

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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|--|---|---------------------------------------|
| <b>Parent, on behalf of Student,<sup>1</sup></b> | ) | <b>Rooms: 2003, 2006</b>              |
| <b>Petitioner,</b>                               | ) | <b>Hearings: 12/18, 1/8</b>           |
|  | ) | <b>HOD Due: January 14, 2014</b>      |
| <b>v.</b>  | ) | <b>Hearing Officer: Michael Lazan</b> |
|  | ) | <b>Case No.: 2015-0344</b>            |
| <b>District of Columbia Public Schools,</b>      | ) |                                       |
|  | ) |                                       |
| <b>Respondent.</b>                               | ) |                                       |

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

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

A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on October 21, 2015 in regard to the Student. On October 29, 2015, Respondent filed a response. The resolution period expired on November 20, 2015.

**II. Subject Matter Jurisdiction**

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

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

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

### **III. Procedural History**

On November 23, 2015, this Hearing Officer held a prehearing conference. Roberta Gambale, Esq., counsel for Petitioner, appeared. Maya Washington, Esq., counsel for Respondent, appeared. A prehearing conference order issued on November 30, 2015, summarizing the rules to be applied in this hearing and identifying the issues in the case. An Interim Order on Continuance Motion was signed on December 29, 2015 extending the decision date from January 4, 2016 to January 14, 2016.

There were two hearing dates in this case, December 17, 2015 and January 8, 2016. This was a closed proceeding. Petitioner was represented by Roberta Gambale, Esq. Respondent was represented by Maya Washington, Esq. Petitioner moved in Exhibits 1-56. Respondent objected to Exhibits 25, 39, and 52-56 on relevance grounds. Exhibit 39 was withdrawn. The objection to Exhibit 55 was sustained. The remaining objections were overruled. Exhibits 1-38, 40-54, and 56 were admitted. Respondent moved into evidence Exhibits 1-12. There was an objection to Exhibit 2 on relevance grounds. This objection was overruled. Exhibits 1-12 were admitted.

At the close of testimony on January 8, 2016, the parties provided closing statements. Emails in support of those statements were received by me on January 11, 2016 (Respondent) and January 12, 2016 (Petitioner).

Petitioner presented as witnesses: Petitioner; Witness A, a psychologist; Witness B, an advocate (expert: special education programming).

Respondent presented as witnesses: the Student; Witness B, a Special Education Coordinator; Witness C, a special education teacher; Witness F, a Social Worker; Witness D (expert: school psychology, evaluating special education students), a School Psychologist.

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

I found all the witnesses in this case both credible and well-intentioned. This is a case where both parties have expressed genuine interest in the welfare of the student, and this came across in the testimony of every witness.

#### **V. Issues**

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

1. When the MDT team met on September 28, 2015, should the team have revised the Student's IEP in view of his lack of academic success? If so, did DCPS violate inter alia, 34 CFR Sect. 300.320, 34 CFR Sect. 300.324, and principles established in Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the student a FAPE?

Petitioner contends that the team agreed that he needed more services but would only provide services that the location of services could implement. Petitioner contends that the Student requires a "full-time" IEP.

2. Did DCPS fail to conduct a comprehensive evaluation of the Student by the end of July, 2015? If so, did DCPS fail to assess the Student in all areas of suspected disability and thereby violate 34 CFR Sect. 300.304(a)(4)? If so, did DCPS deny the Student a FAPE?

Petitioner contends that DCPS agreed to so evaluate the Student by the end of July, 2015, but did not. In particular, Petitioner contends that DCPS did not conduct an autism assessment or an occupational therapy assessment.

3. Did DCPS fail to implement the Student's 2015-2016 IEP? If so, did DCPS violate 34 CFR Sect. 300.350 and precedent such as Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9<sup>th</sup> Cir. 2007)? If so, did DCPS deny the Student a FAPE?

As relief, Petitioner seeks an occupational therapy assessment, a neuropsychological assessment, a revised IEP to provide the Student with weekly counseling, speech and language therapy and "full-time" special education instruction, and compensatory education consisting of tutoring and related services.

