

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,¹

Date Issued: March 25, 2016

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2016-0001

v.

Hearing Date: March 17, 2016

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution, Room 2006
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or GUARDIAN), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner alleges that DCPS has denied Student a free appropriate public education (FAPE) by not timely determining Student’s eligibility for special education and by not offering Student an appropriate Individualized Education Plan (IEP).

¹ Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on January 11, 2016, named DCPS as respondent. The undersigned Hearing Officer was appointed on January 13, 2016. The parties met for a resolution session on February 1, 2016 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on February 13, 2016. On February 3, 2016, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on March 17, 2016 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

The Petitioner testified and called as witnesses CLINICAL PSYCHIATRIST, EDUCATIONAL ADVOCATE, DIRECTOR OF THERAPY, NONPUBLIC SCHOOL ADMINISTRATOR, and CBI SPECIALIST. DCPS did not call any witnesses.

Petitioner's Exhibits P-1 through P-50 were admitted into evidence with the exception of Exhibits P-47 and P-48 which were withdrawn. Exhibit P-20 was admitted over DCPS' objection. DCPS' Exhibits R-1 through R-4 were admitted into evidence without objection. Petitioner's objections to Exhibits R-5 and R-6, which were not disclosed prior to the hearing, were sustained. Counsel for both parties made opening and closing statements.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the February 5, 2016 revised Prehearing Order:

- Whether DCPS denied Student a FAPE by failing to ensure that he was evaluated in all areas of suspected disabilities and determined eligible for special education and related services no later than February 2015 and
- Whether DCPS' proposed December 2015 IEP for Student is inappropriate for failure to identify his disability classification and present levels of performance, failure to provide sufficient special education and related services and failure to provide a sufficiently restrictive placement.

For relief, Petitioner requested in her due process complaint that the Hearing Officer order DCPS to reconvene Student's IEP team to ensure that he is provided full time or near full time instruction, in a therapeutic setting, outside of general education, a dedicated aide, counseling as a related service and coordination of wrap around services; and a behavior intervention plan based on a FBA; and order DCPS to conduct or fund a neuropsychological evaluation, speech and language evaluation, functional behavior assessment (FBA) and occupational therapy (OT) evaluation of Student. Petitioner also seek an award of compensatory education for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

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

1. Student is an AGE resident of the District of Columbia, where he resides

with Guardian and other family members. Testimony of Guardian.

2. On December 9, 2015, Student was initially determined eligible for special education and related services under the disability classification Multiple Disabilities (MD), based upon concomitant Emotional Disturbance (ED) and Other Health Impairment (OHI) disabilities. Exhibit R-4.

3. Since the 2013-2014 school year, Student has attended DCPS' CITY ELEMENTARY SCHOOL. He is currently in GRADE. Previously, he was enrolled in Prince George's County, Maryland public schools. Testimony of Guardian, Exhibit P-20.

4. In October 2014, Student was referred to PSYCHIATRIC HOSPITAL for a psychological evaluation based upon concerns about his anger, disruptive behaviors, and disrespectful behaviors toward family and others. Student was admitted to the hospital for a five day psychological evaluation. In an October 23, 2014 psychological evaluation report, the evaluator reported that Student had been the victim of sexual abuse by a relative and his family history was positive for mental illness including schizoaffective disorder, bipolar disorder, schizophrenia and depression. On measures of cognitive functioning, Student's performance ranged from Extremely Low to Low Average, indicated that Student takes information from his environment and processes it very slowly and also that it is difficult for Student to learn and retain complex information or follow multi-step instructions. Results of educational testing indicated that Student's ability to apply academic skills was within the Low range. On measures of adaptive and behavioral functioning, Student's mother and Guardian endorsed many items that reflected symptomology of hyperactivity and impulsivity. Assessment and collateral interviews highlighted Student's compromised social-emotional functioning. The evaluator reported that Student has difficulty regulating emotions and

demonstrates a tendency to lose emotional and behavioral control. Exhibit P-37.

