DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of
[Student],[1]

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: December 21, 2012

Hearing Officer: Jim Mortenson

Case No: 2012-0737

OSSE
STUDENT HEARING OFFICE
2012 DEC 26 AM 9: 32

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on October 19, 2012. An incomplete response to the complaint was filed on October 31, 2012. The response was framed at a notice of insufficiency and a motion to dismiss. The Respondent claimed the complaint was insufficient because the March 2012 IEP did not require a dedicated aide. The Respondent made no assertion that the complaint did not comply with 34 C.F.R. § 300.508 because it lacked the name or address of the Student, the name of the Student's school, that the complaint lacked a description of the problem including facts relating to the problem, or that the complaint lacked a proposed resolution to the extent known by the Petitioner at the time. The Response alternatively argued for dismissal because a meeting

[1] Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

to review the autism assessment had not yet been held, and so the complaint, therefore, was premature. It was the alleged failure to complete the assessment timely that was one of the issues complained of, so the motion to dismiss was denied.

A resolution meeting was held on November 6, 2012, and did not result in any agreements. The 30 day resolution period was not adjusted and the 45 day hearing timeline began on November 19, 2012.

A prehearing conference was held, via telephone, on November 15, 2012, and a prehearing order was issued on that date.

Both parties exchanged disclosures and filed trial briefs on December 10, 2012. Counsels did not meet to determine and prepare a list of undisputed facts as ordered.

The hearing was convened at 9:45 a.m. on December 17, 2012, in room 2009 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The Petitioner was represented by Zachary Nahass, Esq., and the Respondent was represented by William Jaffe, Esq. The hearing concluded approximately 1:00 p.m. The due date for this HOD is January 2, 2013. This HOD is issued on December 21, 2012.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5E, Chap. 30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

(1) Whether the Respondent failed to timely conduct and review evaluations in all areas of suspected disability when it did not complete an autism spectrum assessment prior to the start of the 2012-2013 school year?

(2) Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to propose or provide the Student an individualized education program (IEP) reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum because the IEP was not revised following a June 7, 2012, IEP team meeting to include a dedicated aide when the IEP team had determined the Student required a dedicated aide?

The substantive requested relief at the time of hearing was:

(1) The provision of the dedicated aide determined necessary by the IEP team; and

(2) Compensatory education consisting of 150 hours of one to one tutoring and mentoring to address academic failure and regression in coping and social skills as a result of the violations alleged.

The Respondent failed to timely complete a reevaluation to rule out or confirm whether the Student suffered from Asperger's Syndrome or is otherwise on the Autism Spectrum, which the IEP team had determined would be done prior to the start of the 2012-2013 school year. The Respondent failed to revise the Student's IEP following the June 7, 2012, IEP team meeting where the IEP team had determined the Student required a dedicated aide to redirect the Student in the classroom and when interacting with peers and who could help him with understanding social cues.

IV. EVIDENCE

Three witnesses testified at the hearing, all for the Petitioner. (The Respondent did not present any witnesses.) The Petitioner's witnesses were:

1) The Petitioner, Student's Father (P)

2) [redacted], Student's Teacher ([redacted])

3) [redacted], Special Education Advocate ([redacted])[2]

All witnesses testified credibly.

All of the Petitioner's nine disclosures were admitted into the record as exhibits. The Petitioner's exhibits are:

Ex. No.	Date	Document
P 1	Undated	Comprehensive Psychological Evaluation [conducted March 10, 2012] (See R 7)
P 2	October 25, 2012	Confidential Psychological Evaluation (Addendum) (See R 4)
P 3	March 30, 2012	IEP
P 4	June 7, 2012	MDT Notes [[redacted]]
P 5	June 7, 2012	[Attorney's IEP meeting notes]
P 6	November 15, 2012	[Handwritten meeting notes]
P 7	November 15, 2012	[Meeting notes]
P 8	December 10, 2012	Email chain ending from Nahass to [redacted] & Jaffe
P 9	Undated	Resumé of [redacted]

All of the Respondent's nine disclosures were admitted into the record as exhibits. The Respondent's exhibits are:

Ex. No.	Date	Document
R 1	December 6, 2012	Service Tracker
	October 3, 2012	Service Tracker
	June 6, 2012	Service Tracker
	May 4, 2012	Service Tracker

[2] In addition to being a fact witness, [redacted] was proffered to provide an expert opinion about compensatory education for the Student. She has expertise in developing IEPs and supplemental service plans and has worked with the Student for eight years. Her technical testimony was based on her extensive special education teaching and assessment experience and training. Unfortunately, her opinion about compensatory education was not reliable because she lacked knowledge necessary for an informed opinion. Specifically, she did not know where the Student would have been but for the alleged violation because she did not know where his educational performance was at the start of the school year, and provided contradictory testimony.