## **VI. Findings of Fact**

1. The Student is a [REDACTED]-year old who is currently eligible for services as a student with Specific Learning Disability. He has numerous issues which hold him back in school. He has difficulties reading complex tests and with the meaning of words. He has difficulty with retention of information. He struggles to keep up with grade level classes. He has issues with daily living skills. He has been diagnosed with Attention Deficit Hyperactivity Disorder. He also does not like to draw attention to his disabilities. He does not like being stigmatized because he wants people to think he is smart. He does not ask questions because he does not want anyone to know he has a disability. He has been diagnosed with a seizure disorder, but he has not had a seizure in the past several years. (Testimony of Petitioner; Testimony of Witness A; P-42-4; P-12-3; P-1-2)

2. He has attended many schools, and this fact may have affected him academically. He has been subjected to bullying during several of his school years.

(Testimony of Petitioner)

3. For the 2014-2015 school year, he first started at School A, a DCPS public high school. Then, after about the first month, he transferred to School B PCS.

Petitioner likes School B PCS because it is always quiet and because it is convenient to her house. At the school, approximately forty-seven children receive special education services, with varying disability classifications. The school is a rigorous institution. It is a college preparatory school that bases its curriculum on the common core. Teachers request a lot from the students. (Testimony of Petitioner; Testimony of Witness B)

4. The Student received 6.5 hours of specialized instruction inside general education for the 2014-2015 school year. He did not understand most of the work last year. For the 2014-2015 school year, the Student failed every single academic class. He failed Portfolio, Chemistry, English III: American Literature, Spanish II, SAT Preparation, Algebra II, Music Appreciation, World History II, and Introduction to Law. Comments on his report card indicated that he difficulty understanding content, did not submit his work on time, struggled to complete assignments, had low test scores, needed to seek extra help, needed to improve his student habits, did not turn in homework, was not attentive in class. In Introduction to Law, his teachers indicated that many times his thoughts are disjointed. His essays were disorganized, he rarely did his homework, and did not pay attention in class. He did not “pull his weight” in group projects. In Chemistry, he was slower than his peers to pick up content and he did not advocate for himself or participate in class. In Algebra, he did not take enough time to work outside

of class. He went for extra help during office hours but the teachers were not there a lot. He was being bullied and laughed at in class. (Testimony of Student; Testimony of Witness C.; P-14-1-2; P-15-1; P-16-4-8; P-29-1)

5. An IEP team met on May 28, 2015. The resulting IEP provided 6.5 hours of specialized instruction inside general education. Discussions at this meeting focused mainly on testing. DCPS agreed to conduct a speech and language evaluation, a vocational assessment, and a psychological evaluation of the Student. (P-12; Testimony of Witness B)

6. DCPS agreed to re-evaluate the Student by the end of the school year, and the team was to meet to create an IEP before the start of the following school year, but the evaluations did not get done on time. (Testimony of Witness B; Testimony of Petitioner)

7. A comprehensive psychological re-evaluation dated July 19, 2015 found that he scored (Woodcock-Johnson III Normative Update tests of Achievement (Form A)) in the low range in broad reading, 11.8 age equivalent, low average range in math, 12.3 age equivalent, low range in broad written language, 11.8 grade level equivalent. His writing fluency was “very low,” at a 10.9 age equivalent. On the Reynolds Intellectual Assessment Scales, he was in the average range in verbal intelligence index, nonverbal intelligence index, composite intelligence index, and with an above average score in composite memory index. On the Behavior Assessment System for Children, 2<sup>nd</sup> edition, a teacher scored him with “clinically significant” scores in aggression, atypicality and withdrawal. On the Conners, 3<sup>rd</sup> Edition, another teacher scored him as “very

elevated” in inattention, defiance/aggression, and peer relations, and elevated in learning problems. (P-30-10-18)

8. A speech and language evaluation conducted on August 10, 2015. His speech and language testing revealed scores in the average range, with average expressive and receptive language skills. He did show weaknesses in his ability to focus and sustain attention with critical information and in social and pragmatic language. (P-29-9)

9. For the 2015-2016 school year, the Student continued at School B. There were about twenty students in his classes. He did not communicate particularly well with his teachers during this time. Ms. A followed him to all classes except to gym and gave him extra help if he did not understand the material. (Testimony of Student)

