
20. A Clinical Update from School A dated May 10, 2010 indicates that the Student's attendance has been a significant issue. (P-13-1)
21. The Clinical Update from School A dated May 10, 2010 indicates that the Student usually sits at a cubicle and does not do any work, sleeps, and disrupts his peers. This report indicates that the Student would benefit from a male mentor as a role model for him. (P-13-1)
22. In October, 2010, the Student was assessed at a 3.2 grade level equivalent in Math according to the Key math test. (P-3-3)
23. In October, 21, 2010, a classroom observation by Anita Hughes, a Clinical Social Worker, found the Student to be engaged and on-task for 70 percent of the time. (P-10-3)
24. A second observation by Ms. Hughes on October, 25, 2010 found the Student to be appropriate and calm for 100 percent of the time observed. (P-10-4)
25. A third observation by Ms. Hughes on October 25, 2010 found the Student to be engaged for 60 percent of the time. (P-10-4)
26. On November 4, 2010, a Functional Behavioral Assessment (FBA) was issued by Anita Hughes, a Clinical Social Worker at DCPS. (P-10-7)

27. The FBA indicated that the Student displays opposition, uses foul language, is defiant, was non-compliant, disruptive, irritable, distractable, inattentive, had excessive motor activity, poor boundaries and disrespectful behaviors, a blatant disregard for rules, and the feelings of others. (P-10-1-2)

28. The FBA indicates that the Student's behavior results in chronic truancy, failing grades and multiple school suspensions. (P-10-1)

29. The FBA indicates that the Student's behavior tends to occur more when he is not feeling well or is tired; when someone new is entering his life; when he is touched or when someone has intruded into his physical space; when he is with peers and is engaged in "hands on" activities. (P-10-1)

30. The FBA indicates that the Student is more likely to be on task when there is structure. (P-10-1)

31. The FBA indicates that the Student is more likely to stay on task when he is able to competently master the subject matter. (P-10-2)

32. The FBA indicates that the Student is more likely to be on task during math class or when he is receiving 1:1 instruction from staff with whom he has developed a trusting relationship. (P-10-1)

33. The FBA indicates that possible reinforcers include barbering classes, lunch incentives, interacting with adults that he holds in high regard. (P-10-1)

34. The FBA indicates that previous interventions included interactions with 1:1 teachers with whom he has developed a rapport, participation in a school wide behavioral modification program, being provided with tangible incentives such was money and food, individual behavioral support services, the use of "therapeutic holding," positive verbal

reinforcement, placement in small groups in the classroom, use of “time-outs,” clear and calm presentation of choices. (P-10-2)

35. The FBA indicates that, of such previous interventions, clear and calm presentation of choices sometimes results in the Student improving his level of compliance. (P-10-2)

36. The FBA indicates that use of verbal cues and redirection are effective “on occasion.” (P-10-2)

37. The FBA indicates that most interventions have not been effective because the Student is generally non-responsive to directives from authority figures and can quickly resort to disruptive behaviors. (P-10-2)

38. The FBA indicates that functions of the behaviors “are multi-faceted” and serve to mask the Student’s personal, physical and academic deficiencies, low frustration level, inability to trust others, and to gain attention. (P-10-2)

39. The FBA indicates that the Student was absent 120 days out of 178 days during the 2009-2010 school year. (P-10-2-3)

40. The FBA indicates that the Student’s behaviors have significantly impacted on his ability to successfully access the general education curriculum. (P-10-6)

41. The FBA indicates that a Behavior Intervention Plan (BIP) should be conducted for the Student. (P-10-6)

42. The FBA recommends implementing the then-current IEP in terms of counseling services to address issues of reducing disruptive and aggressive behaviors, coping skills, ability to manage frustration and anger, the refusal to engage in therapy. (P-10-6)

