DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

Student,[1] by and through the Petitioner,	Date Issued: January 22, 2013
Petitioner,	Hearing Officer: Michael Lazan
v.	Case No: 2012-0768
District of Columbia Public Schools,	Hearing Dates: January 8, 16, 17, 2013
Respondent.	Room: 2005

OSSE STUDENT HEARING OFFICE
2013 JAN 23 AM 10:29

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 November 8, 2012 (IHO Exh. 1). This IHO was appointed to hear this matter on November 30, 2012. Respondent filed a Response to the Complaint on November 13, 2012. (IHO Exh. 2)

A resolution meeting was held in this case on November 27, 2012. This meeting was not timely pursuant to the applicable regulations. 34 C.F.R. Sect. 300.510(a). The parties did not agree in writing to waive the resolution period or resolve the Complaint. The parties were unable to reach agreement and did not agree to shorten the resolution period, which ended on December 8, 2012. The HOD was due on January 22, 2013.

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

A Prehearing Conference was held on December 11, 2012. A Prehearing Conference Summary and Order was issued on December 14, 2012. (IHO Exh. 3)

Hearing dates were held on January 8, 2013, January 16, 2013, January 17, 2013. This was a closed proceeding. Petitioner was represented by Roberta Gambale, Esq. Respondent was represented by Lynette Collins, Esq. Petitioner entered into evidence exhibits 1-36; Respondent entered into evidence exhibits 1-12. Petitioner presented as witnesses: Petitioner; the Student; [redacted] Educational Advocate; [redacted], President, Seeds of Tomorrow, Inc.; [redacted] Admissions Coordinator, School C. Respondent presented as witnesses: Duane Donaldson, Special Education teacher, School B. At the end of the final hearing day, the parties presented oral arguments.

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

BACKGROUND

The Student is male, [redacted], and eligible for services as a student with an emotional disability. The Complaint involves claims implicating 34 CFR 300.507(a). The Complaint indicates that DCPS failed to conduct a requested assistive technology evaluation, occupational therapy evaluation, speech and language evaluation, and vocational/transitional evaluation as requested by the parent at the April 10, 2012 IEP meeting and then failed to review such evaluations and modify the Student's IEP as appropriate; failed to develop transition goals

and/or a transition plan at the April 10, 2012 IEP meeting and failed to reconvene to add transition goals and/or a transition plan to the IEP; that the IEP from April 10, 2012 lacked an updated BIP, reduced counseling services without justification, did not appropriately address the need for ESY services, failed to contain transition goals/transition plan; that DCPS failed to provide the Student with a suitable location of services for 2012-2013 that would implement the IEP; that DCPS failed to fully implement the Student's IEPs from February 7, 2012 to present; that DCPS failed to allow Petitioner access to records of the Student, including service logs, attendance records, credit accumulations, student schedule, previous and current behavior plans.

ISSUES

The issues to be determined are as follows:

1. Did DCPS fail to conduct an assessment in: a) assistive technology; b) speech and language issues; c) occupational therapy; and d) vocational/transition services in response to the parent's requests at the April 10, 2012 IEP meeting? If so, was the Student denied a FAPE by DCPS's failure to conduct such assessments and then reconvene the IEP team to revise the IEP by the end of the 2012-2013 school year?

2. Did the Student require detailed transition goals and a transition plan in the IEP developed at the April 10, 2012 IEP meeting? If so, did DCPS fail to develop appropriate transition goals and an appropriate transition plan at the April 10, 2012 IEP meeting? If so, did such failure deny the Student a FAPE?

3. Did the Student require an IEP on April 10, 2012 that included a Behavior Intervention Plan (BIP)? If so, did the IEP from April 10, 2012 fail to contain an appropriate BIP? If so, did the failure of the IEP to include a BIP deny the Student a FAPE?

4. Did the Student require an IEP on April 10, 2012 that included additional counseling services? If so, did the IEP from April 10, 2012 fail to contain an appropriate amount of counseling services? If so, did the failure of the IEP to provide adequate counseling services deny the Student a FAPE?

5. Did the Student require Extended School Year (ESY) services in the April 10, 2012 IEP? If so, did the failure of the IEP team to provide for ESY services deny the Student a FAPE?

6. Did DCPS fail to provide the Student with an appropriate school setting from February 7, 2012 to present? If so, did that failure to provide an appropriate school setting deny the Student a FAPE?

