NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 15-7002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

B.D., a minor, by and through his parents and next friends, Anne and Brantley Davis, *et al.*,
Plaintiffs-Appellants

v.

DISTRICT OF COLUMBIA,
Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CORRECTED BRIEF FOR PLAINTIFFS-APPELLANTS B.D., a minor, *et al.*

Diana M. Savit #244970
SAVIT & SZYMKOWICZ, LLP
4520 East-West Highway
Suite 700
Bethesda, Maryland 20814
(301) 951-9191
dms@savitlaw.com
Attorney for plaintiffs-appellants

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and amici.* The plaintiffs below and appellants here are B.D., a minor, and his parents, Anne Davis and Brantley Davis. *Amici* are the Children's Law Center and the Council of Parents, Advocates and Attorneys, Inc. (COPAA).

B. *Rulings under review.* B.D. and his parents appeal from the district court's August 28, 2013 protective order (Leon, J.) precluding discovery, and from the December 3, 2014 memorandum opinion and order (Leon, J.) partially granting summary judgment in favor of the District of Columbia. The decision is not formally reported, but may be found at 2014 U.S. Dist. LEXIS 167463 (December 3, 2014).

C. *Related cases.* This case has not previously been before any court other than the district court below. A related case, *B.D., a minor, et al. v. District of Columbia,* Civil Action No. 13-01223 (RJL), is pending in the district court.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES. i

TABLE OF AUTHORITIES. iv

GLOSSARY. viii

JURISDICTIONAL STATEMENT. 1

STATEMENT OF THE ISSUES. 1

STATEMENT OF THE CASE. 2

Events leading to the 2012 administrative proceedings. 5

The psychiatric residential treatment facility referral. 8

The administrative proceedings. 12

The 2012 hearing officer's determination. 15

Post-2012 determination activities. 17

Proceedings in the district court. 23

STANDARD OF REVIEW. 25

SUMMARY OF ARGUMENT. 27

ARGUMENT. 28

I. Upon finding that B.D. was denied a free appropriate public education for more than six months, the hearing officer should have considered the compensatory education required to place him at the educational level he would have achieved had he received appropriate educational

services; awarding only occupational therapy to address deteriorating behavior did not satisfy the legal standard.. 28

II. Parents who prevail in special education due process hearings may enforce their decisions in court, without exhausting further administrative remedies.. 35

A. Favorable special education decisions are enforceable in court. 36

B. The Individuals with Disabilities Education Act does not establish a mandatory administrative procedure that must be employed to enforce a favorable due process decision.. 42

C. The District of Columbia Public Schools' alleged "large compliance" with the 2012 hearing officer's determination did not obviate the need to enforce that decision... 47

III. Locating a therapeutic residential facility, even a presumably appropriate one, more than two and one-half years after the need for such a facility was first identified did not moot the claim for placement.. 50

CONCLUSION. 52

CERTIFICATE OF COMPLIANCE.. 53

CERTIFICATE OF SERVICE. 53

TABLE OF AUTHORITIES*

CASES

A.K. v. Alexandria City School Board, 484 F.3d 672 (4th Cir. 2007). 19

Anderson v. Liberty Lobby, Incorporated., 477 U.S. 242 (1986).. 49

Antkowiak v. Ambach, 838 F.2d 635 (2d Cir. 1988).. 43

Auer v. Robbins, 519 U.S. 452 (1997).. 45

B.D., et al. v. District of Columbia, 2014 U.S. District LEXIS 167463 (December 3, 2014). 1

Board of Education v. Rowley, 458 U.S. 176 (1982). 43

**Boose v District of Columbia,* ___ F.3d ___, 2015 U.S. App. LEXIS 8599, 2015 WL 3371818 (D.C. Cir., May 26, 2015).. . . . . 2, 3, 7, 28, 30, 34, 48, 51

Celotex Corporation v. Catrett, 477 U.S. 317 (1986). 49

Cox v. Jenkins, 278 U.S. App. D.C. 312, 878 F.2d 414 (1989). 42

**D.E. v. Central Dauphin School District,* 765 F.3d 260 (3d Cir. 2014).. . . . 37, 39

Davis v. United States, 495 U.S. 472 (1990). 45

Florence County School District Four v. Carter, 510 U.S. 7 (1993).. . . . . 3, 28

Food Town Stores, Incorporated v. Equal Employment Opportunity Commission, 708 F.2d 920 (4th Cir. 1983), *cert. den. sub nom. Food Lion, Incorporated v. Equal Employment Opportunity Commission*, 465 U.S. 2005 (1984). 41

Honig v. Doe, 484 U.S. 305 (1988).. 47

* Cases and authorities upon which we chiefly rely are indicated with asterisks.

