

OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
December 09, 2016

Student)	
through Parent)	
Petitioner,)	Date Issued: December 9, 2016
)	
v.)	Virginia Dietrich, Chief Hearing Officer
)	
District of Columbia Public Schools)	Case No.: 2013-0637 (Remand)
(DCPS))	
Respondent.)	

SUPPLEMENTAL HEARING OFFICER DETERMINATION

(Remand)

Part I

Background

This case was remanded back to the undersigned Hearing Officer by the U.S. District Court for the District of Columbia Memorandum Opinion (Civil No. 1:14-cv-00886 (APM)) (“Memorandum Opinion”) on November 9, 2016 for a determination of an issue in the underlying case that was not adequately addressed in the Hearing Officer Determination (HOD) issued on February 25, 2014.

That issue was Petitioner’s legal sufficiency claim concerning the appropriateness of the 2012 IEP, regardless of whether or not District of Columbia Public Schools (DCPS) adequately implemented the 02/12/12 HOD Order in the construction of the 02/22/12 Individualized Education Program (IEP).

The issue to be decided at this stage of the proceedings is part of Issue #2 of the underlying administrative due process complaint, as stated in the Amended Second Prehearing Order and read into the record at the due process hearing; that is, Issue #2¹ - Whether DCPS denied Student a free appropriate public education (FAPE) by failing to develop an IEP on 02/22/12 that was designed to meet Student’s educational needs, in that the IEP failed to include (a) a therapeutic setting, (b) small group specialized instruction in all academic subjects for the entirety of each academic

¹ This issue is a challenge to the substantive provisions of the IEP.

classroom period, and (c) behavioral support services that include immediate crisis intervention as necessary; all of which were required by *Student's current behavioral and academic needs*.²

The other parts of Issue #2, that is, whether the 02/22/12 IEP properly incorporated the specifics of the 02/12/22 HOD Order, and whether the goals and baselines of the 02/22/12 IEP were sufficient, was previously decided and affirmed by the Memorandum Opinion.

This Supplemental Hearing Officer Determination is bifurcated into two parts. Part I, a decision on the merits of Petitioner's claim, with an established due date of December 9, 2016 is issued herein. Part II, remedy for the denial of FAPE found herein, shall be issued after consultation with the parties about whether or not a remedy determination may appropriately be made on the existing record or whether a hearing on compensatory education is necessary. What would have been appropriate compensatory education in February 2014 when the underlying HOD was issued may not necessarily be appropriate compensatory education at this time, depending on the needs and current circumstances of Student.

Pre-Existing Findings of Fact

With that mandate from the U.S. District Court, this Hearing Officer incorporates the following Findings of Fact from her 02/25/14 HOD (the numbering below corresponds to the numbering in the 02/25/14 HOD):

#2. On 02/12/12, a Hearing Officer Determination ("HOD") was issued that ordered: (1) DCPS to convene an IEP Team meeting within 10 days and revise Student's IEP to reflect an educational placement that is "therapeutic" and will provide the Student with small group special education instruction in all academic subjects for the entirety of each academic classroom period during the school day; (2) Such educational placement shall provide the Student with behavioral support services for one hour per week; (3) Such educational placement shall provide the Student with immediate behavioral support services if the Student threatens others or threatens himself during the school day; (4) Such educational placement shall have counselors that are qualified to provide counseling to school students; and (5) Such placement may be in a public school operated by DCPS. The HOD did not define the word "therapeutic" or "educational placement."

#3. Therapeutic means a supportive and consistent program where the entire staff work together to help a student change behaviors. A therapeutic environment is one where students with behavioral problems and emotional concerns have services available to them that includes counseling to address a crisis.

#4. On 02/22/12, the Multidisciplinary Team met in fulfillment of the HOD and developed an IEP for Student. Neither Petitioner nor Student attended the meeting. Student was classified with a Specific Learning Disability. The 02/22/12 IEP prescribed the following services for

² At the second prehearing conference, there was discussion about whether or not the 02/22/12 IEP meeting was convened solely to revise Student's IEP in accordance with the 02/12/12 HOD or whether the purpose of the 02/22/12 IEP meeting was for the IEP team to independently assess Student's educational needs beyond what was required by the HOD. Petitioner asserted that it was. DCPS asserted that it wasn't. The matter will be decided herein.