43. The FBA recommends consideration of a support group for adolescents with muscular dystrophy. (P-10-6)
44. The FBA recommends that rules and expectations be clearly stated for the Student and consistently imposed when rules are violated. (P-10-6)
45. The FBA indicates that the Student should be allowed to utilize “tactile manipulatives.” (P-10-6)
46. The FBA recommends that the Student receive more intensive reading remediation. (P-10-6)
47. On November 29, 2010, an IEP meeting was held for the Student. A BIP was not conducted for the Student because it was felt that the interventions at School A were sufficient for the Student. The FBA was reviewed at this meeting. (Testimony of Wilson; P-11-1; Exh.P-11-1)
48. The IEP reflecting the meeting date November 29, 2010 indicates that the Student struggles with following directions and being respectful to peers. (P-6-5)
49. The IEP indicates that the Student struggles with expressing feelings in socially acceptable ways and struggles to use positive social skills. (P-6-5)
50. The IEP indicates that the Student struggles with frustration, motivation, and in maintaining focus. (P-6-5)
51. The IEP indicates that the Student’s social and emotional needs can be addressed through small group instruction, individual and group therapy. This would assist him with social skills, coping skills, learning socially acceptable ways to express thoughts and feelings. (P-6-5)
52. In the IEP, a social and emotional goal relates to the classroom setting. This goal looks for the Student to enhance relationships with peers and staff by using appropriate language

and tone, attend on a consistent basis, following directions, not being argumentative with staff, and seeking out appropriate staff when in need of support. (P-6-5)

53. In the IEP, a social and emotional goal relates to working in a group setting. This goal looks for the Student to joining group activities in a structured setting, expressing his opinion, and listening to the opinion of others. This goal includes short-term objectives of working to form and trust peer and staff relationships, speaking clearly and audibly with appropriate language when interacting with peers and staff, and participating during group sessions in a respectful and cooperative way. (P-6-6)

54. In the IEP, a social and emotional goal relates to working in a structured individual therapy setting. The goal looks for the Student to explore decision-making skills, reflect on past choices, attend individual therapy sessions, explore and process thoughts and feelings regarding self, school, family and community and develop adaptive coping strategies. (P-6-6)

55. For 2010-2011, the Student missed 95 days of school, with 6 days tardy. The Student never provided any medical documentation to support assertions that the Student suffered from asthma and required 95 absences. (R-3-1)

56. The Student was highly resistant to engaging with the community and was resistant to interventions at School A. (Testimony of Wilson),

57. An IEP meeting was held for the Student on September 2, 2011. The MDT team decided to change the Student's location of services. Respondent sought 30 calendar days to place the Student at an alternate location. The parent agreed with the decision to change the location of services. No changes were made to the IEP. The team did not review the FBA of Ms. Hughes. (R-5-2; Testimony of Wilson)

58. The Student attended counseling in September and October, 2011. Counseling reports indicate that the Student made progress in individual therapy by expressing concerns, frustrations, and remains open to feedback and skill development. The Student made progress in group counseling by communication and engaging appropriately through peers. The Student missed six sessions during this period. (R-1-1-2)

59. An IEP meeting was conducted for the Student on October 7, 2011. (P-2-1)

60. At the meeting, the Student was deemed to have "chronic truancy." (P-2-1)

61. At the meeting, the Student was deemed to need 1-1 attention to minimize distractions in reading, math, writing as reflected in the IEP. (P-3-3-5)

62. At the meeting, the Student was deemed to need verbal instruction, modified work, and repetition in reading, math, writing as reflected in the IEP. (P-3-3-5)

63. The IEP recommends 24.5 hours per week of specialized instruction outside the general education setting, with related services of physical therapy 3 hours per week, speech and language services 1 hour per week, behavioral support services 1.5 hours per week. (P-3-9)

64. The IEP contains accommodations relating to interpretation of oral directions, markers to maintain place, repetition of directions, simplification of oral directions, oral response to tests, pencil grip, calculators, location with minimal distractions, preferential seating, small group setting, testing administered over several days, testing administered at best time for student, extended time on subtests. (P-3-11)

65. The IEP indicates that the prognosis for an increase in receptive and expressive speech is guarded since the Student is often absent from school. (P-3-5)

66. The IEP indicates that the Student struggles with following directions and being respectful to peers. (P-3-6)

67. The IEP indicates that the Student struggles with expressing feelings in socially acceptable ways and struggles to use positive social skills. (P-3-6)

68. The IEP indicates that the Student struggles with frustration, motivation, and in maintaining focus. (P-3-6)

69. The IEP indicates that the Student's social and emotional needs can be addressed through small group instruction, individual and group therapy. This would assist him with social skills, coping skills, learning socially acceptable ways to express thoughts and feelings. (P-3-6)

