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Office of the State Superintendent of Education
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OSSE
Office of Dispute Resolution
January 12, 2016

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS") ["LEA"]</p> <p>Respondent.</p> <p>Case # 2015-0287</p> <p>Date Issued: January 11, 2015</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Hearing Date: December 8, 2015</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Jocelyn Franklin, Esq. James E. Brown & Associates, PLLC 1220 L Street, N.W. Suite 700 Washington, D.C. 20005</p> <p>Counsel for Respondent: Maya Washington, Esq. District of Columbia Office of the General Counsel 1200 First Street, NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on December 8, 2015, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age ____ and in grade _____² currently attending a DCPS middle school (School A). He began attending School A at the start of school year (“SY”) 2014-2015. Prior to attending School A, the student attended a DCPS elementary school (“School B”). Prior to attending School B the student attended a District of Columbia public charter school (“School C”).

At the time the due process complaint was filed the student had not been determined to be a child with a disability pursuant to IDEA. The student’s mother (“parent” or “Petitioner”) alleged that in November 2014 she spoke to the School A psychologist regarding testing for the student and was advised that the student’s teachers would be asked to rate the student’s behavior. Petitioner also alleged she requested that student receive services and assistance via letters to the School A principal on February 19, 2015, and March 3, 2015.

On August 25, 2015, Petitioner filed the due process complaint in this matter. She alleged DCPS denied the student a free appropriate public education (“FAPE”) by: (1) failing to identify and evaluate the student pursuant to Child Find, and (2) failing to timely and comprehensively evaluate the student pursuant to her request and convene an eligibility review meeting.

On September 3, 2015, DCPS filed a timely response to Petitioner’s complaint in which it denied that it failed to provide the student with a FAPE. DCPS contended the student was evaluated and determined ineligible for special education and related services on June 11, 2010, at a District of Columbia public charter school (“School C”). The student was also evaluated and determined ineligible for special education and related services on January 9, 2012, at School B. However, the student was determined to be eligible for a Section 504 Plan. DCPS asserted that the a team met during the school year (“SY”) 2014-2015 in order to review and revise the student’s 504 plan. DCPS contended Petitioner requested updated social emotional testing that DCPS performed and reviewed on May 7, 2015.

DCPS asserted that it is unaware of any parental request to evaluate the student for special education and related services. However, on September 1, 2015, DCPS convened a meeting with Petitioner and Petitioner signed a consent form for DCPS to evaluate the student that included a comprehensive psychological and a functional behavior assessment (“FBA”).

² See Appendix B for student’s age and current grade.

A resolution meeting was held on the complaint on September 1, 2015. The complaint was not resolved and the parties did not mutually agree to proceed directly to hearing. The 45-day period began on September 25, 2015, and ended [and the Hearing Officer's Determination ("HOD") was originally due] on November 8, 2015.

The parties prepared for a hearing date of November 2, 2015, and filed disclosures. However, prior to the hearing being convened DCPS convened an eligibility meeting for the student and found him eligible for special education. Petitioner thereafter sought to include facts and requests for relief at the hearing related to the eligibility determination that were not part of the original due process complaint.

On October 28, 2015, Petitioner filed the amended complaint.³ Respondent did not object the amendment. Petitioner again alleged DCPS denied the student a FAPE by: (1) failing to identify and evaluate the student pursuant to Child Find, and (2) failing to timely and comprehensively evaluate the student pursuant to the parent's request and convene an eligibility review meeting.

Petitioner sought as relief an order for DCPS to convene a meeting to review the recently created intervention plan ("BIP")⁴ and fund compensatory education due the student for the delay in evaluation and determining his eligibility.

DCPS did not file a response to the amended complaint but relied upon its original response. A resolution meeting was held on the amended complaint on November 13, 2015. The complaint was not resolved and the parties did not mutually agree to proceed directly to hearing. The 45-day period for the amended complaint began on November 28, 2015, and ends [and the Hearing Officer's Determination ("HOD") is due] on January 11, 2016.