5. The Psychiatric Hospital evaluator's diagnostic impressions were Attention Deficit Hyperactivity Disorder (ADHD), Combined Type, Specific Learning Disorder (SLD) with impairment in Reading, Written Expression and Mathematics. The evaluator also reported that Student should be monitored and further tested to rule out Posttraumatic Stress Disorder, Chronic. Exhibit P-37.

6. The Psychiatric Hospital evaluator recommended, *inter alia*, that a neuropsychological evaluation of Student be conducted, that Student be followed by an outpatient psychiatrist, that he be provided individual therapy and that Student would benefit from a social skills therapy group. The evaluator also recommended that Student may benefit from an IEP to address his learning disabilities and ADHD. Exhibit P-37.

7. The October 23, 2014 Psychiatric Hospital report was provided to City Elementary School shortly after Student was released from the hospital. Testimony of Educational Advocate.

8. For the last term of the 2014-2015 school year at City Elementary School, Student's progress marks were "0" (lower than Below Basic) in Reading, Writing & Language and Math. He had accumulated 33 days absent, of which 6 were unexcused. Exhibit P-26.

9. Over the 2014-2015 school year at City Elementary School, Student was disciplined for numerous behavior incidents, including on September 4, 2014, October 2, 2014, October 3, 2014, October 6, 2014, October 7, 2014, November 5, 2014, November 19, 2014, November 20, 2014, December 10, 2014, December 16, 2014, December 17, 2014, January 5, 2015, January 9, 2015, January 15, 2015, January 30,

2015, February 9, 2015, February 10, 2015, February 20, 2015, April 20, 2015, and April 30, 2015. Most of these incidents resulted in Student's temporary removal from the classroom or in-school disciplinary action. For the November 5, 2014 incident, allegedly engaging in reckless behavior that may cause harm to self or others, Student was disciplined with an off-site short-term suspension. Exhibit P-30.

10. Student was again admitted to Psychiatric Hospital from July 11, 2015 to July 16, 2015, presenting after allegedly burning himself with a cigar, threatening to commit suicide and recently asking a younger brother to participate in sexual behaviors. Exhibit P-22.

11. On September 14, 2015, Petitioner's Counsel wrote the principal and special education coordinator at City Elementary School to request that Student be evaluated for special education eligibility. She requested that the initial evaluation include a neuropsychological evaluation, a functional behavioral assessment (FBA), an occupational therapy (OT) assessment and a speech and language assessment. Exhibit P-12.

12. On September 17, 2015, City Elementary School developed a Behavior Intervention Plan - Level I (BIP) for Student to address his refusing to remain seated during instruction and his provoking other students to fight/play. Exhibit P-23.

13. On September 23, 2015, City Elementary School developed an initial Section 504 Plan for Student (Section 504 of the Rehabilitation Act of 1973, as amended), based on Student's previously diagnosed ADHD and PTSD impairments. The Section 504 team determined that Student required the BIP to participate in testing, to allow compliance with school discipline policy and to be able to access the general education curriculum. The September 17, 2015 BIP was introduced to the team

to address many of the problem behaviors which Student had been exhibiting within the classroom. Exhibit P-24.

14. Student was again admitted to Psychiatric Hospital from November 5, 2015 to November 13, 2015 for Disruptive Mood Dysregulation disorder. His discharge diagnoses were identified as unspecified depressive disorder, PTSD and ADHD combined type. Exhibit P-4.

15. On November 6, 2015, DEAN OF STUDENTS wrote Petitioner's Counsel by email that Student's evaluations were nearly complete. Exhibit P-14. The initial eligibility meeting was convened at City Elementary School on December 9, 2015. At that meeting, Student was determined eligible for special education and related services on the basis of Multiple Disabilities, including Emotional Disturbance (ED) and Other Health Impairment (OHI). Exhibit R-4.