70. The IEP indicates that the Student's frequent absences and difficulty maintaining focus and motivation as well as social and interpersonal difficulties make it difficult for him to concentrate on academic work. (P-3-6-7)

71. The IEP indicates that, when present, the Student has the ability to engage in respectful relationships with peers and staff. (P-3-7)

72. In the IEP, a social and emotional goal relates to the classroom setting. This goal looks for the Student to enhance relationships with peers and staff by using appropriate language and tone, attend on a consistent basis, following directions, not being argumentative with staff, and seeking out appropriate staff when in need of support. (P-3-6)

73. In the IEP, a social and emotional goal relates to working in a group setting. This goal looks for the Student to joining group activities in a structured setting, expressing his opinion, and listening to the opinion of others. This goal includes short-term objectives of working to form and trust peer and staff relationships, speaking clearly and audibly with appropriate language when interacting with peers and staff, and participating during group sessions in a respectful and cooperative way. (P-3-7)

74. In the IEP, a social and emotional goal relates to working in a structured individual therapy setting. The goal looks for the Student to explore decision-making skills, reflect on past choices, attend individual therapy sessions, explore and process thoughts and feelings regarding self, school, family and community and develop adaptive coping strategies. (P-3-7)

75. On October 7, 2011, a Prior Written Notice (PWN) issued indicating that the MDT met and agreed with Respondent's proposal to change the location of services. There was an agreement to change the location within 15 days, and the parent and student agreed to tour the School B. (P-1-1)

76. The PWN indicates that the parent and student have concerns about the Student's behavior. (P-1-1)

77. The PWN indicates that all parent/student recommendations, MDT recommendations, attendance reports, report cards were used as a basis for this action. (P-1-1)

78. The Student was absent from School A at least 76 times during the time period he was designated to attend School A for 2011-2012. (Testimony of Wilson)

79. The Student was accepted to School B by letter dated October 21, 2011. (R-15-1)

80. School B would have provided the Student with additional access to a physical therapist. (Testimony of Wilson)

81. Prior Written Notice was provided for School B dated October 31, 2011. (R-19-1)

82. On or about November 17, 2011, the Student decided not to attend School B. (R-24-1)

83. The Student was upset that children were in wheelchairs at School B. The Student will likely be in a wheelchair at some point. (Testimony of parent; Testimony of Wilson)

84. The Student is suitably grouped with the students at School B in terms of his academic functioning. (Testimony of Wilson)

85. Thereafter, the District sought to accommodate the parent and Student by placing the Student at another school setting. The District then sought to place the Student at School C. (R-28-1; Testimony of Trowers)

86. School C offered the Student an opportunity to do job-related work, which appeals to the Student. (Testimony of Trowers)

87. Students at School C are a variety of disabilities. Some have physical disabilities, the majority do not. There were ten children in the class, about half that of the classes at School A. The facility does not use restraints. (Testimony of Trowers)

88. The Student indicated that he did not like the School C after a visit. (R-29-1; R-40-1) He did not feel that the Students were on his educational level. (R-41-1)

89. When visiting School C, the Student mistakenly went into the wrong classroom. The Student reacted strongly to a lesson in such classroom. He felt that the lesson was not on his level. (Testimony of Trowers)

90. The Student attended School C briefly but engaged in a disciplinary incident on the second day. (R-44-8)

91. The Student has regressed during 2011-2012 in terms of his academics because of his truancy. There was no advancement from academic levels set forth in the November 29, 2010 IEP. (Testimony of Wilson; P-6)