The Hearing Officer convened a pre-hearing conference ("PHC") on the amended complaint November 24, 2015, and issued a pre-hearing order ("PHO") on November 24, 2015, outlining, inter alia, the issues to be adjudicated. The hearing was convened on December 8, 2015, and the record was closed with the simultaneous filing of closing arguments by the parties on December 21, 2015.

ISSUES: 3

The issues adjudicated are:

³ In a conference call the Hearing Officer had with the parties on October 27, 2015, Petitioner's counsel stated that after conferring with her client she would either proceed to hearing on November 2, 2015, or seek to amend the complaint to include new facts and the request for relief of compensatory education.

⁴ At the time of the hearing a recent FBA had been administered and a BIP developed and provided to Petitioner but at the hearing Petitioner still sought a meeting to review and adopt the BIP. DCPS, on the other hand, contended the BIP had been reviewed by a team and adopted and any review was premature.

1. Whether DCPS denied the student a FAPE by failing to abide by its obligations pursuant to Child Find by not identifying and evaluating the student and determining his eligibility for special education no later than June 19, 2015, the final date of the SY 2014-2015.
2. Whether DCPS denied the student a FAPE by failing to timely and comprehensively evaluate the student pursuant to the parent's March 3, 2015, request and timely convene an eligibility review meeting with the parent.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 46 and Respondent's Exhibits 1 through 20) that were admitted into the record and are listed in Appendix A).⁵ Witnesses are listed in Appendix B.

FINDINGS OF FACT: 5

1. The student currently attending School A, a DCPS middle school. He began attending School A at the start of SY 2014-2015. Prior to attending School A, the student attended School B, a DCPS elementary school. (Parent's testimony)
2. Based on an April 2011 psychiatric hospitalization the student was diagnosed with psychotic disorder and conduct disorder. After an incident in October 2011 the student had another medical evaluation that led to him being prescribed medication for these disorders. (Parent's testimony, Petitioner's Exhibits 13-1, 38-2)
3. The student received ongoing treatment for his psychological disorders and medication management in the community through Hillcrest Children's Center. (Parent's testimony, Petitioner's Exhibit 12)
4. The student was evaluated and found ineligible for special education on June 11, 2010, when he attended School C and again on November 10, 2012, when he was attending School B. (Respondent's Exhibits 10, 11, 38-3)
5. The student was, however, provided a 504 plan dated February 12, 2013, while he attended School B. This 504 plan included accommodations for bi-polar disorder. (Petitioner's Exhibit 17-1, 17-2)
6. The student's displayed few behavioral difficulties during his time at School B and the student's 504 plan appeared to be effective. (Witness 3's testimony)
7. A DCPS school psychologist familiar with the student while he was attending School B participated in some meetings regarding his 504 plan and is familiar with the evaluations

⁵ Any documents that were objected to by either party, admitted over objection or not admitted and/or withdrawn by either party are noted as such in Appendix A.

of the student that were conducted by an outside provider that diagnosed him with a psychotic disorder. The student did not display behaviors related to the disorder at School B but the School B staff monitored him through the 504 Plan to ensure that he continued to do well. (Witness 3's testimony)