7. Did Petitioner request that DCPS provide access to educational records? If so, is Petitioner entitled to access to the Student's educational records, including service logs, attendance records, records relating to credit, the student's schedule, the student's current and previous behavior plans? If so, did DCPS fail to respond to the Petitioner's request for the DCPS fail to allow the parent access to educational records?

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 is a [redacted] who is eligible for services as a Student with an emotional disturbance. (P-1-1)

2. The Student has needed a full time IEP since the first or second grade. (Testimony of parent)

3. In fourth grade, the Student was diagnosed with Oppositional Defiant Disorder. (P-3-5)

4. The Student has been also been diagnosed with Depressive Disorder-NOS, Mathematics Disorder, and Attention Deficit Hyperactivity Disorder. (P-3-15)

5. The Student was deeply affected by the death of his father in 2007. (P-3-4)

6. The Student has expressed a desire to be in a mainstream classroom. (P-3-4)

7. The Student requires a behavior plan to address his tendency to not complete his schoolwork, to address lethargy, somatic complaints, and disruptive behaviors. (P-3-16)

8. The Student also has a problem with absences. The Student was absent 34 times in 2011-2012 through April 10, 2012. (P-9-1)

9. The Student needs reduced distractions in math. He is often unfocused in math. For math, he needs preferential seating. He needs modified assignments and extra oral response time. Sometimes he will need to complete an assignment in an alternative location with 1-1 assistance. He will complete more assignments if allowed to respond verbally. (R-4-2; R-1-1; R-3-1)

10. The Student does not like to write. In writing, his performance suffers because of his distractibility. He needs extended time, reduction of the assignment, prewriting, graphic organizers, charts, verbal prompts. (R-4-5;R-1-4).

11. In reading, the Student needs more skills in reading strategies and development in inference, making predictions, summarizing and identifying main ideas. He needs shortened reading materials with accommodations that minimize confusion and aid in comprehension. He needs 1-1 assistance to remain on task and maximum teacher support to comprehend instructions. He needs reading passages broken down into chunks. He misses most key information due to his distractibility and inability to identify key information independently. (R-4-4)

12. The Student does not require speech and language therapy. There are no immediate areas of concern in regard to speech and language skills. (R-3-4)

13. The Student plays the drums and piano. (R-1-4)

14. The Student does not focus well and needs a small setting. (Testimony of parent)

15. The Student wants to go to college. (Testimony of parent, Testimony of Student)

16. The Student attended School A, a non-public school, for 2009-2010 and 2010-2011. The Student did not like the school and did poorly at the school. The Student was disappointed that School A had children with "issues" and no extracurricular activities. (P-3-1; Testimony of Petitioner)

17. In January 2011, the Student was tested on the WISC-IV and was found to function with a full scale IQ of 64. (P-3-8)

18. In January, 2011, the Student was tested on the Woodcock-Johnson III and was found to be functioning on a 4.4 grade level equivalent in math calculation, with a 2.9 grade level equivalent in math fluency, a 4.0 grade level equivalent for math composite, and a 3.6 grade level equivalent for applied problems. (P-2-4)

19. In January, 2011, the Student was tested on the Woodcock Johnson III and was found to be functioning at a 4.7 grade level equivalent in spelling, a 3.6 grade level equivalent in writing fluency. (P-2-7)

20. In January, 2011, testing on the MACI indicated that the Student is experiencing considerable levels of psychological distress due to family disappointments and acting out behaviors. Scores were elevated for Family Discord, Social Insensitivity, Delinquent Predisposition, Dramatizing, Impulsive Propensity, Unruly, Forceful. (P-3-13)

21. In January, 2011, BASC-2 testing indicated elevation in conduct problems, somatization, internalizing problems, learning problems, school problems, atypicality. (P-3-14)

22. In March, 2011, the Student was tested on the Woodcock Johnson III and was found to be functioning on a 9.5 grade level equivalent in letter word ID, a 3.3 grade level equivalent in reading fluency, a 5.4 grade level equivalent in passage comprehension, a 6.5 grade level equivalent in reading composite. (P-2-6)

23. An undated FBA from School A indicates that the Student is generally off-task, needs cues to restart tasks, has short concentration, atypical peer relationships, does not follow rules, fidgets, is aggressive, disorganized, is disruptive. (R-5-1)

This FBA indicates that the behavior occurs when there is an audience or during 1-1 interaction with staff. He is disruptive when he does not want to complete assignments or when he wants peer attention. (R-5-2-3)

24. The FBA from School A indicates that the behavior could be related to academic skills deficits. (R-5-2)

25. The FBA from School A indicates that the Student needs classroom a high degree of adult structure, supervision and support. He needs consistent routines and rules. (R-5-3)