92. The Student was incarcerated in mid-February, 2012. (Testimony of parent)
93. The Student and parent were accepted to attend School D on March 2, 2012. (R-47-1)
94. The Student had a criminal court date on April 5, 2012. The Court has expressed interest in the Student finding an educational setting. The Government has recommended probation for the Student. (Testimony of Parent; Testimony of Taylor)
95. provides provides education services to District of Columbia public school students. Their summer program tries to help students transition to a career path. They provide a variety of assessments, personality indicators to determine learning styles, skill levels. They will then provide career awareness activities; career exploration activities; hands-on experiences for students. Students are given tasks in connection to career work, provide observations for Students, work on personal social skills, resumes, work readiness skills, a mock job application. They will have a career plan to bring back to their school to create appropriate transition plan for the students. They can provide related services for the Student, academic remediation for the Student. (Testimony of
96. The program can provide motivation for students with truancy by giving them a career path to motivate them past their truancy issues. (Testimony of
97. School E provides specialized instruction and counseling for Students. It also provides occupational therapy, physical therapy, speech therapy, counseling. The program services students with multiple disabilities, emotional disturbance, learning disabilities, OHI, intellectual disability. The program provides for a 1-5 teacher to student ratio. Every classroom has a teacher as well as paraprofessional. Behavior issues will be used with verbal

redirection. In the most dire situations, behavioral issues would be met by use of restraint. Staff are able to implement a BIP at the school. All teachers are certified at the school, which has a Certificate of Approval from OSSE. Academically, the school has credit bearing classes; includes a career explorational class, computer classes, life skills training, direct instruction within the classroom for reading. (Testimony of Akers)

98. School D includes certified teachers. Students are in grades 9-12. Disabilities vary within the classes. Students are classified as emotionally disturbed, intellectually disabled, learning disabled. The classes offer core academic subject areas. There is a transition specialist who comes into the classroom and works with the students. Classrooms are self-contained. There are 8-9 students in the classroom as of the date of testimony. There is small group instruction, differentiation of instruction, diploma track instruction. There are three adults in the classroom, including a behavior intervention counselor. There is an on-site social worker who meets with students on "self-esteem" issues. Truancy plans have been developed by the social worker. Token economy systems are used, points systems are used, Applied Behavioral Analysis is used in connection to behavioral programs, there is daily data collection, there are specific reinforcers for each individual student. (Testimony of Glenn)

99. I found all the witnesses in this matter credible except that I found the parent and the students partly credible. I do not find the Student's asthma caused his attendance difficulties. No medical evidence or testimony was presented here in connection to such a severe asthma problem.

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 DCMR 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 conforming 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; Schaffer 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). The standard set out by the Supreme Court in determining whether a child is receiving a FAPE, or the “basic floor of opportunity,” is whether the child has “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” Rowley, 458 U.S. at 201. The IDEA, according to Rowley, imposes “no additional requirement that the services so provided be sufficient to maximize each child’s potential commensurate with the opportunity provided other children.” Id. at 198; A.I. ex rel. Iapalucci v. Dist. of Columbia, 402 F. Supp. 2d 152, 167 (D.D.C. 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. FAPE, November 29, 2010 IEP.

Petitioner contends that the District denied the Student a FAPE in connection to the IEP dated November 29, 2010 because no BIP was created in connection to that IEP.

If the behavior of a student impedes the student's learning or the learning of other students, the IEP team shall consider the use of positive behavioral supports and other strategies to address that behavior in conformance with the IDEA and its implementing regulations. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i). In the District of Columbia, there are specific provisions in the District of Columbia Municipal Regulations that relate to BIPs. According to DCMR 5-3007.3, if a student's behavior impedes the child's learning or the learning of others, the IEP team shall consider strategies, including positive behavioral intervention, strategies, and supports, to address that behavior. An individual behavior plan shall be developed and incorporated into the IEP. A copy of that individual behavior plan shall be provided to the child's parents and to each teacher and service provider.

In regard to the November 29, 2010 IEP, the FBA created on October 28, 2010 recommended that Respondent develop a BIP. Respondent indicates that, at the time of the November meeting, the IEP team determined that the interventions at School A could satisfy the Student's behavioral issues without a BIP. A review of the November 29, 2010 IEP indicates that the IEP team determined that it would attempt to meet the Student's behavioral needs through behavioral support services. There is a reference in the IEP that the Student's attendance in physical therapy has significantly improved. (P-6-6) There is an additional reference that the Student was now attending group therapy. (P-6-6) The FBA was reviewed at this meeting. There is a goal relating to attendance.