10. Ms. A is a [REDACTED] year-old. She will provide check-ins, monitor students’ progress, and she spends a lot of time after school. She has a college degree from [REDACTED] with a degree in world history. She has a teaching certification from Texas. She has no training in special education. She was hired as a paraprofessional, and then as a special education teacher in December, 2015. The Student also meets with Witness C, a special education teacher, every other day, for one hour outside general education. (Testimony of Witness C; Testimony of Witness B; R-1-3)

11. This year, he is retaking classes that he took during the prior school year. He is taught on grade level, but he is receiving work on the 7<sup>th</sup> grade level. The teachers are “talking about the same thing he heard last year, so he is getting it now.” He is a bit more focused on work this year, though he does not usually raise his hand or ask for help.

He goes to office hours about the same amount as last year. (Testimony of Student; Testimony of Witness C)

12. Even with the assistance he is currently getting, he does need more help in school than he is currently getting. Sometimes he just “zones” right out while a teacher is talking. Sometimes he will not understand the material. The teacher will explain it again, and he will again not understand the material. (Testimony of Student; Testimony of Witness C)

13. He struggles to hand in work even though it is modified. He is still failing in English and Literature. He cannot write an essay that is 250 words. (Testimony of Witness C; R-1-3)

14. An MDT team met on September 28, 2015 to review the Student’s program. This meeting was not held until the end of September because of a problem with the DCPS “SEDS” system. They also met to review the recent speech and language evaluation, a psychological evaluation from DCPS, to review his grades, and to determine his eligibility. The parent requested full-time special education for the Student because in the previous year he had failed all of his classes. The parent felt that the speech and language report was not as comprehensive as it should have been because some concerns in pragmatic language were not addressed. The psychological evaluation did not contain measures to confirm or rule out autism. The parent requested an I.E.E. and an occupational therapy evaluation at the meeting since his teacher complained that his handwriting was not legible. Also at the meeting, the parent requested a speech and language evaluation, a psychological evaluation, and that DCPS fund a neuropsychological evaluation. There was no disagreement with the request for an

occupational therapy assessment. At the meeting, the parent was informed that the Student was being taught by a paraprofessional and not a special education teacher. No IEP was created at this meeting. (Testimony of Witness E; Testimony of Witness B; Testimony of Witness D; R-4-6)

15. Also at this meeting, informally, DCPS agreed to provide the Student with twelve hours of specialized instruction inside general education and three hours a week of specialized instruction outside general education. (R-4-6)

16. A draft IEP was written for the student in November, 2015. This IEP provides for twelve hours per week of specialized instruction in general education, and three hours a week of specialized instruction outside general education, with sixty minutes per month of behavioral support services. (P-43-11)

17. A Functional Behavior Assessment was conducted for the Student on November 10, 2015. It indicated that the student loses focus in class and struggles to complete assignments when they are due. It also indicates that he completes work at a slower rate than other students. (P-42)

18. Another MDT meeting was held in December, 2015. Again, no IEP was finalized. The team agreed to thirty minutes per week of counseling, changed some goals, and addressed transportation issues. The parent contended that the student is overwhelmed and needs outside support. A general education teacher said that he is exhausted at the end of the day, falls asleep, and that his work is rarely handed in on time. The special education paraprofessional stated that support is provided to complete assignments. The family requested fifteen hours of instruction outside the general education setting. (R-1-2; Testimony of Witness C; Testimony of Witness B)

19. Testing was conducted by Witness A in December, 2015. Witness A found that, in GARS testing, that the student is “possibly” autistic based on stereotypical behaviors on answers providing by the parent. He was determined to be “unlikely autistic” pursuant to his teacher’s scores on the indexes. Cognitive scores were average, and achievement testing scores that were low average. (P-50-12-13; Testimony of Witness A)

20. The Student’s most recent report card shows grades of B in Chemistry, B- in DC History and Policy, F in English Literature, C+ in U.S. History, C in Spanish, C- in Algebra. (P-33-1)

21. The most recent teacher reports for the student indicate that, in his special education class outside general education, the Student is on task, compliant, and attentive to detail. He keeps to himself, is responsive to the teacher, and has the highest grade in the class. In Chemistry, he is reported to have a good attention span and he gets along with his peers and teachers. In Algebra II, he performs in the average-below average range. (P-50-4)