26. The BIP dated March 14, 2011 by School A indicates that the Student talks out of turn, argues with peers and staff, engages in noncompliance with authority figures, demonstrates aggressive behavior. (P-20-1)

27. The BIP provides that the Student should get 1:1 academic support, time-outs. Rewards indicated for the Student are computer time, "School A bucks," time to socialize with a peer of choice, verbal praise. (P-20-1)

28. Consequences for the behavior are extended time-out, in-school suspension, out of school suspension, therapeutic supports. (P-20-1)

29. For the 2011-2012 school year, the Student was recommended for 29 hours of special educational services outside general education with behavioral support services for 90 minutes per week and a dedicated aide. (P-2-9)

30. For the 2011-2012 school year, the Student was recommended for extended school year services because of the need for continuity for academic skills and access to therapeutic services. It was recommended that the Student participate in a part time, shortened day ESY program. 19.25 hours of specialized instruction outside general education was recommended, with 45 minutes per week of behavioral support services. (P-2-12)

31. The Student attended School B, a public school, for the 2011-2012 school year. At school B, the Student is in the Arts and Technology program. The school has 8-10 students in a class, with 2 teachers and a behavioral aide in class. The Student has his own 1-1 aide. There were safety concerns at School B at first; however, these concerns diminished over time. (Testimony of Petitioner; [redacted])

32. During the 2011-2012 school year, the dedicated aide was not able to get the Student to complete assignments. (R-1-2)

33. During the 2011-2012 school year, the Student would get distracted in about 2-5 minutes. (R-1-2)

34. During the 2011-2012 school year, the Student struggled with the content of the work in math because it is difficult. (R-1-2)

35. During the 2011-2012 school year, the Student's grades were negatively impacted by his attendance, tardiness, time-outs. (R-4-2, 5)

36. During the 2011-2012 school year, the student's performance was "significantly" impacted by his symptoms of distractibility. The Student has an inability to follow through on his work. The Student puts forth no effort to complete homework. (Testimony of [redacted]; R-4-6)

37. At the April 10, 2012 IEP meeting, a speech and language assessment and an occupational therapy assessment were agreed to by the parties. (P-10-1-2; Testimony of [redacted]; Testimony of [redacted])

38. At the IEP meeting, the District promised the Student an assistive technology assessment once a written recommendation was received by a physician. (R-1-4)

39. At the IEP meeting, the Student complained of having difficulty sustaining attention in class. (Testimony of [redacted])

40. At the IEP meeting, the behavioral support services were reduced from 90 minutes to 60 minutes because the team wanted to provide him with more support in the classroom. Petitioner agreed with this recommendation. (R-1-4)

41. At the April 10, 2012 meeting, the District offered to add elements relating to attendance, distractibility and not completing assignments to the School A BIP. The School A BIP was not working to allow the Student to make appropriate academic gains in the classroom. (R-1-3; P-13-1; Testimony of [redacted]

42. In the April 10, 2012 IEP, the Student was recommended for 29 hours of special education support outside general education with behavioral support services for 60 minutes a week with a 1-1 aide. (R-4-4-11)

43. In this IEP, the Student was recommended to receive a setting with minimal distractions, repetition of directions, interpretation of oral directions, translation of words and

phrases in math, science and composition. The Student was not recommended for ESY services. (R-4-4-11)

44. The IEP's post-secondary transition plan notes that his academic interests are in graduation with a diploma. It indicates that his functional interests are playing music and that his employment interests are playing music. The plan indicates that the Brigance was used to assess the Student, but there are no assessment results listed on the IEP beyond the Student is interested in graduation, in playing music, and in looking at some vocational training. The Brigance is an insufficiently comprehensive assessment for this Student. (R-4-12; Testimony of [redacted])

45. Transition goals include researching 4 vocational and 2 year college programs that will lead him to his chosen job; investigating what he needs to get into his chosen vocational school; investigating various financial options to pay for training and education; developing a detailed plan about how he will obtain employment; being able to complete the job application process . (R-4-13-14)

46. Transition services are for a special educator to provide assistance in researching schools that will be able to assist him in meeting his vocational goals. (R-4-13-14)

47. Petitioner signed a consent for a re-evaluation on 4/10/12. (R-2-1)

48. After the IEP meeting, Respondent agreed to amend the IEP to include ESY for the Student. (P-13-1)

49. The advocate for Petitioner, [redacted] requested service logs, attendance records, credit accumulations, a student schedule, previous BIP and new BIP by Email on April 11, 2012. Service logs were later clarified to be psychological logs. (P-23-1)