8. The student completed School B and moved on to middle school at School A at the start of SY 2014-2015. During his last year at School B the student was returned to the custody of his parent who had, up until that time, been incarcerated. The student had been living with a guardian from the time he was an infant until age nine when he was reunited with his parent. (Parent's testimony)
9. After the student transitioned to School A at the start of SY 2014-2015 there were some manageable behaviors at school that the school attributed to the student moving to middle school. However, there were also changes at home for the student and his parent shared with the School A staff that the student was aggressive at home and was not following home rules. The student denied some of the behavior to the School A psychologist. (Witness 3's testimony)
10. The student's parent acknowledged that the student did not have major problems until he began attending School A when she began to get calls from the school two to three times per week to pick the student up or he was in school suspension because of his behavior. As time went on the parent began to notice the student's behavior was affecting him academically. (Parent's testimony)
11. During SY 2014-2015 the student scored below grade level in reading in September 2014 and November 3, 2014. The student had behavioral infractions during September 2014 through February 2015 for class disruptions and defiance toward adults and he had a two-day out of school suspension in March 2015 and an eight-day out of school suspension in April 2015. He received Ds and Fs on his report card in Science and World Geography respectively. His grades in other subjects were at least average. The student had a total of 18 days absent during the school year and was tardy 24 days. (Petitioner's Exhibits 10-1, 16, 31, 23, 38-3, 38-4)
12. In October 2014 when the student's behavior worsened the student's parent took him to be evaluated by a psychiatrist who eventually asked that School A also evaluate the student to determine if he had a learning disability. (Parent's testimony)
13. In late February 2015 that parent met with one of the student's teacher and the School A psychologist and expressed her concerns about the student. The student's parent asked about evaluations and the psychologist explained the student had been found ineligible for special education in the past and it may be a good idea to update the student's 504 plan and she agreed she would do updated testing for the 504 plan. The DCPS psychologist conducted the testing in February 2015 and conducted observations of the student. She gave the parent and the student's teacher(s) a questionnaire regarding the student's behavior. (Witness 3's testimony)

14. In the School A psychologist's opinion the data she collected on the student did not support a finding that the student was a child with a disability in need of special education. The student's scores and grades were fluctuating. However, the School A psychologist believed the student's attendance and tardiness explained the fluctuation. The psychologist wanted to ensure the student was receiving in-school counseling as an intervention. The psychologist completed her report and the student's 504 plan was updated by adding counseling and updating his BIP. However, there was no follow up meeting with the parent by the School A 504 coordinator or the psychologist. (Witness 3's testimony, Respondent's Exhibit 9)
15. Because the student's behaviors were a concern the School A staff tightened its implementation of his 504 plan and added additional interventions the school staff thought were appropriate at the time. The student's behavior was up and down and his behavior was better in the morning than the afternoon. It was always a struggle at the end of the day. However, despite his behaviors the student was able to access the curriculum. The student was added to reading intervention group to assist his reading skills and was also moved into the co-taught English Language Arts ("ELA") class. (Witness 4's testimony)
16. On February 19, 2015, the parent gave School A a letter requesting that the student be evaluated. She provided a copy of the letter to the school attendance counselor who verified she received the letter from the student and put it in the School A principal's mailbox. The parent also sent the principal an email requesting the student be evaluated. The student's parent provided the School A assistant principal a letter from the student's psychiatrist indicating his medication(s) and requesting the student be evaluated. This letter was given to School A on March 3, 2015. (Parent's testimony, Petitioner's Exhibits 6, 35)
17. The student's parent also provided School A a letter from the student's psychiatrist about the student's diagnosis and about the student hearing voices telling him to do bad things. She provided School A the letter at a meeting when the student returned to school from a two-day suspension. (Parent's testimony, Petitioner's Exhibits 4, 22)
18. On May 7, 2015, DCPS conducted a data evaluation review. The School A psychologist in her data review noted that the student's academic performance was being impacted by his behavior. However, she did not observe the psychotic disorder behaviors, but the student's Attention Deficit Hyperactivity Disorder ("ADHD") behaviors. She observed that the student was a bit disruptive in the classroom and bothered by occurrences caused by other students. The data review included interventions to address the student's behaviors and academic difficulties. However, School A did not proceed to conduct evaluations to determine the student's eligibility for special education during SY 2014-2015. (Witness 3's testimony, Respondent's Exhibit 9)
19. Although the student's 504 Plan was amended the student did not respond to the interventions. DCPS prepared an analysis of existing data on September 1, 2015, after

the due process complaint was filed and obtained a consent form from the student's parent to evaluate the student for special education. (Respondent's Exhibits 5, 6)