16. Also on December 9, 2015, Student's initial IEP was developed. The IEP contained annual goals for Mathematics; Reading; Written Expression; and Emotional, Social and Behavioral Development Areas of Concern. The IEP identified Student's disability as MD (Emotional Disturbance, Other Health Impairment) and stated his present levels of performance for each area of concern. The IEP provided for Student to receive 15 hours per week of Specialized Instruction outside general education and 240 minutes per month of Behavioral Support Services. Exhibit P-40.

17. An educational advocate for the Guardian stated at the December 9, 2015 IEP meeting that Student needed placement in a full-time Behavior and Education Support (BES) program. Dean of Students agreed to make a referral to DCPS for a more restrictive environment for Student. At the meeting, the educational advocate also requested a compensatory education award to compensate Student for DCPS' failure to

find him eligible 16 months earlier. Exhibit P-15. The educational advocate also sent an email to Assistant Principal to ask when OT and Speech and Language assessments of Student would be completed. Exhibit P-15. DCPS completed OT and Speech and Language evaluations of Student on March 16, 2016. These reports were not made available to Petitioner before the due process hearing and were not admitted into evidence. Hearing Officer Notice.

18. On or about January 21, 2016, there was an incident in Student's classroom at City Elementary School when Student allegedly assaulted the classroom teacher. As of the due process hearing date, Student has not been allowed to return to the classroom but has been instructed in a separate classroom, 1:1 with a teacher or with one to two other students. Testimony of CBI Specialist.

19. Since at least spring 2015, Student has been provided weekly counseling services at THERAPY CENTER. Testimony of Director of Therapy. In addition, since August 2015, CBI Specialist has been meeting with Student, twice a week, to work on his social-emotional and behavior issues. Testimony of CBI Specialist.

20. Student has been accepted for immediate admission to Nonpublic School. Nonpublic School is a special education day school in suburban Maryland. It provides services for students, grades 3 through 12, with disabilities, including ED, OHI, Autism Spectrum Disorder and Intellectual Disability. Students at Nonpublic School have no in-school interaction with non-disabled peers. Nonpublic School holds a current Certificate of Approval issued by the D.C. Office of the State Superintendent of Education. The annual tuition is approximately \$35,000. Classroom size is nine students, taught by a special education teacher and a teaching assistant. Providers for speech and language, OT and counseling services are available on staff. Every student

has a counselor. Behavior management staff is always present. Testimony of Nonpublic School Administrator.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.14. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

A. Child Find

Did DCPS deny Student a FAPE by failing to ensure that he was evaluated in all areas of suspected disabilities and determined eligible for special education and related services no later than February 2015?

Student has a sad history of being abused by adults in the community and suffering severe mental health issues over a period of several years. In an October 23, 2014 psychological evaluation report, following a 5-day inpatient evaluation, a Psychiatric Hospital evaluator diagnosed Student with ADHD, SLD and PTSD (rule out). In the evaluation report, the evaluator recommended, *inter alia*, that Student may benefit from an IEP to address his learning disabilities and ADHD condition. Shortly after Student was released from Psychiatric Hospital, this report was provided to City Elementary School. Throughout the 2014-2015 school year, Student was repeatedly

disciplined for problem behaviors in school, including provoking fights and refusing to remain in his seat in class. His final term grades for the school year were less than Below Basic in the core subjects. Student was hospitalized again at Psychiatric Hospital from July 11 to 16, 2015. City Elementary School developed a Section 504 Plan for Student, but DCPS did not evaluate Student for special education eligibility until Guardian made a formal request on September 14, 2015. Petitioner contends that DCPS' failure to evaluate Student sooner violated the IDEA's child find requirements and denied Student a FAPE.

Under the IDEA child find mandate, “[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction.” *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005). “Instead, the IDEA imposes an affirmative obligation on school systems to ‘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.’ *Reid*. at 519 (internal quotations omitted); 20 U.S.C. § 1412(a)(3)(A). The District's laws implementing the IDEA require that once a potential candidate for special education services is identified, the District must conduct an initial evaluation and make an eligibility determination within 120 days. D.C. Code § 38–2561.02(a).” *DL v. District of Columbia*, 109 F. Supp. 3d 12, 16-17 (D.D.C. 2015). “The ‘child find’ duty extends even to ‘[c]hildren who are suspected of being a child with a disability . . . even though they are advancing from grade to grade.’ 34 C.F.R. § 300.111(c)(1).” *Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 941 (E.D.Va. 2010).