50. As of April 12, 2012, the Student had earned .5 Carnegie units of credit for graduation. The Student is behind where he should be in terms of credits. (P-22-1; Testimony of Donaldson)

51. Speech testing on April 23, 2012 found that the Student scored a standard score of 95 on the ROWPVT test and a standard score of 81 on the EOWPVT test. On the CELF-4, the Student scored a Receptive Index Score of 98 and an Expressive Language Index of 108. (R-3-2-3)

52. The occupational therapy assessment agreed to at the April 10, 2012 IEP meeting was never conducted. The team never completed an assistive technology assessment after the April 10, 2012 IEP meeting. The team did not update the Student's BIP after the April 10, 2012 IEP meeting. The team did not give the Student an vocational assessment after the April 10, 2012 IEP meeting. (Testimony of [redacted])

53. The Student received behavioral support services every week in May, 2012. In June, 2012 through June 18, 2012, the Student received behavioral support services once because the provider was sick once. In September, 2012, the Student received behavioral support services twice because the Student was unavailable for one session. There is no reference for the second week of September in the service log. (R-7-1; R-8-1; R-9-1; R-10-1; R-11-1)

54. For 2012-2013 at School B, the Student's classes are "good." (Testimony of Student)

55. Three of the Student's teachers did not meet NCLB requirements; Glaspell (Spanish), Chisholm (English II) and Dimattio (Sound Production and Engineering). (Testimony of Long; P-30-1; P-26-1; P-27-1)

56. For October, 2012, the Student attended counseling once. Twice that month he was unavailable, once the counselor was unavailable. For November, 2012, the Student attended counseling twice. The Student was absent once, the provider was sick once, and on one other occasion the Student's Science teacher requested that he remain in Science class to complete computer work. (R-6-1; R-7-1; R-8-1; R-9-1; R-10-1; R-11-1)

57. The Student's progress report dated November 2012 indicates grades of D in World History, Spanish I, English II, and Algebra 1-A. He received a C- in Environmental Science and a B in Computer MusicTech 1. There was an A in Physical Education. Behavior was excellent in math and physical education, and he was a "pleasure to have in class" in World History. The Student had excessive absences in English and lacked initiative. The Student had poor behavior in Spanish. The Student was absent from homeroom 8 times. (P-26-1)

58. The Student's progress report dated December 7, 2012 indicated a grade of F in Environmental Science, World History, with D in Spanish I, Algebra 1-A and Advisory, C- in English II, A in Physical Education. The Student was a pleasure to have in class in History, but did not complete assignments. He lacked initiative and did not complete assignments in Environmental Science. He was a pleasure to have in Spanish, but there was excessive tardiness and he did not complete assignments. In English, he was a pleasure to have in class but there was a lack of initiative and he did not complete assignments. He needed to study more in Algebra. (P-27-1)

59. School C has a small classroom setting, with a special education teacher and a program assistant in the room. Classrooms have no more than 14 students. Teachers are certified in special education and in content areas. (Testimony of [redacted])

60. There are 82 students in the high school at School C. (Testimony of [redacted])

61. All students at School C receive at least one hour of counseling. (Testimony of [redacted])

62. There is some disruptive behavior in the school. (Testimony of [redacted]

63. The school has therapists offices next to the classrooms. The program has 7 therapists. (Testimony of [redacted])

64. The school uses a points system to encourage positive behaviors. There are consequences for non-compliance with rules. (Testimony of [redacted])

65. The school will provide BIPs if needed for particular behaviors. (Testimony of [redacted])

66. The school has a clinical intervention program whereby, upon behavioral incident, a clinical intervention program specialist will provide services. (Testimony of [redacted])

67. It has been awhile since the school staff has seen the Student. The staff accepted the Student in 2011. It is "a bit speculative" to state that he should attend school there. (Testimony of [redacted])

68. Seeds of Tomorrow offers a credit recovery program which requires 4 hours per week of work. The program involves the use of a live teacher with an online program. If there are 4 hours a week for 2 semesters, the Student receives one credit. (Testimony of [redacted])

69. Seeds of Tomorrow offers a vocational program during the summer which will allow a Student to participate in hands-on career exploration activities. (Testimony of [redacted])

70. I found all the witnesses in this matter credible.

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; 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). 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. Assessments Requested at April, 2012 Meeting (Excepting Vocational Assessment).

Petitioner alleges that Respondent failed to conduct a speech and language assessment, an assistive technology assessment, and an occupational therapy assessment.