20. In September 2015 the student's extreme at home behaviors caused the student's parent to place him at a group home for 21 days. While living at the group home the student continued to attend School A. The student returned home from the group home on or about October 9, 2015. (Parent's testimony)
21. DCPS conducted a comprehensive psychological reevaluation on September 25, 2015. The student's cognitive abilities were determined to be below average at the 16th percentile. The student's academic achievement in math and writing was average but his reading scores revealed severe deficits in passage comprehension (at second grade level) with broad reading near fourth grade level. Behavior data revealed that the student presents with inattentive, hyperactive and defiant behaviors in the school and home setting. The psychologist concluded the evaluation justified the student being considered by an eligibility team for the OHI and ED disability classifications.⁶ (Witness 3's testimony, Respondent's Exhibit 4-1, 4-8, 4-20)
22. DCPS conducted a FBA and a social history assessment on October 2, 2015. (Respondent's Exhibit 2)
23. On October 22, 2015, the student was found eligible for special education with the disability classification of multiple disabilities including ED and OHI for ADHD. (Respondent's Exhibits 15, 16, 17)
24. The student's parent participated in the eligibility meeting by telephone. During the meeting the parent asked about what interventions would be put in place to address the student's behaviors and keep him in the classroom. The team reviewed the student's FBA and indicated a BIP would be developed. (Witness 4's testimony, Petitioner's Exhibits 42-1)
25. On November 2, 2015, DCPS finalized the student's IEP and BIP and agreed that the BIP could be revised if it was not working. The IEP prescribes the following services: 4 hours per week of specialized instruction in reading outside general education, and 4 hours each in math and reading inside general education for a total of 12 hours per week of specialized instruction. The student also is to receive 120 minutes per month of behavioral support services outside general education. (Respondent's Exhibits 18-1, 18-7, 19)

⁶ Although at the hearing Petitioner's expert witness opined that the student might be considered for an Autism diagnosis, Autism was never brought up as an area of testing by the parent or any member of the School A staff. The School A psychologist opined that she doesn't think the student fits the Autism criteria as he has displayed no speech and language impairment, no difficulty making eye contact and relates easily with peers and school staff. The Hearing Officer gave more weight to the DCPS psychologist's testimony in this regard because she has actually evaluated and observed the student in a school setting.

26. The student's parent believes the student needs additional help through tutoring for his reading. The parent would also like the student to be provided mentoring. The parent acknowledged that the student's behavior has improved since he was provided the IEP and a BIP and she is not receiving as many phone calls from School A. The student is coming home with his homework and getting it done. (Parent's testimony)
27. Petitioner had a consultant provide opinions as to compensatory education for the student to compensate the student for the alleged delay in him being evaluated and determined eligible for special education. The consultant had not met the student or talked with any of his teachers or his parent but only reviewed the student's records and evaluations. The consultant opined that the student should have been eligible for special education services during the time his 504 plan was put in place because he was still struggling and the 504 was not effective. The consultant recommended the student be provided an adaptive assessment, vocabulary building in a life skills context of 1 to 2 hour per week through the academic year until his next IEP is reviewed. She also recommended the student also be provided counseling to process negative feelings. (Witness 1's testimony)
28. Petitioner's educational advocate who attended the meeting where the student's IEP was developed prepared a compensatory education proposal. The proposed plan estimated that the student should have started receiving special education services by the end of May 2015 and proposed 132 hours of specialized tutoring and 22 hours of behavior support. The plan includes the period of extended school year ("ESY"). (Witness 2's testimony, Petitioner's Exhibit 45)⁷
29. Over the past month prior the hearing the student's behavior has been more problematic with him making threats and not following the rules. He expresses anxiety about going home having not received a good report from school. During the time the student was in a group home setting he was more socially appropriate with school staff and his peers than he is now. The student is currently not arriving to school on time and as result is having to serve lunch detention. (Witness 4's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of

⁷ This witness acknowledged that the student did not qualify for ESY and therefore the amount of tutoring and behavioral supported recommended should have not been calculated on missed services of 22 weeks. He asserted that it should instead be calculated on 16 weeks and the amount of tutoring should be reduced from 132 hours to 100 hours and the behavior support should be 16 hours. However, the Hearing Officer concluded the student missed approximately 9 weeks of services not 16 weeks.

educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. 7 *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied the student a FAPE by failing to abide by its obligations pursuant to Child Find by not identifying and evaluating the student and determining his eligibility for special education no later than June 19, 2015, the final date of the SY 2014-2015.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence of on this issue.