## **VII. Conclusions of Law**

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

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

must determine whether DCPS has demonstrated that the child's behavior was not a manifestation of such child's disability. 5-E DCMR Sect. 2510.16

The central purpose of the IDEA is to ensure that all children with disabilities have available to them special education and related services designed to meet their unique needs and provided in conformance with a written IEP (i.e., free and appropriate public education, or “FAPE”). 20 U.S.C. Sects. 1400(d)(1)(A), 1401(9)(D), 1414(d); 34 C.F.R. Sects. 300.17(d), 300.320; Shaffer v. Weast, 546 U.S. 49, 51 (2005). Pursuant to the Supreme Court's decision in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, (1982), the IEP must, at a minimum, “provid[e] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Branham v. District of Columbia, 427 F.3d 7 (D.C. Cir. 2005).

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

**Issue # 1: When the MDT team met on September 28, 2015, should the team have revised the Student’s IEP in view of his lack of academic success? If so, did DCPS violate inter alia, 34 CFR Sect. 300.320, 34 CFR Sect. 300.324, and principles established in Hendrick Hudson Bd. of Educ. v. Rowley, 458 U.S. 176 (1982)? If so, did DCPS deny the student a FAPE?**

In S.S. ex rel. Shank v. Howard Road Academy, 585 F. Supp.2d 56, 66-67 (D.D.C. 2008), the Court found that the measure and adequacy of an IEP decision must be determined as of the time it was offered to the student. Citing to Circuit court decisions,

the Court found that an IEP should be judged prospectively to avoid “Monday morning quarterbacking.” See Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10<sup>th</sup> Cir. 2008); Adams v. Oregon, 195 F.3d 1141, 1149 (9<sup>th</sup> Cir. 1999); Carlisle Area Sch. V. Scott P., 62 F.3d 520, 530 (3d Cir. 1995); Roland M. v. Concord Sch. Comm., 910 F.2d 983, 992 (1<sup>st</sup> Cir. 1990).

The role of the hearing officer is to determine if the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive additional benefits. Gellert v. District of Columbia Public Schools, 435 F.Supp.2d 18, 22 (D.D.C. 2006). The IEP should be both comprehensive and specific and targeted to the Student's “unique needs.” McKenzie v. Smith, 771 F.2d 1527, 1533, D.C. Cir. 1985); N.S. ex rel. Stein v. District of Columbia, 709 F.Supp.2d 57, 60 (D.D.C. 2010); 34 CFR Sect. 300.320(a)(2)(B) (the IEP must contains goals that meet each of the child's educational needs that result from the child's disability); 34 CFR Sect. 300.324(a)(1)(iv)(the IEP must address the academic, developmental, and functional needs of the child).

There is no real dispute that the student needed additional services beyond the 6.5 hours of specialized instruction inside general education that were provided for the 2014-2015 school year. There is also no dispute that this meeting did not result in any formal change to the student's hours, though DCPS agreed to provide the Student with twelve hours of specialized instruction inside general education and three hours of specialized instruction outside of general education at this time.

The IEP is a legal document, and it exists so that a parent can have assurances that a particular service will be provided. This is at least in part why the United States Supreme

Court has referred to the IEP as the “centerpiece” of the act. Honig v. Doe, 484 U.S. 305, 311 (1988) Accordingly, DCPS and School B should have made sure to write an IEP with respect to the meeting in question and increase the hours of service so that the parent would have a document that would show that her child was entitled to the services that were recommended.

Moreover, I agree with Petitioner that the hours proposed by the MDT team were not enough. The Student failed every single class during the 2014-2015 school year. Reports indicated that the Student was lost in school, overwhelmed, and that he needed additional help in every single academic class. The record reveals that this school is a college preparatory school that requires rigorous academics from its students. However, with the recommended twelve hours of instruction, the Student would still be in general education classes without any special education instruction. Moreover, with only three hours of instruction outside general education, he would have only a modest amount of time to review his work with a special education teacher before or after class. There also are not supplemental aids and services on the IEP that allow for special modifications for this Student. Recent testing shows that the student reads like an eleven-year old and writes like a ten-year old. Witnesses discussed the student’s inattentiveness and tendency to “zone out” in class. The Student explained that he will not understand material, and then, after the teacher explains the material again, he will still not understand it. If this child is to be maintained in a general education setting, additional support is needed to address his needs.