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 record shows that the team agreed to conduct a speech and language assessment at the April 10, 2012 IEP meeting. This assessment was conducted shortly afterward, by report dated April 23, 2012. The assessment indicates that the Student functions well in speech and language both expressively and receptively and does not require speech and language services. There is no testimony or evidence in the record to contradict this assessment.

In regard to assistive technology, the record indicates that the team agreed to conduct an assessment if the Petitioner brought in medical documentation supporting this request. The record does not indicate that any such documentation was brought to the Respondent's attention. Petitioner does not argue that it was unreasonable for the Respondent to ask for medical documentation in this connection. Moreover, there is insufficient support in the record to establish that the Student requires assistive technology. There is no medical documentation in the record to support this claim, and an expert in assistive technology was never called as a witness to support this claim.

In regard to the parent's request for an occupational therapy assessment, the team did agree to complete this assessment. The record, however, does not establish that there was any consequence to the Respondent's failure to meet its commitment. Petitioner indicated that the Student has difficulty with his hands, making it difficult for him to write. However, Petitioner did not harmonize this testimony with evidence establishing that the Student plays the piano. There is no medical documentation in the record to support this claim, and an expert in occupational therapy was never called as a witness to support this claim. There is no testimony from any school witness to support the claim that the Student's occupational therapy needs are material to his education.

Accordingly, I find that Petitioner has not met her burden in regard to showing that the failure of Respondent to produce an occupational therapy assessment or an assistive technology assessment amounts to a material denial of FAPE.

2. Need for Vocational Assessment/Adequacy of Transition Goals/Plan.

Transition Services are defined as "a coordinated set of activities for a child with a disability" that is a "results oriented process" that is "based on the individual child's needs." 34

C.F.R. Sect. 300.43. The focus of transition services is to "improve the academic and functional achievement of a child with a disability, to facilitate the child's movement from school to post-school activities." Id. Services must be "based on an individual child's needs, taking into account the child's strengths, preferences and interests" and includes instruction, related services, community experiences, employment and other post-school adult living objectives, and "if appropriate" acquisition of daily living skills and provision of a functional vocational evaluation. Id.; see also 71 Fed. Reg. 46579 (2006)(definition of transition services is written broadly).

Beginning when the Student is 16, or younger if determined to be appropriate by the IEP team, the IEP must include appropriate measurable post-secondary goals based upon appropriate transition assessments relating to training, education, employment, and where appropriate independent living skills. 34 C.F.R. Sect. 300.320(b); see 20 U.S.C. Sect. 1414(d)(1)(A)(i)(VII).

The Student has indicated that he wants to attend college. Petitioner has also indicated that the Student's goal is to attend college. There is no testimony in the record to the effect that this is an unrealistic goal for the Student, and Respondent does not take the position that the Student cannot attend college.

However, the Student has few credits, below average skills in all domains, and has done poorly in his classes for the current school year. The Student also did poorly in his classes during the prior school year. A plan is necessary for the Student to be able to attend college. There is nothing in the transition plan to indicate how this Student can achieve enough credits and/or develop enough skills to be able to attend college. Compare Rodrigues v. Fort Lee Bd. of Educ., 458 Fed. App'x 124 (3d Cir. 2011)(IEPs set forth academic requirements for student to attend college and included a detailed checklist to assist transition; transition plan upheld).

There are references to researching vocational programs and investigating "what he needs to get into his chosen vocational school," but the Student has expressed no interest in vocational school. Moreover, there is no specificity as to what vocational programs should be considered or what schools should be considered.

Additionally, the goals in the plan are not individualized. There is no goal relating to the Student's main interest of getting into college. One goal involves "researching 4 year vocational programs," but there is nothing explaining why a 4 year vocational program would be appropriate for this Student or explaining what 4 year vocational program is being considered. Another goal involves investigating what he needs to do to get into a 2 year vocational program. Again, there is nothing explaining why a 2 year vocational program would be appropriate for this Student or explaining what 2 year vocational program is being considered. Finally, one goal indicated that the Student should develop a detailed plan about how he should obtain and maintain employment. In fact, such a plan should be part of the transition plan in the IEP.

Accordingly, Respondent denied the Student a FAPE by creating an inappropriate transition plan, and by writing inadequate transition goals.

3. BIP.

Petitioner contends that the Student required a BIP in his April 10, 2012 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.