The "Child Find" requirements of IDEA at 20 U.S.C. 1412 (a); 34 C.F.R. Section 300.111 require every state to effectuate policies and procedures to ensure that all children with disabilities residing in the state including wards of the state who are in need of special education and related services are "identified, located and evaluated."

Reid v. District of Columbia, 401 F. 3d 516, 519 (D.C. Cir. 2005) held: "School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction. Instead, school systems must ensure that 'all children with disabilities residing in the State...regardless of the severity of their disabilities and who are in need of special education and related services, are identified, located, and evaluated.'" See also *Branham v. District of Columbia*, 427 F. 3d 7, 8 (D.C. Cir. 2005). In *Scott v. District of Columbia*, 2006 U.S. Dist. LEXIS 14900, the Court citing the above cases held: "The Circuit's holdings require DCPS to identify and evaluate students in need of special education and related services, whether or not parents have made any request, written or oral."

The "Child Find" requirement is an affirmative obligation on the school system. A parent is not required to request that a school district identify and evaluate a child. In *N.G., et al. v. District of*

Columbia, 556 F. Supp. 2d 11, (U.S.D.C. 2008) the Court stated: "This Court has held on numerous occasions that as soon as a student is identified as a potential candidate for special education services, DCPS has a duty to locate that student and complete the evaluation process.

The evaluation component of "Child Find" requires a district to conduct an initial evaluation of a child to determine whether he qualifies as a child with a disability within 60 days or within the time frame specified by the state (120 days as mandated by the District of Columbia) and to determine his educational needs, including the content of his IEP. 20 USC 1414(a)(1)(C); 20 USC 1414(b)(2)(A).

The evidence in this case demonstrates that the student had been identified and found ineligible as a child with a disability twice in 2010 and again in 2012. The record in this case does not support a finding that DCPS failed to locate, identify, and evaluate the student to determine his eligibility for special education and related services.

The student was diagnosed with a psychosis disorder but did not display any major behavior concerns while attending School B. On February 12, 2013, the student was determined eligible with a disability under Section 504 of the ADA and a 504 plan was developed.

The student was reunited with his mother shortly before transitioning to middle school at School A during the 2014-2015 SY. His mother reported a decline in behaviors while in the home environment and the student exhibited some behavioral issues during his transition to middle school.

Throughout SY 2014-2015 the student's academic progress was inconsistent. His grades were average except for Science and History. School A recognized the student required additional support and initiated a reading intervention for the student to address his deficits.

In February 2015 the student's parent met with the School A psychologist and asked about evaluating the student's behavior. The psychologist explained that student was found ineligible for special education previously and had a 504 plan and agreed to conduct observations and administer behavior rating scales to update the student's 504 plan. In May 2015 the testing was completed and a team met to review the behavior testing and updated the student's 504 plan. The student's parent did not participate in the meeting.

The testimony of all of the witnesses including the parent and the evidence in the record indicate that DCPS identified the academic and behavioral struggles the student exhibited during the SY 2014-2015 and acted appropriately to put in place interventions to address his academic deficits and behavioral concerns before initiating an evaluation to determine his eligibility for special education and related services. With the interventions in place the student's was promoted to the next grade.

Based upon the fact that the student had been evaluated twice previously and found ineligible and had a 504 plan in place, the Hearing Officer concludes that School A acted reasonably to address the student's behavior and academic concerns by conducting assessments and observations and updating his 504 plan. The evidence does not indicate that the School A staff

ignored its obligations toward the student. Although the staff did not take action to immediately evaluate the student for special education based upon these concerns they took reasonable actions and instituted interventions to address his behavior and academics.