Ex. No.	Date	Document (cont.)
R 2	November 19, 2012	BIP [Draft]
R 3	November 6, 2012	RSM Notes
R 4	October 25, 2012	Confidential Psychological Evaluation (Addendum) (See P 2)
R 5	August 20, 2012	Independent Educational Evaluation Checklist
R 6	August 1, 2012	Review of Independent Educational Evaluation
R 7	June 7, 2012	Comprehensive Psychological Evaluation [conducted March 10, 2012] (See P 1)
R 8	June 15, 2012	IEP Progress Report – Annual Goals
R 9	May 18, 2012	IEP Progress Report – Annual Goals

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

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

1. Student is a [redacted] learner with a disability enrolled at Wilson Senior High School.[3] The Student is eligible for special education and related services by meeting the definition of "multiple disabilities" as a result of: a reading disorder; written expression disorder; and hyperactivity, conduct, and attention problems in the classroom.[4] The Student does not suffer from Autism.[5]

[3] Testimony of P, P 1, P 2, P 3.
[4] P 1.
[5] P 2, P 7.

2. The Student has very low cognitive ability in language processing, which impacts his ability to perceive visual patterns of words and objects and have a conceptual understanding of how those patterns can be related in larger systems of verbal or visual information.[6] The Student has low average auditory memory and he can be attentive and responsive to instruction, but he has difficulty in gaining abstract verbal concepts and relationships.[7] His cognitive weaknesses have resulted in the Student having significant emotional and social difficulties in the classroom, including absenteeism, refusing to complete work, altercations with and teasing of other students, sleeping in class, not following directions, and not being focused and being disengaged from the class.[8]
3. The Student is failing one or more classes this school year.[9] He is often missing from class or late to class and missing out on information taught.[10] His behavior has not changed from the prior school year.[11]
4. The Student's IEP team met on June 7, 2012.[12] The IEP team discussed the Student's behavior and academic performance and determined that a reevaluation to rule out or confirm the existence of Asperger's Syndrome or Autism was necessary and would be done over the summer.[13] The team also determined that after the new school year started, a functional behavioral assessment (FBA) would also be conducted.[14] The team determined that the Student required a dedicated aide to redirect him while he is in the classroom and interacting

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[6] P 1.
[7] P 1.
[8] P 1, P 4, P 5, T of S.M.
[9] T of J.M., P 7.
[10] T of J.M.
[11] T of J.M.
[12] P 4, P 5, T of J.M., T of S.M.
[13] P 4, P 5, T of J.M., T of S.M.
[14] P 4, P 5, T of S.M.

with peers and who could help him with his perspective and understanding social cues.[15] While it may not have been discussed at the meeting, the aide could also ensure the Student gets to class.[16] The Petitioner's attorney requested that the aide be a social worker, but the team did not agree this was necessary.[17]

5. The reevaluation of the Student did not take place until October, and the assessment report was not discussed with the IEP team until November 15, 2012.[18] A FBA was discussed at the November 15, 2012, IEP team meeting, but no assessment report is part of the record.[19]
6. The IEP was never updated to include the dedicated aide as determined by the IEP team on June 7, 2012, and the aide was never provided for the Student.[20]
7. The Petitioner believes the Student requires compensatory education to address academic and behavioral regression due to the lack of a behavioral aide this year.[21] The Petitioner's Educational Advocate opined that the Student requires one hour of mentoring, two to three times per week, to instruct the Student on appropriate behaviors and advise him on social cues, and that the Student requires at least 90 minutes of tutoring per week for a year.[22] S.M. could not identify where the Student would have been but for the lack of a dedicated aide during the current school year, but noted that the Student would not be failing and be eight grade levels behind his peers.[23] S.M. also testified that the Student would be three to four