The record is clear the Student had significant behavioral issues in the year prior to the April 10, 2012 IEP. These behavioral issues had a direct connection to the Student's schoolwork. The Student does not complete his school work, does not do homework, engages in disruptive behaviors in class, and has a problem with absences. The Student has also talked out of turn, engaged in aggressive behaviors, and engaged in noncompliance with authority figures. The District argues that there is no testimony that the Student engages in behaviors, but the District's own witness, [redacted], indicated flatly that the Student makes no effort to complete homework, is highly distractible in class, and has a problem with absences. Lauren P. v. Wissahickon Sch. Dist., 48 IDELR 99 (E.D. Pa. 2007), aff'd in part, rev'd in part 310 Fed. App'x 552 (3d Cir. 2009) (BIP required when student, inter alia, did not complete assignments); cf. Danielle G. v. New York City Dep't of Educ., 50 IDELR 247 (E.D.N.Y. 2008)(FBA required when student, inter alia, would not complete assignments).

The District has indicated that the Student already has a BIP dated March 14, 2011. However, this BIP was apparently created at School A and is geared toward the instruction at School A. For instance, the BIP indicates that, as a reward, the Student can obtain "School A bucks." Moreover, the Student's multiple behavioral issues during the 2011-2012 school year make clear that this BIP has not proven effective to address the Student's behavioral issues. Accordingly, during the IEP meeting, [redacted] from Respondent indicated that the District would update the BIP. No such update was ever written.

In this connection, Respondent has an "affirmative duty" to address a Student's absences. 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 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).

Finally, the lack of a BIP was not mitigated by other factors. There is nothing in the record to suggest that School B implemented its own individualized behavioral plans to address the Student's behavioral issues. 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).

The testimony and evidence submitted here indicates that the Student's behavioral issues should have resulted in an updated BIP in the April 10, 2012 IEP. The lack of such BIP prevented the Student from deriving educational benefit from School B in connection to the April 10, 2012 IEP.

4. Additional Counseling.

Petitioner alleges that Respondent denied the Student a FAPE by reducing counseling services from 90 minutes to 60 minutes in the April 10, 2012 IEP.

Petitioner's argument is premised on the fact that Respondent provided the Student with 90 minutes of counseling in the prior IEP. However, there is nothing in the record to suggest that counseling is material to the Student's educational program. No witness with any expertise in counseling was called by Petitioner to bolster this claim. The record indicates that the Respondent reduced the counseling to provide the Student more time in class. Petitioner agreed with this approach. This claim is without merit.

5. ESY.

Petitioner alleges that Respondent improperly denied the Student's request for ESY services for the summer, 2012.

As recently stated by the Court in Jackson Johnson v. District of Columbia, 873 F. Supp.2d 382 (D.D.C. 2012), a student's right to extended school year services require a significant showing. These services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months. S.S. ex rel. Shank v. Howard Rd. Acad., 585 F. Supp. 2d 56, 68-69 (D.D.C. 2008).

Petitioner's argument is based on the fact that Respondent had previously provided ESY services to the Student. Petitioner also notes that Respondent agreed to provide the Student with ESY services after the IEP meeting. However, there is nothing in this record to establish that the Student's gains during the school year would be significantly jeopardized by the lack of ESY services for 2012. Petitioner did not address the standards for ESY services in oral opening or closing statements. Petitioner's testimony did not relate to ESY services. The Student's testimony did not relate to ESY services. Under the circumstances, Petitioner did not meet her burden on this issue.

6. Failure to Implement.

Petitioner contends that the Respondent failed to provide the Student with a school at which the April 10, 2012 IEP (and the previous IEP dated May 26, 2011) can be implemented. Petitioner contends that the designated school setting, School B, does not have all certified teachers. Petitioner also contends that the school did not provide the Student with consistent behavioral support services and did not provide the Student with 29 hours of specialized instruction per week. Petitioner also contends that the school is a chaotic environment and that the Student is disrupted in the classroom to the point where he cannot complete his work.

"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).

In regard to the Petitioner's claim that Respondent did not provide the Student with 29 hours of instructional hours of special education, Petitioner presents the testimony of the Student, who indicated that Respondent provided regular education classes in physical education and reading. It is not clear from the testimony, however, how many hours per week these classes were, or the time period for these classes. There is no testimony or evidence from Petitioner or her witnesses making clear as to length of the school day and the amount of special education hours provided to the Student. There is also no testimony from the Petitioner or her witnesses

as to the actual impact of these two classes on his education. Accordingly, Petitioner has not her her burden on this issue.