Student: 10 hours/week of specialized instruction outside of general education and 1 hour/week of behavioral support services outside of general education, and reading instruction in a small, pull-out setting for 45 minutes/day to address difficulties with reading. Student's IEP stated that Student responded much better in a small group cooperative or one-on-one setting and those settings should be utilized as much as possible with Student in his inclusion setting in the academic areas of mathematics, reading, and written expression. The 02/22/12 IEP complied with the academic educational requirements of the HOD Order. The 02/22/12 IEP also complied with the HOD requirement that Student was to receive 1 hour/week of behavioral support services. One of the emotional/social/behavioral support goals on Student's IEP was that Student develop a therapeutic relationship with his behavioral support services provider. The IEP also provided for the development of an incentive program to improve Student's attendance, motivation, completion of class assignments and improvement with social interactions towards peers and adults.

#5. The 02/22/12 IEP was developed while Student was enrolled at DCPS School A. Student was withdrawn from DCPS School A on 04/10/12 and transferred to a public school outside of the District of Columbia. Student's next reenrollment in DCPS was on 11/05/12 when he began attending DCPS School B.

#6. There was no evidence in the record about the type or quantity of IEP services provided to Student or about Student's academic adjustment while Student attended DCPS School A from 02/22/12 through 04/10/12.

#7. On 01/31/13, while Student attended DCPS School B, the IEP team met and conducted an annual review of Student's IEP. Student, Petitioner and Petitioner's advocate were in attendance. At that time, Student had 36 unexcused absences. Student's special education teacher hadn't seen him during the entire month of January 2013. The IEP, consisting of 7.5 hours/week of specialized instruction in reading, 2.5 hour/week of written expression, 5 hours/week of mathematics, 10 hours/week of specialized instruction and 1 hour/week of behavioral support service, with all services to be provided outside of general education, was considered to be a full-time IEP. At the meeting on 01/31/13, Petitioner asked for and received an IEP with full-time instruction outside of general education. All team members, including Petitioner, agreed with the full-time outside of general education IEP.

Additional Findings of Fact

This Hearing Officer establishes these Additional Findings of Fact, based on the underlying administrative record:

#1. Immediately preceding the 02/22/12 IEP was an IEP dated 10/04/11, developed by DCPS with the approval of Petitioner, that prescribed 10 hours/week of specialized instruction inside of general education. (P-7-1, P-7-11). Preceding the 10/04/11 IEP was an IEP dated 12/22/10 that was developed by a non-DPCS school, that prescribed 25 hours/week of specialized instruction outside of general education. (P-6-1, P-6-6). There is nothing in the record about whether Petitioner agreed or consented to the 12/22/10 IEP, whether it was ever implemented or its effectiveness.

#2. A very thorough comprehensive psychological evaluation was administered to Student on 12/05/11 while Student was in the “__” grade.³ It included data from: Student, Petitioner, Student’s then current special education teacher and general education teacher; educational and personality testing; and relevant historical records. (P-24).

#3. During psychological testing on 12/05/11, which was a one-on-one risk free setting with a trained professional psychologist, Student was generally agitated, unmotivated, and defiant and had to be constantly redirected and encouraged to complete tasks of cognitive, academic and personality functioning. Student generally avoided performing any academic tasks. Student’s overall functioning in testing was indicative of and likely to be his behavior and performance in the educational setting. (P-24-6). Student had a history of absences, suspensions and misbehaviors in school (P-24-4, P-24-5, P-24-17), as well as incarcerations both before and after the 02/22/12 IEP. (Testimony of Paralegal).

#4. The results of 12/05/11 evaluation, which were current within 2 months of the 02/22/12 IEP, was used by the IEP team to construct the IEP baselines and goals in reading, mathematics, written expression and emotional/social and behavioral development, and served as a basis for the formulation of the level of services that Student needed. (P-10, P-24).