[15] P 4, P 5, T of S.M.
[16] T of J.M.
[17] P 4, P 5.
[18] R 3, R 4, P 7, T of S.M.
[19] P 7, T of S.M.
[20] T of S.M., T of P, P 7, R 3.
[21] T of S.M.
[22] T of S.M.
[23] T of S.M. (It is noted that it has not been found that the Student is, in fact, eight grades behind his peers.)

grade levels ahead of where he was when the complaint was filed (October 19, 2012) had the dedicated aide been in place assisting the Student since the first day of school.[24]

VI. CONCLUSIONS OF LAW

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

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. *Schaffer v. Weast,* 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the 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." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia,* 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. There is not a set deadline for completing a reevaluation of a student with a disability. However, "[r]eevaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." *Herbin v. District of Columbia,* 362 F.Supp. 2d 254, 261 (D.D.C. 2005), *citing, Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone,* 21 IDELR 1127, 1129 (1995).
3. In this case the IEP team determined the Student would be reevaluated to look at whether he had Asperger's Syndrome or was otherwise afflicted with Autism. The team made this

[24] T of S.M. (It is noted that the first day of school was August 27, 2012, and so this amounts to less than two months of service in which the witness believes the Student would have advanced this far. This opinion, on its face, is not reliable because it is not clear what the Student's academic levels were at the start of the school year, and wherever they were, a three to four year period of growth with the assistance of an aide, when the Student has relatively low cognitive abilities, is plainly not reasonable and the opinion is not relied upon.)

determination on June 7, 2012, and determined the reevaluation would be completed by the start of the new school year so that, presumably, the IEP could be timely revised if there was new data to assist in programming for the Student.[25] The Respondent failed to ensure the IEP team's determination was carried out, and the reevaluation was not complete and the IEP team did not meet until November 15, 2012 (after the resolution meeting for the complaint in this matter). As a result of the delayed completion of the reevaluation concerning Autism, the FBA the team had agreed would be completed following the start of the school year was also delayed. The FBA was discussed at the November 15, 2012, IEP team meeting, but it is not clear it was actually completed as there is no assessment report in the record. Thus, the reevaluation, completed more than two months after the IEP team determined it would be completed, was untimely. Because the Student was determined to not have Autism, there was no impact on programming for the Student. However, the FBA was also delayed as a result of the untimely Autism assessment. This was not raised in the complaint and so is not addressed here.

4. A FAPE consists, in part, on the provision of special education and related services "provided in conformity with an [IEP] that meets the requirements of 34 C.F.R. §§ 300.320 through 300.324." 34 C.F.R. § 300.17. The IEP is developed by an IEP team that includes, among others, the parent of the child. 34 C.F.R. §§ 300.321, 300.324.

5. The IEP team determined, on June 7, 2012, to add a dedicated aide to the Student's IEP. The Respondent failed to ensure the dedicated aide was added to the IEP. Thus, the related service of a dedicated aide was not provided in conformity with an IEP developed pursuant

[25] The staff person conducting the FBA also wanted the assessment concerning Autism completed before she completed the FBA and so the FBA was also delayed. T of S.M.

to, and meeting the requirements of, 34 C.F.R. §§ 300.320 through 300.324, and FAPE was denied.

6. This hearing officer has broad discretion to grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). The Petitioner has requested two forms of relief to remedy this matter: the provision of the aide the IEP had previously determined necessary, and compensatory education. Compensatory education is an equitable remedy that may be provided as relief in disputes under the IDEA. Reid ex rel. Reid v. District of Columbia, 401 F.3rd 516, 523, (D.C. Cir. 2005), *citing* G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003), and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993). If, in the hearing officer's broad discretion, compensatory education is warranted, the "goal in awarding compensatory education should be 'to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'" Wilson, at p 9, *citing* Reid, 401 F.3d at 518, and Carter at 15-16. "Once a student has established a denial of the education guaranteed by the IDEA, the Court or the hearing officer must undertake 'a fact-specific exercise of discretion' designed to identify those services that will compensate the student for that denial." Id., *citing* Reid, 401 F.3d at 524; *see* Stanton ex rel. K.T. v. District of Columbia, 680 F. Supp. 2d 201, 207 (D.D.C. 2010); Phillips ex rel. T.P. v. District of Columbia, 736 F. Supp. 2d 240, 247 (D.D.C. 2010).