I should point out that DCPS has pointed to the Student’s current report card, which does indicate that he has done better this year. However, DCPS sidesteps the fact that the

Student is taking almost all of his classes over again this year. Naturally, he is going to do better in the classes the second time. Even so, the Student is failing in English III, and his grades are C- in Algebra II, C in Spanish II, and C+ in History.

Finally, I agree that counseling should have been on the Student's IEP. The record shows that the Student is having difficulty with the stigma of his disability and would benefit from discussing these issues with a counselor. There is no dispute on this issue. While the record does indicate that the Student met eight times with Witness F, much of the counseling was for less than thirty minutes and some of the "counseling" was in fact observations relating to the Functional Behavior Assessment.

As a result, I find that the Student was denied educational benefit, and therefore a FAPE, when no IEP was created at the September 28, 2015 MDT meeting.

**2. Did DCPS fail to conduct a comprehensive evaluation of the Student by the end of July, 2015? If so, did DCPS fail to assess the Student in all areas of suspected disability and thereby violate 34 CFR Sect. 300.304(a)(4)? If so, did DCPS deny the Student a FAPE?**

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

the child is a child with a disability; and (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities. The LEA should not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child, and use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 28 U.S.C. Sect.1414(b)(2); 34 CFR Sect. 300.304(b). An LEA must assess a Student in all areas of suspected disability, including, “if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.” 34 CFR Sect. 300.304(c )(4).

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

Petitioner contends that the student needs additional assessments. She contends he has had seizures in the past, and that a report from Children’s National Medical Center in 2007 indicated that a “rule-out” was appropriate for Pervasive Developmental Disorder-NOS. (P-10-12) Petitioner cites concerns in the student’s pragmatic language, contends that the student’s Functional Behavior Assessment was not completed until November, 2015, and adds that an occupational therapy assessment was promised at the

meeting and still has not been done. Finally, Petitioner contends that the assessments that were completed were done late.

I cannot agree that there was sufficient reason to suspect that the student needed additional assessments with respect to seizures and autism. The Student's inattentiveness in class is very likely due to his ADHD and/or his inability to grasp the material instead of issues relating to autism or seizures. The record shows that the student has not experienced seizures in several years, and there is nothing in the record that diagnoses the student with autism. Recent testing by Witness A confirms that the Student is not displaying the characteristics of an autistic student according to his teachers. There is no need to test this student once again on these issues, and it was reasonable for School B and DCPS to conduct the evaluation as it did in this regard.

Additionally, while I can understand the Petitioner's desire to have the student testing with respect to pragmatic language, the lack of such a measure does not rise to the level of FAPE denial. While DCPS did indicate that it would be willing to conduct such testing (R-4-4), the record does not establish that pragmatic language difficulties are what made the student fail all of his classes in the 2014-2015 school year. Similarly, while I can understand Petitioner's desire for a Functional Behavior Assessment, the record shows that the Student's behavior in class was mostly a function of losing focus as opposed to "acting out" behavior. While a Functional Behavior Assessment is certainly a good idea if the etiology of the student's behavior is unclear, here I find that the record

is clear that the student was simply having trouble with the material.<sup>2</sup> It is noted that DCPS provided an FBA for this Student on November 10, 2015. (R-6)

With respect to an occupational therapy assessment, the record does indicate that the Student does require an occupational therapy assessment because of handwriting issues. While the record is not convincing on whether failure rises to the level of FAPE denial, I agree that DCPS should conduct an occupational therapy assessment for this Student as soon as possible.

Finally, with respect to the delay in the conducting of the speech and language evaluation and the psychological evaluation, both were completed prior to the start of the 2015-2016 school year. Though they were promised before the date they were delivered to Petitioner, the lateness did not prejudice the Student in any way and does not serve as the basis for a claim of FAPE denial.

Accordingly, I decline to find that DCPS denied the Student a FAPE by failing to assess the Student in all areas of suspected disability.