#5. Overall, the evaluation data established that Student’s cognitive ability was in the Extremely Low Range, better than or equal to only 0.4% of his peers (P-10-2); that Student was far below grade level in mathematics, reading and written expression and required instruction in an individual or small group setting in all of these areas (P-10-3, P-10-6, P-10-9); that Student’s disability prevented him from completing grade level work at the same pace and with the same accuracy as his non-disabled peers (P-10-11); that by Student’s own account, Student had difficulty keeping up with the pace of instruction and had difficulty concentrating in a noisy class (P-24-3); and that Student’s social/emotional/behaviors interfered with learning (he was embarrassed about his lack of academic achievement and resorted to being oppositional and defiant about completing tasks to mask his deficits). (P-24-19).

#6. In mathematics, Student’s overall ability was in the 1st percentile rank and at a grade equivalent of 2.7. When left to work on his own, Student avoided work in mathematics class, choosing to put his head down or draw on his paper. Student responded to 1-on-1 interactions at times, and showed adept skill when working with his teacher. That information was in the 02/22/12 IEP (P-10-2).

#7. Student’s basic reading ability was at the 0.2 percentile rank. Student rarely participated in classroom discussion and was more inclined to respond when talking to the teacher one-on-one. Student responded positively to the systematic approach of a phonics-based intervention class called Wilson Reading System which was taught in a small group. That information was in the 02/22/12 IEP (P-10-5). In reading class, Student’s negative behaviors of verbal aggression, disrespect and oppositional-defiant behavior outweighed his positive behaviors. He often refused to complete classroom assignments. (P-24-4).

³ Grade is provided in Appendix A.

#8. In the area of written expression, Student's performance was at the 0.1 percentile. Student rarely completed writing assignments, but would respond orally to prompts given to him. That information was in the 02/22/12 IEP (P-10-8, P-10-9). In December 2011, in Student's English class of 17, Student was noted to be withdrawn, not participating in class and refusing to complete his work (P-24-4).

#9. In the social/emotional/behavioral realm, Student's deficits were just as pronounced as his academic deficits. He lacked motivation, attendance and participation in class was a problem, he often slept in class and socially isolated himself from others, not to mention demonstrated bouts of aggression, disruptiveness, anger and disrespect towards adults and peers in school. (P-10-11). That information was in the 02/22/12 IEP. His significant emotional and behavior dysregulation interfered with his academic achievement and he required integrative interventions to address his emotional, behavioral and academic difficulties. This latter information was in the 12/05/11 comprehensive psychological evaluation that was used to establish present levels of performance in the 02/22/12 IEP. (P-24-20).

#10. At the time the 02/22/12 IEP was developed, Student had not shown adequate growth in the general education setting due to a lack of focus, effort, and other behavioral concerns. (P-10-14). As well, Student's academic and behavioral deficits and needs were such that he would have benefited from individualized instruction or instruction in small group settings in all academic subjects, as well as a placement that could address his significant emotional and behavioral dysregulation. (P-24-20, P-10).

#11. On 01/31/12, DCPS generated a letter to Petitioner (Letter of Invitation) inviting Petitioner to a meeting on 02/17/12 to review the results of the evaluation or reevaluation to determine the academic achievement, functional performance and educational needs of Student. (P-8-1). There is no evidence in the record whether this letter was sent to Petitioner by DCPS or whether Petitioner received the letter or whether Petitioner intended to attend this meeting.

#12. The 02/22/12 IEP was developed at an annual review meeting. Student's then current special education teacher, who had provided instruction to Student both inside and outside of general education and who had provided input into the comprehensive psychological evaluation conducted on 12/05/11, participated in this IEP development meeting. (P-10-1, P-24-1, P-24-4).

Conclusions of Law

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative

hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. 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 C.F.R. 300.513(a).

The IEP must contain a statement of the special education and related services and supplementary aids and services...that will be provided to the child to enable the child to advance appropriately toward attaining annual goals and to be involved in and make progress in the general education curriculum. 34 CFR 300.320(a)(4).