Consequently, the Hearing Officer concludes that Petitioner did not demonstrate by a preponderance of the evidence that DCPS should have been on notice that the student should have been evaluated for special education rather than the actions School A took, and did not prove that DCPS failed to abide by its obligations pursuant to Child Find by not identifying and evaluating the student and determining his eligibility for special education no later than June 19, 2015.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to timely and comprehensively evaluate the student pursuant to the parent's March 3, 2015, request and timely convene an eligibility review meeting with the parent.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence of on this issue.

DCPS is required to complete evaluations of children in 120 days under the IDEA and DC law. 34 CFR § 300.301(c)(ii); D.C. Code § 38-26561.02 (2010) (DCPS shall evaluate within 120 days from the date the child was referred). Evaluation under the IDEA includes assessment procedures as well as the eligibility determination. *See* 34 CFR §§ 300.15 (definition of evaluation includes § 300.306), 300.306 (procedures for eligibility meeting and decision).

The evidence demonstrates that the student's parent requested that the student be tested for special education and provided the School A principal a letter with that request through the student and then through the School A attendance counselor. She then emailed a copy to the letter to the principal. In addition, the parent provided School A a letter from the student's psychiatrist on or about March 3, 2015, requesting that the student be evaluated for special education. This communication provided to School A, despite the efforts that were being taken by School A to update the student's 504 plan, created a duty for School A to comply with the request within the statutory period.

The Hearing Officer concludes that the date that the DCPS was clearly on notice of the parent's request for special education evaluation was the date that she personally⁸ provided the request at a meeting with School A. The Hearing Officer thus concludes that DCPS should have fully evaluated the student for special education and determined his eligibility within 120 days of March 3, 2015, and by July 3, 2015. Had the evaluation process been timely completed the student's eligibility would have been determined and an IEP would have been in place by the start of SY 2015-2016. Consequently, because the evaluations were not conducted until SY 2015-2016 and after a due process complaint was filed the student missed approximately nine weeks of services prior to his IEP being finalized on November 2, 2015. The parent testified that

⁸ There was no clear evidence that the letter sent through the student or emailed by the parent was actually received and read by the School A principal.

the student's behavior and academic performance improved after he was provided the IEP. The Hearing Officer thus concludes that DCPS' failure to timely evaluate the student and provide him special education services was denial of a FAPE.

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. 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." Reid, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." Id. at 526.

Petitioner presented a compensatory education plan and witnesses to support its request for compensatory education. Although the witnesses including the student's parent indicated the student would benefit from tutoring and counseling/mentoring, the plan presented contained errors in the amount of missed services the student actually suffered. Consequently, the Hearing Officer cannot reasonably grant the requested amount of compensatory education. The evidence demonstrates that the student missed approximately nine weeks of specialized instruction and behavioral support. Although the evidence was insufficient for the Hearing Officer to determine what amount of services would compensate the student for those missed services and put him in the stead he would have been but for the denial of a FAPE, there was sufficient evidence that the student would benefit from the type of services requested.⁹ Consequently, the Hearing Officer provides the student in the order below what the Hearing Officer considers a nominal amount of tutoring and counseling services based upon the evidence in the record that the student would benefit from these services.¹⁰

ORDER:

1. DCPS shall, within ten (10) school days of the issuance of this order provide the student twenty-five (25) hours of independent tutoring and ten (10) hours of independent counseling/behavioral support services at the OSSE/DCPS prescribed rate to be used by Petitioner no later than December 31, 2016.
2. All other relief requested by Petitioner is denied.

⁹ In addition, there was evidence that the student's more recent in-school behavior is problematic and can hopefully be addressed with these additional services.

¹⁰ The Hearing Officer concludes that despite Petitioner's inability to establish appropriate compensatory education, to award nothing would be inequitable. (A party need not have a perfect case to be entitled to compensatory education. *Stanton v. D.C.* 680 F Supp. 201 (D.D.C. 2011). If a student is denied a FAPE a hearing officer may not "simply refuse" to grant a compensatory education award. *Henry v. D.C.* 55 IDELR (D.D.C. 2010))

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.

Hearing Officer

Date: January 11, 2015