7. The Student will be provided the aide the IEP team determined necessary and his IEP will be immediately updated to reflect the aide, including the specific purposes of the aide and anticipated frequency, location, and duration of the use of the aide. An award of compensatory education is also warranted, and is difficult to determine because the evidence

does not clearly show where the Student would have been but for the violations herein. The Petitioner's witness, S.M., provided an opinion on the amount and type of compensatory education services required, but when asked detailed questions about how she came up with that opinion, she answered both that she could not pinpoint where the Student would be if he had been provided the aide (except that we would not be getting failing grades) and also that he would be three grades further ahead of where he was at the time the complaint was filed. It is unclear how the requested mentoring will "compensate" the Student. The provision of the dedicated aide is designed to help the Student understand social cues and address other behavioral issues with the Student, so additional mentoring outside of school, where he does not have problems (his behavioral problems are closely linked to his learning problems and resulting frustration) does not appear to be appropriate. Remedial tutoring, from a special education teacher, however, would be appropriate to assist the Student is making up credits he has lost this school year. Thus, his compensatory education will consist of such tutoring to be provided at least 90 minutes weekly, in all of the subjects the Student failed this school year through the second advisory providing his the opportunity to earn the credits passing those classes would have provided. The specifics of the compensatory education plan (frequency, location, duration, staff involved, how progress will be measured) will be determined by his IEP team based on this determination.

VII. DECISION

The Respondent failed to timely conduct an assessment determined necessary by the IEP team to be completed before the start of the 2012-2013 school year.

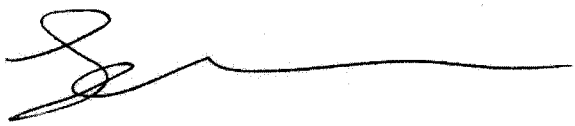
The Respondent failed to revise the Student's IEP following the IEP team's determination to add a dedicated aide for the 2012-2013 school year on June 7, 2012.

VIII. ORDER

1. Student will be provided with a dedicated aide within one week of his return to school from the winter break, in January 2013. The IEP will be updated to reflect the provision of the aide, including that the aide will redirect the Student in the classroom and during transition periods to help him understand social cues and to ensure he attends class. The aide will assist the Student throughout the school day, and will be provided at least through the end of the current school year, when the IEP team must meet to review and revise the IEP, as appropriate, for the 2013-2014 school year, and will consider whether the aide is still required.
2. Student is awarded compensatory education consisting of remedial tutoring from a special education teacher, to be provided for at least 90 minutes per week, on a schedule to be determined by the IEP team. The remedial tutoring will be designed to provide the Student with the content of the classes he failed during the first advisory of the 2012-2013 school year, and any classes failed during the second advisory of the 2012-2013 school year. The frequency, location, duration, and how the Student's progress will be measured, will be determined by the IEP team and documented in a compensatory education plan separate from the IEP. The tutoring will be provided until the Student is able to earn the credits for the failed classes, or the day before the start of the 2013-2014 school year, whichever is sooner.
3. The IEP team must meet and make all the determinations specified herein, no later than January 16, 2013. If the Petitioner cannot participate in person in that timeframe, the Respondent shall take, and document, steps to ensure alternative means of participation. If

the Petitioner cannot participate at all by the date specified herein, the IEP team will meet without the Petitioner and provide the Petitioner prior written notice, in conformity with 34 C.F.R. § 300.503, of its determinations, including for the compensatory education plan. The start date for compensatory services must be a reasonable time, not exceeding two weeks, following the Petitioner's receipt of the notice, and in no case after January 31, 2013. These specifications are to protect the Student's award of compensatory education. The dedicated aide will already be working with the Student, even if the IEP is not updated until January 16, 2013.

IT IS SO ORDERED.



Date: December 21, 2012

Jim Mortenson, Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

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