The IEP must be reasonably calculated to enable a child to receive passing marks and advance from grade to grade while being placed in the least restrictive environment (LRE). The IDEA's LRE requirements are geared toward making sure that students with disabilities can be educated in an integrated setting with children who do not have disabilities. 34 CFR 300.114, *Moradnejad v. District of Columbia*, 67 IDELR 261 (D.D.C. 2016), *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 204, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

IDEA provides a "basic floor of opportunity" for students, *Rowley*, 458 U.S. at 201, 102 S.Ct. 3034, rather than "a potential-maximizing education." *Id.* At 197 n. 21, 102 S.Ct. 3034; *see also Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) (inquiry is not whether another placement may be "more appropriate or better able to serve the child") (emphasis in original); *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 583 (5th Cir.2009) (IDEA does not guarantee "the best possible education, nor one that will maximize the student's educational potential"; instead, it requires only that the benefit "cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.' ") (quoting *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir.1997)). Consistent with this framework, "[t]he question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute." *Houston Indep. Sch. Dist.*, 582 F.3d at 590. *K.S.*, 962 F.Supp.2d at 220-221.

"[B]ecause the question ... is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, ... the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. ... Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *S.S. ex rel. Shank v. Howard Rd. Academy*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008) (quoting *Thompson*, 540 F.3d at 1149). As such, "the court judges the IEP prospectively and looks to the IEP's goals and methodology at the time of its implementation." *K.S.*, 962 F. Supp. 2d at 221. Further, a child's academic progress under a challenged IEP can be relevant in determining the appropriateness of that IEP. *Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 44 (D.D.C. 2006) ("Academic success is an important factor 'in determining

whether an IEP is reasonably calculated to provide education benefits."') (*quoting Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 (6th Cir. 2003)).

On 02/12/12, a Hearing Officer Determination ("HOD") was issued that ordered DCPS to convene a meeting within 10 days to develop an IEP to meet Student's need for small group special education instruction in all academic subjects for the entirety of each academic classroom period during the school day, 1 hour/week of behavioral support services outside of general education, and an IEP that enabled Student to access counselors who could respond immediately to any behavioral crisis if Student threatened himself and others.

On 02/22/12, this IEP meeting took place as ordered. Noticeably absent from the meeting was Petitioner and Petitioner's counsel, both of whom had participated in the due process hearing that led to the HOD Order to convene the meeting. There was no testimony or meeting notes in the record about what transpired at the 02/22/12 meeting. Petitioner's signature was not the 02/22/12 IEP. There is no indication in the record that Petitioner received notice of the meeting or that at or near the time of the development of the IEP, Petitioner either agreed or disagreed with the 02/22/12 IEP services. Although Petitioner was present at due process hearing underlying this decision, Petitioner did not testify to provide any clarity on these points or any other points with respect to prior IEPs, especially the 10/04/11 IEP developed with DPCS with only 10 hours/week of specialized instruction inside of general education that she consented to. There was no evidence in the record about the effectiveness of the prior 12/20/10 IEP with 25 hours/week of specialized instruction outside of general education.

The question for this determination is whether or not DCPS developed an IEP on 02/22/12, irrespective of the 02/12/12 HOD requirements, that was reasonably calculated to confer educational benefit and provide Student a FAPE? Was DCPS required to independently reevaluate Student's needs based on the data available and come up with a beefier IEP than was determined to be adequate based on the 02/12/12 HOD Order, that is, one with full-time specialized instruction of 25 hours/week outside of general education and one that had a more robust therapeutic component? Or, did the data available to the IEP team realistically and reasonably suggest that Student could be academically successful with only 10 hours/week of specialized instruction outside of general education with the remaining academic instruction occurring in small groups within the general education setting (inclusion setting), along with one hour/week behavioral support services outside general education? Was the latter scenario Student's least restrictive environment where he could receive some meaningful educational benefit?

A public agency is required to conduct a reevaluation of the child if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance warrants it. 34 CFR 300.303(a)(1). However, a reevaluation may not occur more than once a year, unless the parent and the public agency agree otherwise. 34 CFR 300.303(a)(b)(1).

Arguably, DCPS was not required to conduct an independent reevaluation of Student's needs on 02/22/12. An annual reevaluation by DCPS had just occurred on 10/04/11. It resulted in an IEP that Petitioner concurred with; that IEP provided for 10 hours/week of specialized instruction inside of general education. And, although the 02/22/12 IEP face page indicates that

the meeting was an annual review, DCPS was not required to conduct an annual review of Student's needs because one had just occurred 4 months prior, Petitioner had agreed with that IEP, and there is no indication in the record that Petitioner agreed to a reevaluation within the same year, which is required by 34 CFR 300.303.