**Issue # 3. Did DCPS fail to implement the Student's 2015-2016 IEP? If so, did DCPS violate 34 CFR Sect. 300.350 and precedent such as Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9<sup>th</sup> Cir. 2007)? If so, did DCPS deny the Student a FAPE?**

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<sup>2</sup> The FBA's role is to determine the cause, or "function," of the behaviors and then the consequences of that behavior. Harris v. Dist. of Columbia, 561 F. Supp. 2d 63, 68 (D.D.C. 2008); see also Long v. Dist. of Columbia, 780 F. Supp.2d 49 (D.D.C. 2008)(in ruling the District failed to provide an FBA/BIP for a Student, court stated that "the quality of a student's education is inextricably linked to the student's behavior"); Shelton v. Maya Angelou Charter School, 578 F.Supp.2d 83 (D.D.C. 2008)(FBA/BIP required where learning disabled student was suspended). An FBA may not be required if the IEP provides for interventions that meet the Student's needs. 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).

“Failure to implement” claims are actionable if the school district cannot materially implement an IEP. A party alleging such a claim must show more than a de minimis failure, and must show substantial or significant portions of the IEP could not be implemented. Savoy v. District of Columbia, 844 F. Supp.2d 23 (D.D.C. 2012)(holding no failure to implement where District’s school setting provided ten minutes less of specialized instruction per day that was on the IEP); see also Van Duyn ex rel Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9<sup>th</sup> Cir. 2007).

This claim focuses on Ms. A, who is the individual who has been assigned to the Student for the 2015-2016 school year inside general education. Since the IEP has not been revised since the 2014-2015 school year, the mandate for special education inside general education is for 6.5 hours of specialized instruction per week. (It is noted that Witness C, the special education teacher, provides the Student with one hour of specialized instruction every other day *outside* general education).

DCPS conceded that Ms. A is not a certified special education teacher. Moreover, there is evidence that Ms. A is a [REDACTED]-year old recent undergraduate with *no previous training in special education*. DCPS argued that charter schools do not have to have licensed teachers, but they do not provide me with any specific authority on this point. Instead, DCPS argued that 34 CFR Sect. 300.156(e) and 34 CFR Sect. 300.18(f) prohibit an action to enforce teacher requirements.

34 CFR Sect. 300.156(e) reads as follows:

Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student or a class of students for the failure of a particular SEA or LEA employee to be highly qualified, or to prevent a parent from filing a complaint about staff qualifications with the SEA as provided for under this part.

34 CFR Sect. 300.18(f) reads as follows:

Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular SEA or LEA employee to be highly qualified, or to prevent a parent from filing a complaint under Sec. Sec. 300.151 through 300.153 about staff qualifications with the SEA as provided for under this part.

Petitioner, in response, presents Turner v. District of Columbia, Civ. No. 12-1943 (ESH) slip op., (D.D.C. 2013), a case in which Judge Ellen Segal Huvelle was presented with the same situation as here, i.e., that a college graduate with no licensure was held out to be satisfying the IEP's requirement for special education instruction. In Turner, the student received no required instruction inside general education by a certified special education teacher. The instructor was a college graduate was deemed to be a paraprofessional, just as the MDT team in September, 2015 characterized Ms. A as a paraprofessional. Noting that Petitioner need not show educational harm to prevail, Judge Huvelle found for Petitioner, reversing the IHO. See Turner, pp. 12-15.

I agree with Petitioner on this issue. The regulations referenced by DCPS appear to relate to a claim based solely on the issue of teacher certification. Here, the claim is one pursuant to the IDEA. Teacher certification is an element of the claim, but the essence of the claim is that Respondent failed to implement the IEP. By having the service provided by a paraprofessional, School B failed to implement the IEP's requirement for specialized instruction inside general education, denying the Student educational benefit and a FAPE. As noted by Judge Huvelle, there is

no need for Petitioner to show harm to prevail on this claim. Wilson v. District of Columbia, 770 F. Supp.2d 270, 275 (D.D.C. 2011).