As Petitioner asserts, DCPS was certainly on notice, at least since receiving the Psychiatric Hospital psychological evaluation report in fall 2014, that Student was a

child suspected of having a qualifying disability. Under the IDEA's child find mandate and D.C. Law, DCPS was required to ensure that Student was evaluated and his special education eligibility determined, at latest, within 120 days from the date that the school received the Psychiatric Hospital report. See D.C. Code § 38–2561.02(a). Assuming that City Elementary School received the Psychiatric Hospital evaluation report by the end of October 2014, Student should have been evaluated and his eligibility determined no later than March 1, 2015. Student's initial IEP should have been developed within 30 days of the eligibility determination. See 34 CFR § 300.323(c)(1) (Public agency must ensure that a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services.) I conclude that under the IDEA and D.C. law, DCPS was required to have offered Student his initial IEP no later than March 31, 2015. However, DCPS did not complete its initial eligibility evaluation of Student or offer Student an IEP until December 9, 2015. The failure to timely offer Student an IEP was a denial of FAPE. See *Leggett v. District of Columbia*, 793 F.3d 59, 67 (D.C.Cir. 2015) (Parents are not required to demonstrate that their child's education was affected by a procedural violation where the violation was "obviously substantive.")

B.
Appropriateness of Initial IEP

Was DCPS' December 9 2015 IEP inappropriate for failure to identify Student's disability classification and present levels of performance, failure to provide sufficient special education and related services and failure to provide a sufficiently restrictive placement?

Petitioner contends that DCPS' initial December 9, 2015 IEP was inadequate for not identifying Student's disability, omitting Student's present levels of performance and because the IEP did not provide full-time special education services. To determine

whether an IEP is adequate to provide a FAPE, a hearing officer must determine “[f]irst, has the [District] complied with the procedures set forth in the [IDEA]? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the [District] has complied with the obligations imposed by Congress and the courts can require no more.” *A.M. v. District of Columbia*, 933 F. Supp. 2d 193, 203-04 (D.D.C. 2013), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

Petitioner’s allegation that the December 9, 2015 IEP omitted Student’s disability classification and present levels of performance raises procedural issues. The IDEA requires a statement of a child’s present levels of performance in the IEP to include how the child’s disability affects his involvement and progress in the general education curriculum. *See Analysis of Comments and Changes, supra*, 71 Fed. Reg. at 46662. However the Act does not require that the disability classification be identified in the IEP. *See, e.g. Letter to Anonymous*, 48 IDELR 16 (OSEP 2006). (Child’s identified needs, not the child’s disability category, determine the services that must be provided to her.); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE). Contrary to Petitioner’s claim, the December 9, 2015 IEP both identified Student’s disability, Multiple Disabilities (Emotional Disturbance, Other Health Impairment) and stated Student’s present levels of performance for each area of concern. I find that, aside from the long delay in offering the program, Petitioner has not shown that DCPS failed to comply with the IDEA procedural requirements in developing the December 9, 2015 IEP.

With regard to the second prong of the *Rowley* inquiry, whether the December 9, 2015 IEP was reasonably calculated to enable Student to receive educational benefits, the requirements for an appropriate IEP were discussed in *K.S. v. District of Columbia*, 962 F.Supp.2d 216 (D.D.C.2013):

[The] 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.