In regard to the Petitioner's claim that Respondent did not provide sufficient counseling services, the Student testified that he has not met with his counselor every week. The behavioral support logs support this contention, though it is clear that the Student did receive some counseling for the 2011-2012 school year and the 2012-2013 school year. However, there is nothing in the record to support the contention of the Petitioner that the counseling is material to the Student's educational services, or that missing some counseling sessions can be deemed a material denial of FAPE in this matter. Additionally, the record indicates that the Student was absent from counseling on occasion. Under the circumstances, the record does not support the finding that the Student was denied a FAPE because some counseling sessions were missed.

In regard to the contention that the Student received education from teachers who are not "highly qualified" pursuant to the No Child Left Behind (NCLB) laws, this is not a basis for relief under the IDEA. A parent may not use the due process procedures under the IDEA to assert that a particular teacher is not "highly qualified" pursuant to NCLB. 34 C.F.R. Sect. 300.18[f]; see also "Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities," US Dep't of Educ. [revised June 2009] (http://www2.ed.gov/policy/speced/guid/idea/procedural-safeguards-q-a.pdf).

Finally, in regard to Petitioner's claims that the environment at School B is chaotic and that the school therefore did not appropriately implement the IEP, claims of his nature can be cognizable under the IDEA as explained by Courts in the District of Columbia. Gellert v. District of Columbia, 435 F. Supp.2d 18 (D.D.C. 2006). However, there is insufficient testimony and evidence to support the Petitioner's claims here. Petitioner presented little detail about the

disruption in the school, and the Student also provided little detail about the environment in the school. There were no witnesses called from the Respondent to corroborate these assertions. Moreover, unlike in Gellert, the public school classroom for the Student is not a large classroom. The classroom here is small, 8-10 students in the classroom. There are two teachers in the classroom and an aide in the classroom. The record also reveals that the Student has a 1-1 aide in the classroom that helps him focus. Finally, the record shows that the Student does not complete his work because of his own behavioral issues.

Accordingly, I find that Petitioner's failure to implement claims are without merit.

7. Records.

Petitioner also claims that Respondent failed to provide copies of records, in particular service logs, attendance records, credit accumulations, a student schedule, previous BIP and new BIP. These records were requested by [redacted], the parent advocate, by email after the April 10, 2012 meeting.

Regarding the Petitioner's request for records, the IDEA regulations provide in pertinent part: "(t)he parent of a child with a disability must be afforded, in accordance with the procedures of Sects. 300.613 through 300.621, an opportunity to inspect and review all education records with respect to -- the identification, evaluation, and educational placement of the child and the provision of FAPE to the child." 34 C.F.R. Sect. 300.501(a). The term "education records" means the type of records covered under the definition of "education records" in 34 C.F.R. Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. Sect. 1232g (FERPA)." 34 C.F.R. Sects. 300.611-300.625. Education records as defined under FERPA are "directly related to a student" and "maintained by an educational agency or institution or by a party acting for the agency or institution." The term does not

include: "records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the "record". "Record" means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm and microfiche. 34 C.F.R. Sect 99.3.

The record reveals that the District has by now provided all the documents requested by Petitioner. The record here includes service logs for counseling, attendance records, credit accumulations, all BIPs, the Student's IEP. There is no argument from Petitioner, and no evidence or testimony in the record, that this issue is capable of repetition or avoiding review. Accordingly, this claim should be deemed moot at this time. See generally, District of Columbia v. Doe, 611 F.3d 888 (D.C. Cir. 2010).

8. Relief.

A. School C.

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

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.

Caselaw 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.

While School C does have the small classes and special education teacher support that this student needs, School B also has such services. Moreover, the Student has testified that the classes at School B are "good." The record reveals that the Student's relatively poor performance at School B is related to the school's failure to provide the Student with an appropriate behavioral intervention plan. There is nothing in the record to indicate that Respondent is incapable of providing such a plan or that School B is incapable of providing behavioral supports.

Moreover, the testimony from School C indicates that their acceptance of the Student was back in 2011, when the Student was still at School A. The witness from School C indicated that "it is a bit speculative" to find that the Student is a good fit for the school at this time.

Further, there is reference in the record to the Student having a preference for an environment where there is some access to general education students and extracurricular activities. The record does not establish that School C has any general education students or any substantial extracurricular activities. In fact, the environment at School C appears similar

to School A, where the Student was unhappy because the other students had "issues." N.T. v. District of Columbia, 839 F. Supp.2d 29, 34-36 (D.D.C. 2012) (affirming an HOD denying a tuition award on, inter alia, LRE grounds, notwithstanding a finding of FAPE denial); cf. Jennifer D. v. New York City Dep't of Educ., 550 F. Supp.2d 420 (S.D.N.Y. 2008)(District's full special education placement in special education setting as not LRE where Student could have been placed in special education classes within regular education school; tuition reimbursement ordered). Accordingly, this IHO finds that School C is not the LRE for this Student.