However, DCPS did undertake an annual review of Student's educational needs, as indicated on the face page of the 02/22/12 IEP and as evidenced by the fact that the 02/22/12 IEP referenced evaluation test results that occurred in December 2011, after the preceding IEP of 10/04/11 was developed. If the meeting was simply to implement the HOD Order, the "Type of Meeting" block would have indicated just that. But, it didn't. Further bolstering the conclusion that the meeting was to reevaluate Student's needs is the fact that the Letter of Invitation dated 01/31/12 indicated that the purpose of the proposed meeting on 02/17/12 was to conduct a reevaluation and determine the child's educational needs; it didn't say that the purpose of the meeting was to comply with the HOD.

Therefore, this Hearing Officer determines that DCPS was bound by the reevaluation requirements of IDEA when it developed the IEP on 02/22/12. That is, as part of any reevaluation, the "IEP team must review existing evaluation data on the child, including evaluations provided by the parents of the child; current classroom-based, local, or State assessments, and classroom-based observations; and observations by teachers and related services providers...and on the basis of that review, determine...the educational needs of the child... and determine what services are needed to enable the child to meet the measurable goals in the IEP and participate, as appropriate, in the general education curriculum." 34 CFR 300.305(a), (b).

As of 02/22/12, Student's cognitive, academic and behavioral deficits were pronounced. His low cognition was better than or equal to only 0.4% of his peers. His academic performance in reading, writing or math didn't even exceed the 1 percentile ranking. Student was far below grade level, struggled in all academic areas, and generally opposed performing academic tasks in the general education setting due to embarrassment over his limited academic abilities. But, with one-on-one assistance or academics in small group settings, Student responded positively to instruction. Therefore, the prognosis for Student to achieve adequately in the general education setting in academics, even in a small group setting or with one-to-one assistance, was bleak.

Counterbalanced against the black and white 12/05/11 comprehensive evaluation data that served as a basis for the development of the 02/22/12 IEP was the participation of Student's very own special education teacher who presumably knew Student's needs the best. The result was an IEP with only 10 hours/week of specialized instruction outside of general education, which fell short of the 25 hours/week of specialized instruction outside of general education that constituted a full-time IEP to address instruction in all academic areas. Perhaps DCPS was trying to strike a midway balance in the determination of the least restrictive environment in which Student could be educated successfully; halfway between the prior IEP (10/04/11) with only 10 hours/week of specialized instruction inside of general education and the huge leap to a full time IEP with 25 hours/week of specialized instruction outside of general education, but this is just speculation.

Objectively, Student's performance in school was likely analogous to his performance on the 12/05/11 educational testing in the risk-free environment; there, Student was adverse to performing academic tasks and was combative and insolent about it due to his lack of ability. Therefore, Student's IEP required 25 hours/week of specialized instruction outside of general education to meet his educational needs; this amount being premised on 25 hours/week constituting full time instruction outside of general education in all academic areas.

This Hearing Officer determines by a preponderance of the evidence that based on the child's documented abilities and needs as of 02/22/12, the 02/22/12 IEP with only 10 hours/week of specialized instruction outside of general education was inappropriate and insufficient to confer an educational benefit. The IEP should have contained 25 hours/week of specialized instruction outside of general education. Student could not be successful with any specialized instruction in academic areas occurring within the general education setting. Student had not shown adequate growth in the general education setting due to a lack of focus, effort, and other behavioral concerns. In Student's English class of 17, Student was withdrawn, did not participate in class and did not complete assignments. Student was denied an educational benefit due to insufficient specialized instruction outside of general education. This resulted in the denial of a FAPE.

Student also required a "therapeutic" placement to address his emotional/social/behavioral needs. A therapeutic environment is one where students with behavioral problems and emotional concerns have services available to them that includes counseling to address a crisis.

Insofar as Student was not comfortable learning in the general education setting and the 02/22/12 IEP had instruction taking place within the general education setting, it is likely that Student would have erupted behaviorally in response to embarrassment, whereupon immediate crisis intervention services would have been necessary.