While there is evidence that the Student was already in counseling and already had significant attendance issues, Petitioner bears the burden of proving a violation of substantive rights. Smith v. District of Columbia, 2010 WL 4861757 (D.D.C. 2010), at *5. Petitioner did not call any witness to indicate Respondent's IEP was inappropriately calculated in view of the information before the IEP team at the time. As a result, I must find that the IEP written on November 29, 2010 was reasonably calculated to provide the Student with educational benefits. See S.S. ex rel Shank v. Howard Road Academy, 585 F.Supp.2d 56, 66 (D.D.C. 2008)(warning against "Monday Morning Quarterbacking," i.e. reviewing IEPs based on prospective evidence; "the Court must ask whether the IEP was appropriately designed and implemented so as to convey a meaningful benefit")

2. FAPE, October 7, 2011 IEP.

A. Psychological Evaluation.

Petitioner alleges that the failure to conduct a comprehensive psychological evaluation of the Student caused a FAPE denial in connection to the October 7, 2011 IEP.

An LEA has an obligation to reevaluate a Student every three years. 20 U.S.C. Sect. 1414(b)(1)-(3); 1412(a)(6)(b); 34 CFR Sect. 303(b)(2). Reevaluations should occur sooner if conditions warrant or if parents or a teacher requests a reevaluation. 34 CFR Sect. 300.303(a). IDEA requires an LEA conducting an evaluation of a child to use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child that may assist in determining whether the child is a child with a disability. 34 C.F.R. Sect. 300.304(b)(1)(i). In conducting a reevaluation, the LEA must ensure that the child is assessed in all areas related to the suspected disability. 34 C.F.R. Sect. 300.304(c)(4). DCMR 5-3005.9, indicates that an LEA should ensure that "a variety of assessment tools and strategies" are used to gather relevant functional and developmental information about the child.

An IDEA claim is viable only if violations of procedural deadlines affected the student's substantive rights. Lesesne ex rel. B.F. v. District of Columbia, 447 F.3d 828, 834 (D.C.Cir.2006); Smith v. District of Columbia, 2010 WL 4861757 (D.D.C. 2010); Holdzclaw v. District of Columbia, 524 F.Supp.2d 43, 48 (D.D.C.2007); Kruvant v. District of Columbia, 99 Fed. Appx. 232, 233 (D.C.Cir.2004).

The Student has not been assessed through a psychological evaluation since 2006. However, Petitioner has called no witnesses to explain why the lack of a psychological evaluation has resulted in a substantive deprivation of educational opportunity for the Student. Petitioner has not identified what particular psychological testing would be helpful to determine this Student's needs at this point. No psychologist was called to testify by Petitioner. No expert witness was called to testify by Petitioner. Finally, Respondent claims that a psychological evaluation was attempted, but the Student was unable to complete it. Petitioner did not call a witness to rebut the claim that the Student had not made himself available to Respondents. I find that Petitioner has not met her burden on this issue. Smith v. District of Columbia, 2010 WL 4861757 at *5.

B. Behavior Intervention Plan.

Petitioner contends that the District denied the Student a FAPE in connection to the IEP dated October 7, 2011 because no BIP was created in connection to that IEP.

As stated, supra, if the behavior of a student impedes the student's learning or the learning of other students, the IEP team shall consider the use of positive behavioral supports and other strategies to address that behavior in conformance with the IDEA and its implementing regulations. 20 U.S.C. Sect. 1414(d)(3)(B)(i); 34 C.F.R. Sect. 300.324(a)(2)(i). According to DCMR 5-3007.3, if a student's behavior impedes the child's learning or the learning of others,

the IEP team shall consider strategies, including positive behavioral intervention, strategies, and supports, to address that behavior. An individual behavior plan shall be developed and incorporated into the IEP. A copy of that individual behavior plan shall be provided to the child's parents and to each teacher and service provider.

Respondent has an "affirmative duty" to address a Student's truancy. Springfield School Committee v. Doe, 623 F.Supp.2d 150 (D. Mass 2009)("behavior management services" fall within the scope of IDEA); cf. R.B. v. Mastery Charter School, 762 F. Supp.2d 745 (E.D. Pa 2010)(District had duty to respond to absences through educational intervention). Further, courts in the District of Columbia have recently held that the failure to create BIPs to address behavior issues can result in a material deprivation and lead to a finding of FAPE denial. Long v. District of Columbia, 780 F. Supp.2d 49, 61 (D.D.C. 2011)(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).