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 C must be denied.

B. Seeds of Tomorrow/Other 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 (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 Seeds of Tomorrow provides a program designed to help students gain credits. This "credit recovery" program involves the use of a live teacher with an online program. If there are 4 hours of work a week for 2 semesters, the Student receives one credit. The testimony of Carrie Pecover from Seeds of Tomorrow was credible throughout. Mr. Donaldson from DCPS indicated that the Student is short credits, and the documentation in the record also indicates that the Student does not have enough credits to graduate given his age and grade. Graduation is particularly important to this Student, since he wants to attend college. Moreover, such relief is consistent with Reid, which directs that compensatory relief provide educational benefits that would have accrued if the Student had been provided a FAPE. I find that if the Student had been provided a FAPE, the Student would not be behind in credits, as he is now. Accordingly, I will order that the District pay for a credit recovery program by Seeds of Tomorrow amounting to two semesters of work.

The testimony from Seeds of Tomorrow also indicates that a vocational program that relates to career exploration activities is available for the Student during the summer. However, the record does not indicate that the Student is interested in attending such a program. Instead, the record indicates that the Student is interested in going to college. During closing argument,

Petitioner did not emphasize this relief. Under the circumstances, I decline to award a vocational program to Petitioner.

Petitioner also requests independent assessments in speech and language, occupational therapy, a vocational assessment, and an FBA. A speech and language assessment has already been provided for the Student. Since I did not find that there was FAPE denial premised on the lack of an occupational therapy assessment, I find that the record does not support the need for an occupational therapy assessment. In regard to a vocational assessment, the Student has indicated that he wants to attend college and has expressed no interest in this sort of assessment. Petitioner also expressed no interested in this sort of assessment. Moreover, Petitioner did not underscore this point in her opening or closing arguments. This request must be denied.

In regard to Petitioner's request for an FBA, courts have suggested that an FBA should be conducted before a BIP is created in cases where a Student refuses to complete work. Cf. Williams v. Milwaukee Public Schools, 58 IDELR 252 (E.D. Wis. 2012)(restrictiveness of District program held to be LRE where Student received detailed FBA and BIP in connection to work refusal). I will therefore order that Respondent conduct an FBA prior to the creation of the Student's BIP. There is nothing in the record to suggest that Respondent cannot conduct the FBA itself. Accordingly, I will deny the request for an independent FBA.

Finally, Petitioner also requests, in her compensatory education plan, remediation in a number of other areas, including 48 hours of specialized instruction and 12 hours of behavioral support services. In regard to the 48 hours of specialized instruction, this request was not connected to the Student's FAPE deprivation. Instead, advocate [redacted] indicated that this relief was to support the Student in his efforts to perform school work for the upcoming school year. Moreover, this relief was not mentioned by Petitioner at the prehearing conference and is

not memorialized in the prehearing conference order. Additionally, there is nothing in the record to explain why Petitioner selected this amount of hours or how this instruction would remediate the FAPE deprivation. Finally, the record does not make clear who would provide such services. This request must be 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).

In regard to the behavioral counseling, this IHO has not found FAPE denial on this issue. Moreover, there is nothing in the record to explain why Petitioner selected this amount of hours or how this instruction would remediate the FAPE deprivation. The record does not make clear who would provide such services. Further, Petitioner did not call any witness qualified to provide behavioral support services to support her on this point. This request must be denied.

ORDER

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

1. Respondent shall create a detailed, thorough FBA for the Student within 20 school days of the issuance of this Order;

2. Such FBA shall address the function of all the Student's behavioral issues impacting his education, including in regard to the failure to complete work, absences, distractibility;

3. Respondent shall create a detailed, thorough BIP for the Student within 10 school days of issuance of the FBA;

4. Such BIP shall provide a new plan to address the Student's behavioral concerns impacting his education, including failure to complete work, absences, distractibility;

5. After the issuance of such BIP, Respondent shall reconvene the IEP team and determine if any alternate school setting is necessary to implement the BIP;

6. Respondent will fund two semesters of credit recovery at Seeds of Tomorrow, for four hours a week, which program shall be funded at Seeds of Tomorrow's regular and customary rates;

7. Petitioner's other claims are hereby denied with prejudice.

Dated: January 22, 2013

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: January 22, 2013

Michael Lazan
Impartial Hearing Officer