In her testimony at the due process hearing, Petitioner’s expert, Educational Advocate, opined that because Student had not been attending-to class in the general education classroom and because of his extreme behavior issues, Student’s initial IEP should have been provided him full-time special education services in a self-contained setting. However, as the U.S. District Court explained in *Oberti by Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 789 F. Supp. 1322 (D.N.J. 1992), *aff’d* 995 F.2d. 1204 (3d Cir.1993),

[T]he IDEA sets forth its preference for mainstreaming in terms of least restrictive environments. Participating school systems must provide a continuum of placements, ranging from full inclusion in regular settings, in which a child with a disability becomes a full member of the regular class, to completely segregated settings, *see* 34 C.F.R. § 300.551(a) and (b), and must consider the least restrictive option first. Moreover, children

placed in segregated or partially segregated settings must be simultaneously included in mainstream components 'to the maximum extent appropriate.' Finally, in accordance with the purposes and policies expressed by Congress in the IDEA, the goal for every child should be directed toward moving up on the continuum in the direction of full inclusion.

Oberti, 789 F. Supp. at 1329.

The measure and adequacy of an IEP can only be determined as of the time it is offered to the student. *See S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008). The December 9, 2015 IEP, developed by Student's IEP team, provided for Student to receive 15 hours per week of Specialized Instruction in a self-contained setting, while allowing him to be included in the regular education classroom for the rest of the school week. Educational Advocate, who is an employee of law firm representing Petitioner, did not attend the December 9, 2015 IEP meeting and had not observed Student in the classroom setting. I find unpersuasive Educational Advocate's opinion that the IEP team's decision in the initial IEP, to allow Student to participate in the mainstream setting for part of the school day, was inappropriate at the time the IEP was offered.

An IEP, especially an initial IEP, is not required to, and does not guarantee, any particular outcome or any particular level of academic success. *See, e.g., Holman v. District of Columbia*, 2016 WL 355066, at 2 (D.D.C. Jan. 28, 2016). Unfortunately, the December 9, 2015 IEP placement was clearly not successful for Student. In fact, Student allegedly assaulted his classroom teacher in January 2016 and since then, City Elementary School has not permitted him to return the general education classroom. As of the date of the due process hearing, Student was being instructed in an *ad hoc* setting

in a classroom alone with a teacher, or with one or two other students.² Going forward, DCPS must ensure that Student's IEP team, including the Guardian, is convened to review the new information on Student and to revise, as appropriate, his IEP and placement. *See* 34 CFR § 300.116(a).

Remedy

In this decision, I have determined that DCPS denied Student a FAPE by not ensuring he was determined eligible for special education and provided an IEP by March 31, 2015. For relief in this case, Petitioner requested in her due process complaint that DCPS be ordered to ensure Student is provided full time or near full time instruction, in a therapeutic setting, outside of general education; a dedicated aide; counseling as a related service; coordination of wrap around services and a behavior intervention plan based on a FBA; and that DCPS be ordered to conduct or fund a neuropsychological evaluation, a speech and language evaluation, an FBA and an occupational therapy evaluation of Student. Petitioner also seeks an award of compensatory education for the denial of FAPE to Student.

DCPS has now completed speech and language and OT evaluations of Student, but the evaluations have not yet been reviewed by his IEP team. DCPS' Counsel represents that DCPS has also issued funding authorization for the Guardian to obtain an independent neuropsychological evaluation of Student. I conclude that the appropriate next step is for Student's IEP team, including the Guardian, to review and update the December 9, 2015 IEP, informed by the new evaluations and other information, including Student's *ad hoc* removal from the general education setting, and

² Petitioner has not raised the school's January 2016 decision to place Student in this *ad hoc* setting as an issue in this case.

to make appropriate revisions to Student's IEP and educational placement. Because the IEP team may decide to place Student at a special school where a DCPS BIP would not be needed, I will not order DCPS to conduct an FBA for now. (No competent evidence was offered at the due process hearing that Student requires a dedicated aide, but Student's possible need for a dedicated aide and other supplemental aids and services must be considered by the IEP team. *See* 34 CFR § 300.320(a)(4).)