Despite behavioral interventions initiated at School A -- including individual and group counseling, verbal redirection -- the Student was absent 95 days during the 2010-2011 school year. The IEP team considered the student a "chronic truant."

The testimony and evidence submitted here indicates that such behavioral issues prevented the Student from deriving a meaningful benefit from school in 2010-2011. Ms. Wilson from Respondent indicated that the Student did not progress in his grade level functioning during the 2010-2011 year at School A. Further, the October 7, 2011 IEP team concluded that the Student's behavioral issues materially impacted on his performance in 2010-2011. The IEP stated: "(the Student's) frequent absences, and difficulty with maintaining

focus and motivation, as well as his struggle with social and interpersonal relationships, make it difficult for him to concentrate on academic work, master academic and social/emotional goals, and absorb new material.” (P-3-6)

The IEP team’s main response to the Student’s truancy and behavior issues was to change the Student’s school setting to a setting with more peers with physical disabilities. This proposal is not in sync with the available FBA, which was not reviewed at the October 7, 2011 IEP meeting. The FBA does not suggest that placing the Student in an environment with other physically disabled students would result in the end of his truancy and related behavior problems. On the contrary, the FBA indicates that the Student has difficult and long-standing behavioral issues that are complex and “multi-faceted,” suggesting that a detailed behavioral plan was in order.

The lack of a BIP was not mitigated by other factors. There is nothing in the record to suggest that either first two of Respondent’s recommended school settings – School B or School C -- would not have implemented any of their own individualized behavioral plans to address the Student’s persistent truancy. Compare E.Z.-L. v. New York City Department of Educ., 763 F. Supp.2d 584 (S.D.N.Y. 2011)(no BIP required where classroom included significant behavioral interventions that would address the Student’s behavioral needs). Nor did the October 7, 2011 IEP address the Student’s truancy in any new way. Respondent’s October 7, 2011 IEP is virtually identical to the November 29, 2010 IEP in regard to describing the student’s emotional, social and behavioral needs, goals, and services. The two documents are word for word identical in connection to emotional, social and behavioral needs. The two documents are also word for word identical in connection to the impact of such needs on the Student. (P-6-5) Cf.

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).

Respondent suggests a BIP is not needed because Petitioner does not want to go to school at all. This is not supported by any witness testimony, including from that of Respondent. Antoine Trowers of Respondent indicated in testimony that the Student did want to go to school. Moreover, the Student and parent have testified credibly that the Students wants to go to school, in particular to learn how to read. Compare Garcia v. Albuquerque Public Schools, 520 F.3d 1116, 1127 (10th Cir. 2008)(Student's patters of misbehavior would have prevented her from getting an educational benefit no matter what the District did).

Respondent also suggests that the Petitioner's behavior issues are not related to his disability. However, the FBA of Respondent's Ms. Hughes specifically connects the Student's behavioral issues to the Student's academic performance. The FBA indicates that functions of the behaviors "are multi-faceted" and serve to mask the Student's personal, physical and academic deficiencies, low frustration level, inability to trust others, and to gain attention. The FBA indicates that "his disruptive behaviors and emotional disposition have significantly impacted his ability to successfully access the general education curriculum." It should be pointed out that local Courts have recently found that students who are eligible for services as students with a specific learning disability may require BIPs. Long v. District of Columbia, 780 F. Supp.2d 49 (D.D.C. 2011); Shelton v. Maya Angelou Public Charter School, 578 F.Supp.2d 83 (D.D.C.2008).

Respondent also suggests that it could not create a BIP because the Student was not available. However, availability of the student is not required for a BIP. This Hearing Officer finds that Respondent's IEP team should have reviewed the detailed FBA, which had been

conducted by Ms. Hughes of DCPS not one year prior.² This Hearing Officer also finds that, after consideration of such FBA, the IEP team should then have created a BIP to address the Student's truancy and other behaviors.³ 34 CFR Sect. 300.324(a)(2)(i); 5 DCMR 3007.3; Long v. District of Columbia, 780 F. Supp.2d 49, 61 (D.D.C. 2011); Shelton v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008). As a result of the foregoing, I find that the Student was denied a FAPE from October 7, 2011 through to the date of this decision.