### **VIII. Relief**

As a remedy, Petitioner asserts that appropriate relief in this matter is to order compensatory education in the form of 40 hours of tutoring in reading, writing and math; 12 hours of “organizational/conceptual help” 12 hours of counseling; and an Independent Functional Behavior Assessment. Petitioner also seeks: 1) a change in the Student’s program including 60 minutes a week of counseling; 2) “full-time” special education” for at least four academic subjects; 3) one hour per week of speech and language therapy; 4) revised goals per the evaluation of Witness A; 5) an independent occupational therapy assessment; and a 6) neuropsychological evaluation.

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

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

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

One of the equitable remedies available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA, is compensatory education. Under the theory of compensatory education, courts and hearing officers may award “educational

services to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F. 3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student").

A Petitioner need not "have a perfect case” to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011) Under the IDEA, if a Student is denied a FAPE, a hearing officer may not “simply refuse” to grant one. Henry v. District of Columbia, 55 IDELR 187 (D.D.C. 2010) Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Reid, 401 F.3d at 524.

Petitioner’s compensatory education plan requests a relatively modest amount of forty hours of academic tutoring and twelve hours of counseling. The period of FAPE deprivation, from September 28, 2015 to present, includes considerable more hours of instruction than has been requested in this plan. A qualified witness testified in support of these elements of the plan, and a written copy of the plan is in the record. (P-51) The plan does apply the standards in Reid. I will therefore order the forty hours in academic tutoring and twelve hours of counseling as requested.

The plan also requests 12 hours of “organizational/conceptual help.” This was not required on the IEP, and it is difficult to decipher from the plan what exactly Witness A is referring to with this language. I will accordingly deny the request for 12 hours of “organizational/conceptual help.”

In terms of the Student’s program going forward, I listened closely at the hearing to the genuine pleas from School B that the Student was better off staying at the school, at least for the remainder of the school year. Petitioner, also, expressed considerable reservations about the Student leaving the school. Notwithstanding the issues pertaining to Ms. A, I was impressed overall with the commitment of the school to its students. I therefore agree that the Student should not be transferred to a new school in the middle of this school year to prevent a disruption to his work.

This is, in essence, what Petitioner is asking with this relief. The record is reasonably clear that School B cannot provide this Student with self-contained special education classes as requested.

Rather than comply with Petitioner’s request, I will instead order that the Student receive five extra hours of specialized instruction outside general education per week to assist with his studies. This specialized instruction should be able to help the student work through any deficits he may have in his academic classes, and the instruction may be provided by an independent service provider after school hours. This service provider should work in tandem with School B to make sure that the specialized instruction is synced to the current classes. I will also order that an IEP be finalized to require twelve hours of specialized instruction inside general education, and eight hours of specialized instruction outside general education.

In regard to Petitioner's other requests for relief, I will order that the Student receive thirty minutes per week of counseling. I am concerned that ordering sixty hours per week of counseling would take away from the Student's instructional time at the school, and the record suggests that behavioral problems are not the main difficulty the student is facing. There is insufficient support in the record for speech and language therapy for this student. The request for such therapy is based on the report of a psychologist, Witness A. Similarly, the revised goals written by Witness A relate to pragmatic language, which is not an area of expertise for a psychologist. I do agree that the Student should be receive an occupational therapy evaluation given the issues with his handwriting, as reported by his teacher. Finally, the record does not support the need for a neuropsychological evaluation especially given Witness A's report indicating that the student is unlikely to be autistic according to teacher reports on the GARS.

#### **X. Order**

As a result of the foregoing:

1. Respondent is hereby ordered to provide the Student with forty hours of 1:1 academic instruction as compensatory education;
2. Respondent is hereby ordered to provide the Student with twelve hours of compensatory counseling;
3. Respondent is hereby ordered to revise the Student's IEP to provide for 12 hours of specialized instruction inside general education, 8 hours of specialized instruction outside general education, and thirty minutes per week of counseling;

4. Respondent is hereby ordered to authorize an occupational therapy evaluation of the Student, to be provided by an independent provider, at Respondent's expense;

5. All of Petitioner's other requests for relief are denied.

Dated: January 14, 2016

Michael Lazan  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Roberta Gambale, Esq.  
Maya Washington, Esq.  
OSSE Division of Specialized Education  
[Contact.resolution@dc.gov](mailto:Contact.resolution@dc.gov)  
Chief Hearing Officer

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

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: January 14, 2016

Michael Lazan  
Impartial Hearing Officer