The Guardian also requests that I order DCPS to place Student at Nonpublic School for the remainder of the current school year. Because Student's IEP team needs to first determine his least restrictive environment, I decline to order Student's nonpublic placement. *See Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 12 (D.C.Cir. 2005) (Extent to which the placement represents the least restrictive educational environment "relevant" to determining whether a particular [nonpublic] placement is appropriate for a particular student.) Moreover, Nonpublic School serves Students from grades 3 to 12, and does not offer a class for Student's current grade. I find that Petitioner has not established that Nonpublic School is appropriate for Student.

Finally, Petitioner seeks an award of compensatory education. In a recent decision, *B.D. v. District of Columbia*, 2016 WL 1104846 (D.C.Cir. Mar. 22, 2016), the Circuit Court of Appeals for the District of Columbia provided expanded guidance on crafting a compensatory education award.

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. As we held in *Reid*, 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 . . . 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.”

B.D. 216 WL 1104846 at 4-5.

In this decision, I have found that Student should have been determined eligible for special education and provided an IEP no later than March 31, 2015 and that DCPS denied Student a FAPE by not providing him an IEP until December 2015. Due to DCPS’ failure to timely evaluate Student and develop his initial IEP, Student was denied some 26 school weeks of special education services, including 15 hours per week of Specialized Instruction and 240 minutes per month of behavioral support which the IEP team ultimately determined he needed.

In her testimony, Petitioner’s expert, Educational Advocate, recommended that Student be compensated with one hour of tutoring for each week of IEP services he was denied. (Educational Advocate’s proposed plan was based upon her assumption that Student was denied 40 weeks of IEP services. However, I have determined that DCPS’ delay in developing the initial IEP resulted in Student’s missing some 26 weeks of services.) Educational Advocate’s compensatory tutoring proposal was not contested by DCPS at the due process hearing. Following Educational Advocate’s recommendation for one hour of tutoring for each week of IEP services missed, I will order DCPS to provide Student 26 hours of 1:1 academic tutoring as compensatory education.

Educational Advocate also proposed providing Student additional counseling and mentoring to compensate Student for not being offered IEP behavioral support services until December 2015. The December 9, 2015 IEP team included behavioral support services in Student's initial IEP because, due to his disruptive behavior and non-compliance, Student was "often unable to access instruction" in the classroom. *See Exhibit P-40, p. 8.* Since at least spring 2015, Student has been provided weekly counseling services at Therapy Center. In addition, since August 2015, CBI Specialist has been meeting with Student, twice a week, to work on his social-emotional and behavior issues. When Student's IEP is revised, the IEP team will have to determine Student's ongoing educational setting, whether in a full-time special education placement or otherwise. It is the duty of Student's IEP team to ensure that in his revised IEP, he is offered all of the related services, including counseling, that he requires in order to benefit from special education. *See 34 CFR §§ 300.34(a), 300.320(a)(4).* In light of the extensive community-based counseling and behavioral support services which Student already receives and the requirement for Student's IEP team to reconsider his ongoing educational placement, I conclude that Petitioner has not shown that Student will require additional counseling or mentoring, as compensatory education, to receive the educational benefits that likely would have accrued if DCPS had provided Student an IEP in spring 2015. *See Reid, supra, 401 F.3d at 524* (Compensatory education intended to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.)

ORDER

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

ORDERED:

1. As soon as possible, and not later than within 10 school days of entry of this order, unless it has already done so, DCPS shall convene Student's IEP team, including the Guardian, to review Student's current educational placement and to determine an appropriate, immediate, ongoing placement pending completion of Student's neuropsychological evaluation;
2. Within 15 business days of receipt of Student's independent neuropsychological evaluation, DCPS shall again convene Student's IEP team to review his IEP and revise, as appropriate Student's IEP and educational placement;
3. As compensatory education for the denial of FAPE in this case, DCPS shall provide Student 26 hours of individual academic tutoring by a qualified DCPS or independent tutor. These tutoring services must be used by the end of the 2016-2017 regular school year or shall be forfeited and
4. All other relief requested by the Petitioner herein is denied.

Date: March 25, 2016

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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

cc: Counsel of Record
Office of Dispute Resolution
Chief Hearing Officer
OSSE Division of Specialized Education
DCPS Resolution Team