Although the 02/22/12 IEP included one hour/week of behavioral support services outside of general education, the IEP also should have specifically included additional direct behavioral support services by a person trained in crisis intervention, listed under Consultation Services, as needed, to provide immediate behavioral support if Student was experiencing a behavioral crisis. In this respect, the 02/22/12 IEP also was deficient. Thus, Student was deprived of an educational benefit that resulted in the denial of a FAPE.

The record did not show by a preponderance of the evidence that a special school with all disabled children, as proposed by Petitioner, was the least restrictive environment in which Student could be educated. Although the 12/05/11 comprehensive psychological evaluation proposed such an educational placement, it was merely a recommendation. The educational placement of a child must be decided by the IEP team. 34 CFR 300.116. There was insufficient evidence in the record for this Hearing Officer to conclude that Student could not attend lunch or other non-academic classes with his non-disabled peers. The record did show that a full time IEP of 25 hours/week of specialized instruction outside of general education, which was satisfactory to Petitioner, could be implemented in a self-contained setting within a public school. (See HOD issued by this Hearing Officer dated 02/25/14).

Remedy

Herein, this Hearing Officer found that Student was denied a FAPE by an inadequate IEP that was developed on 02/22/12 in that it lacked sufficient specialized instruction outside of general education, as well as direct behavioral support services on a consultation basis to provide immediate crisis intervention by a person trained in crisis intervention. This denial of FAPE persisted until a new IEP was developed on 01/31/13, which IEP this Hearing Officer previously determined was sufficient in the 02/25/14 HOD.

During this 11-month interval of the denial of a FAPE, Student was only enrolled in DCPS from 02/22/12 until 04/10/12 and then again from 11/05/12 until 01/31/13. These 4 months are the months for which DCPS was responsible for providing a FAPE. These 4 months will serve as a basis for calculating a compensatory education award.

The D.C. Circuit Court of Appeals recently explained the compensatory education remedy in its decision in *B.D. v. District of Columbia*, 817 F.3d 792 (D.C. Cir. 2016): When a hearing officer or district court concludes that a school district has failed to provide a student with a FAPE, it has “broad discretion to fashion an appropriate remedy,” which can go beyond prospectively providing a FAPE, and can include compensatory education. *Boose v. District of Columbia*, 786 F.3d 1054, 1056 (D.C.Cir.2015).

As was held in *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005), an award of compensatory education “must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” 401 F.3d at 524. In other words, compensatory education aims to put a student like B.D. in the position he would be in absent the FAPE denial. An appropriate compensatory education award must “rely on individualized assessments,” and the equitable and flexible nature of the remedy “will produce different results in different cases depending on the child’s needs.” *Id.* In some cases, the award may consist of “only short, intensive compensatory programs targeted at specific problems or deficiencies,” while in others the student may require “extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.” *Id.* To fully compensate a student, the award must seek not only to undo the FAPE denial’s affirmative harm, but also to compensate for lost progress that the student would have made.

The underlying complaint, filed in November 2013, requested compensatory education in the form of a full time out of general education therapeutic program, 2 credit recovery classes, 100 hours of tutoring and 50 hours of mentoring services to compensate for all of the denials of FAPE alleged in the complaint.

Compensatory education will be determined in Part II of these supplementary proceedings. A four-month time period shall be the basis for calculating a compensatory education award. Any carryover effect of not having compensatory education ordered in February 2014 will be factored into the ultimate award.

ORDER

Having found a denial of FAPE with respect to the 02/22/12 IEP, to wit, insufficient specialized instruction outside of general education (approximately 15 hours/week shortage in order to comprise a full-time program outside of general education in all academic areas) and the lack of direct behavioral support services on a consultation basis by a person trained in crisis intervention, for a four month time period between 02/22/12 and 01/31/13; it is hereby **ORDERED** that,

This case is **CONTINUED**, for further proceedings to determine an appropriate compensatory education award; and it is **ORDERED** that,

Parties shall be contacted by the Hearing Officer to schedule the next stage of these proceedings.

12/09/2016

Dated

Virginia A. Dietrich /s/

Virginia A. Dietrich, Esq.
Chief Hearing Officer

Copies to:

Petitioner's Attorney: See Appendix A
DCPS' Attorney: See Appendix A
ODR
OSSE Division of Specialized Instruction