Jeremy H. v. Mount Lebanon School District, 95 F.3d 272 (3d Cir. 1996). 45

Kerkam v. McKenzie, 274 U.S. App. D.C. 139, 862 F. 2d (1989) ("*Kerkam I*") 26, 34

**Kerkam v. Superintendent, D.C. Public Schools,* 289 U.S. App. D.C. 239, 931 F.2d 84 (1991) ("*Kerkam II*"). 26, 33, 35

King v. Burwell, 576 U.S. ___ (No. 14-114, June 25, 2015). 40

Lesesne ex rel. B.F. v. District of Columbia, 447 F.3d 828 (D.C. Cir. 2006). 3

Local Division 1285, Amalgamated Transit Union, AFL/CIO/CLC v. Jackson Transit Authority, 650 F.2d 1379 (6th Cir. 1981), *rev'd on other grounds sub nom. Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15 (1982). 41

Manchester School District v. Crisman, 306 F.3d 1.. 38

Mary T. v. School District of Philadelphia, 575 F.3d 235 (3d Cir. 2009). 31

Mrs. W. v. Tirozzi, 832 F.2d 748 (2d Cir. 1987).. 45

New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973) 40

**Nieves-Marquez v. The Commonwealth of Puerto Rico,* 353 F.2d 108 (1st Cir., 2003). 37, 38, 39

**Porter v. Board of Trustees of Manhattan Beach Unified School District,* 307 F.3d 1064 (9th Cir. 2002). 37, 38, 43, 45, 46, 47

**Reid ex rel. Reid v. District of Columbia,* 401 F.3d 516 (D.C. Cir. 2005) 2, 3, 26, 31, 32, 34, 40

School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts, 471 U.S. 359 (1985). 34, 40

Smith v. Robinson, 468 U.S. 992 (1986). 37

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993). 38

STATUTES AND REGULATIONS

Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq*.. 2

20 U.S.C. §1400(c)(1). 40

*20 U.S.C. §1400(d)(1)(A). 34

*20 U.S.C. §1400(d)(1)(B). 34

20 U.S.C. §1401(26)(A). 5

20 U.S.C. §1401(9)(A). 35

*20 U.S.C. §1412(a)(1)(A). 2

20 U.S.C. §1412(a)(4). 3

20 U.S.C. §1414(d). 3

20 U.S.C. §1414(d)(1)(A)(VII). 19

20 U.S.C. §1414(d)(1)(A)(i). 19

20 U.S.C. §1414(d)(1)(B)(ii).. 18

20 U.S.C. §1415.. 12

20 U.S.C. §1415(a)-(i).. 42

20 U.S.C. §1415(i)(1)(A). 43

20 U.S.C. §1415(i)(2)(A). 1, 36

20 U.S.C. §1415(i)(3)(B)(i). 24

28 U.S.C. §1291.. 1

28 U.S.C. §1331.. . . . . 1, 41

34 C.F.R. §§300.151. 44

34 C.F.R. §300.151 *et seq*. 42

34 C.F.R. §300.152(c)(1).. 44

34 C.F.R. §300.152(c)(2).. 44

34 C.F.R. §300.152(c)(3).. . . . . 42, 44

*34 C.F.R. §300.153(a). 44

34 C.F.R. §300.502(d). 32

100 Stat. 796 (1986). 37

Fed. R. Civ. P. 8(c)(1). 43

Fed. R. Civ. P. 56(c). 49

Patient Protection and Affordable Care Act, 124 Stat. 119. 40

GLOSSARY

2012 decision	The March 9, 2012 administrative hearing officer's determination
Children's Guild	Children's Guild School
DCPS	District of Columbia Public Schools
Eagleton	The Eagleton School
FAPE	Free appropriate public education
IDEA	Individuals with Disabilities Education Act
IEP	Individualized education program
Katherine Thomas	Katherine Thomas School
Kingsbury	Kingsbury Day School
Lindamood-Bell	Lindamood-Bell Learning Processes™
Meridell Center	Meridell Achievement Center
OSSE	Office of the State Superintendent of Education for the District of Columbia
The District	The District of Columbia

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case under 20 U.S.C. §1415(i)(2)(A) and 28 U.S.C. §1331. This Court has jurisdiction over this appeal under 28 U.S.C. §1291 because it is an appeal from a final order of the district court. The order in question was entered on December 3, 2014, and appellants timely noted an appeal on December 31, 2014.

STATEMENT OF THE ISSUES

1. Whether the compensatory education awarded to a special education student, found to have been deprived for more than six months of the free appropriate public education ("FAPE") to which he was entitled under the Individuals with Disabilities Education Act ("IDEA"), was sufficient when the award included no services to make up for lost instructional time, and was instead limited to occupational therapy to remediate behavioral problems that developed during the period of FAPE denial.

2. Whether parents and students who prevail in IDEA due process hearings may file suit to enforce their favorable decisions to effectuate Congress's intent, in enacting IDEA, to protect the rights of disabled children and their parents to secure the FAPE to which they are entitled.