C. Implementation of the 2011-2012 IEP.

Petitioner contends that the Respondent failed to provide the Student with a school at which the October 7, 2011 IEP can be implemented. (See Revised PHC Order) There is no specific claim that the IEP itself does not meet the Student's needs. Instead, Respondent claims that the schools have either rejected the Student or have students with such low functioning levels that it would be inappropriate for the Student.

"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 indicate that substantial or significant portions of the IEP could not be implemented. Savoy v. District of Columbia, 2012 WL 548173 (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 (9th Cir. 2007).

² This FBA specifically flagged the issue of the Student's truancy, in addition to the fact that the Student displays opposition, uses foul language, is defiant, was non-compliant, disruptive, irritable, distractable, inattentive, had excessive motor activity, poor boundaries and disrespectful behaviors, a blatant disregard for rules, and the feelings of others. The FBA suggests a variety of interventions and supports, including making sure the Student receives structure, making sure the Student can competently master the subject matter, the provision of certain vocational classes, lunch incentives, interacting with adults that he holds in high regard.

³ It is noted that, prior to incarceration, the Student rarely attended school for 2011-2012. The Student was absent for 76 days at School A and largely refused to attend School B and School C.

The record reveals that Respondent has recommended 3 different schools for the Student in connection to the October 7, 2011 IEP. The record reveals that all three schools – School B, School C, and School D – accepted the Student. Further, the record reveals that none of the proposed classrooms contain students who are improperly grouped with the student in regard to functioning levels. On the contrary, the witnesses from Respondent indicated that the Student would appropriately grouped with students at his functioning level at each of these school settings. Petitioner presents no witnesses to the contrary. These claims are without merit.

3. Relief.

A. School E.

Petitioner asserts that appropriate relief in this matter is to order placement of the Student at School E, a non-public school in the District of Columbia.

In Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005), the Circuit laid forth rules for determining when it is appropriate for IHOs to order funding of non-public placements. First, the court indicated that “(i)f no suitable public school is available, the [school system] must pay the costs of sending the child to an appropriate private school.” Id. At 9 (citing Jenkins v. Squillacote, 935 F.2d 303, 305 (D.C.Cir.1991)). The Circuit then explained that such relief “must be tailored” to meet a student’s “unique needs.” Id. At 11-12 (citing to Florence County School Dist. v. Carter, 510 U.S. 7, 16 (1993)). To inform this individualized assessment, courts must consider “all relevant factors” including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. Id. at 12.

A recent case in the District of Columbia underscores the point that an IHO need not grant relief for a non-public school if a public school is available. In N.T. v. District of Columbia, 2012 WL 75629 (D.D.C. 2012), where there was a finding of FAPE denial, the Court found that a non-public placement was not justified because, inter alia, the parents “have not argued, let alone demonstrated,” that a public school could not meet the student’s educational needs. Id. At *4.

The testimony from School E indicates that the school’s behavioral interventions consist mainly of verbal redirection and counseling. The existing FBA suggests that verbal redirection is not an overall effective strategy for the Student. Verbal redirection was tried at School A, without any particular success. Indeed, the FBA states that the Student “is generally non-responsive to directives from authority figures and can quickly resort to disruptive behaviors.” (P-10-2) Further, there is evidence in the record that counseling will not address the Student’s truancy issues. The Student received counseling at School A, but truancy persisted during the Student’s time at School A.

There is also testimony from School E that the school will on occasion use physical restraint on students if behavioral issues get out of control. This approach is not appropriate for this Student, who will engage in behavioral incidents when he is touched.

Additionally, the witness from the school did not indicate that school staff had any particular experience with truancy or any particular expertise in how to address truancy. Further, the school witness did not indicate that it would provide an updated FBA for the Student or work to create a BIP for the Student, though the school witness did indicate that it would implement a BIP if written by the District. Matrejek v. Brewster Central School Dist., 471 F.Supp.2d 415 (S.D.N.Y. 2007), aff’d, 293 Fed. Appx. 20 (2d Cir. 2008)(specific strategies to

address student's behavior not shown by parents in reimbursement case involving unilateral placement; reimbursement denied). The Petitioner has not shown that School E is tailored to meet the Student's "unique needs" in terms of social, emotional and behavioral issues.

Moreover, as in N.T. v. District of Columbia, 2012 WL 75629 (D.D.C. 2012), the parents "have not argued, let alone demonstrated," that a public school could not meet the student's educational needs. Id. At *4.⁴

Finally, this Hearing Officer is of the view that it is premature to designate a school setting for the Student. The BIP should be developed first. Thereafter, the IEP team should select a school setting that can implement such BIP. The request for funding for School E must be denied.

B. Seeds of Tomorrow and related relief.

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

⁴ In contrast, the testimony from the witness for School D indicated that such school would provide the Student with specific behavioral intervention. Truancy plans have been developed by the social worker at the school, with successful results. Techniques derived from Applied Behavioral Analysis are used at the school to help students with behavioral issues. Specific reinforcers are used in connection to particular students. The FBA has suggested that, for this Student, particular reinforcers would be appropriate. Petitioner asserts that School D programs are exclusively for emotionally disturbed students, but the record does not indicate this. Petitioner also expresses concern that the setting is only for Students who are on a diploma track, but the school witness indicated that the setting could accommodate the Student.

(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.

The record indicates that _____ is a program designed largely to help help students transition to a career path. The 8 week summer program provides a variety of assessments, personality indicators to determine a student's learning styles, skill levels. They will then provide career-oriented activities, including career "exploration" activities, hands-on experiences. Students work on personal social skills, resumes, work readiness skills, a mock job application. They will have a career plan to bring back to their school to create appropriate transition plan for the students. The program can also provide academic remediation for a Student, including a Wilson reading program.

This Hearing Officer is persuaded that _____ is an appropriate compensatory education remedy for this Student. The testimony from _____ indicates that the _____ program can provide motivation for students with truancy by giving them a career path to motivate them past their truancy issues. This testimony fits squarely within the reasoning of Reid, which looks to whether the remediation can provide a student with skills that will allow the student to get to the level s/he would have been at had s/he received a FAPE.

Given the Student's history of truancy, this Hearing Officer finds it reasonable and appropriate to place conditions on the Student's attendance at [redacted]. Accordingly, I will order that any and all absences from [redacted] be documented by a note from a physician. Such medical note shall be provided to Respondent within 3 business days of the absence date. If Petitioner fails to provide a medical note relating to such absence date to Respondent so that Respondent receives it within 3 business days of the absence date, funding for [redacted] may be terminated by Respondent.

Finally, Petitioner also requests, in her compensatory education plan, remediation in a number of other areas, including 20 hours of mentoring services, 40 hours of counseling services, 20 hours of speech services, 20 hours of physical therapy, 5 hours a week of independent tutoring. The testimony suggests that these services can be provided by and through [redacted]. However, Petitioner has presented only conclusory testimony and evidence on these issues. Petitioner did not show how such services would be provided, by whom they would be provided, when they would be provided, where they would be provided, or how such services would provide the Student with an educational outcome that would make up for the FAPE deprivation in 2011-2012. Since Petitioner has not met the Reid standard in connection with these requests, these requests are accordingly denied. Gill v. District of Columbia, 770 F.Supp.2d 112 (D.D.C. 2011)(IHO justifiably denied compensatory education where particular requests were only supported by statements by advocate).

ORDER

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

1. The IEP team shall convene to create a BIP for the Student within 20 days of the issuance of this Order;
2. Such BIP shall be based on the FBA created by Ms. Hughes and on all other available information relating to the Student's school-related behavior issues;
3. At the IEP meeting referenced in paragraph #1, the IEP team shall select a school setting for the Student that will be able to implement the BIP;
4. Respondent will fund an 8 week summer program for summer, 2012 at which program shall be funded at regular and customary rates;
5. Any and all absences from the program must be documented by a note from a physician, and such medical note shall be provided to Respondent within 3 business days of the absence date;
6. If Petitioner fails to provide a medical note relating to such absence date to Respondent so that Respondent receives it within 3 business days of the absence date, funding for may be terminated by Respondent;
7. Petitioner's other claims are hereby denied with prejudice.

Dated: April 10, 2012

Michael Lazan
Impartial 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 USC §1415(i).

Date: April 10, 2012

Michael Lazan
Impartial Hearing Officer