3. Whether a more than two-year delay in offering a disabled student the therapeutic residential placement deemed necessary to his educational progress mooted a claim for injunctive relief to compel that offer, although the issue of compensatory education during the period of delay remained open.

STATEMENT OF THE CASE

Congress enacted the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* ("IDEA"), *inter alia,* "...to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living..." and to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. §1400(d)(1)(A) and (B). IDEA aims to ensure that every child has a meaningful opportunity to benefit from public education. To serve that goal, public school systems must provide a "free appropriate public education," or FAPE, to all resident children with disabilities. 20 U.S.C. §1412(a)(1)(A); *Boose v District of Columbia,* ___ F.3d ___, 2015 U.S. App. LEXIS 8599, 2015 WL 3371818 (D.C. Cir., May 26, 2015); *Reid ex rel. Reid v. District of Columbia,* 401 F.3d 516 (D.C. Cir.

2005). The primary tool for ensuring delivery of a FAPE is the "individualized education plan," or IEP. 20 U.S.C. §§1412(a)(4), 1414(d).

If a school district fails to offer a disabled student an appropriate IEP, or fails to do so in a timely fashion, the district has denied the student a FAPE. *Boose v. District of Columbia, supra.* Parents who wish to challenge a school district's failure to offer their child a FAPE have several procedural safeguards available to them, among them the right to an administrative due process hearing. 20 U.S.C. §1415. The remedies available if the school district is found to have denied the student a FAPE include compensatory education. *Boose v. District of Columbia, supra; Lesesne ex rel. B.F. v. District of Columbia,* 447 F.3d 828 (D.C. Cir. 2006); *Reid ex rel. Reid, supra.*

Courts have broad discretion to fashion appropriate remedies if a FAPE denial has affected the student's substantive rights. *Florence County School District Four v. Carter,* 510 U.S. 7 (1993); *Boose v. District of Columbia, supra.*

In a March 9, 2012 hearing officer's determination ("2012 decision"), hearing officer Michael A. Lazan found that the District of Columbia Public Schools ("DCPS") had denied minor plaintiff B.D., a disabled child entitled to special education, a FAPE from August 29, 2011 through the date of his decision, but awarded as compensatory services only occupational therapy designed to remediate

behavioral problems that arose during the first period of FAPE denial (August 29, 2011 through October 11, 2011). Mr. Lazan further ordered DCPS to, *inter alia,* prospectively provide 1:1 instruction for B.D., along with other services to be determined by the IEP team, while it assessed him. DCPS was then to develop an IEP for B.D., completing it within 70 days, or by May 18, 2012. Docket #31-1, pp. 32-34, 42.

The compensatory education award was insufficient to meet the standard of putting the student in the educational position he would have occupied had he not been denied a FAPE. Furthermore, DCPS offered B.D. no services beyond those specifically enumerated in the 2012 decision (tutoring and occupational therapy), nor did it meet the IEP completion deadline. B.D. therefore endured many additional months without a FAPE.

The district court found that B.D. and his parents, Anne Davis and Brantley Davis ("the Davises") could not judicially enforce the 2012 decision and therefore denied them a remedy for DCPS's failure to carry out the 2012 decision's mandate. The district court further found that DCPS's belated "large" compliance with the 2012 decision in October 2012 left nothing to enforce, and that an April 4, 2014 offer of a therapeutic residential placement mooted the Davises' complaint of failure to act on a 2012 finding that he needed such a placement. Finally, the district court held

that confining compensatory education to three months of occupational therapy to address interfering behaviors was sufficient, and ruled against B.D. and his parents on their appeal from the 2012 decision's failure to consider or award additional compensatory services.

Events leading to the 2012 administrative proceedings

B.D., now 15 years old, attended the Kingsbury Day School ("Kingsbury") for the three school years ending in June 2009, per a DCPS IEP. Docket #31-1, pp. 12-13, 41. His IEP called for a full-time special education program that included the related services of occupational therapy, psychological counseling, and speech and language therapy.[1] Due to substantial regression during the 2008-09 school year, his June 9, 2009 IEP recommended a change from Kingsbury. Docket #31-1, p. 13.

From October 21, 2009 until August 29, 2011, B.D. received his education in a home-based program that consisted of 21 hours of 1:1 service, including tutoring, speech, counseling services and occupational therapy. Docket #31-1, p. 14.

In Spring 2011, DCPS and the Davises arranged for him to attend the Katherine Thomas School ("Katherine Thomas"), a private, full-time special education school.

---

[1] "Related services" are supportive and other services designed to help a child with a disability benefit from special education. 20 U.S.C. §1401(26)(A).

B.D. entered Katherine Thomas on August 29, 2011. Docket #31-1, pp. 14, 41. On September 21, 2011, Katherine Thomas informed DCPS that B.D. could not remain there past October 11, 2011. Docket #31-1, p. 15. According to Katherine Thomas, B.D. engaged in disruptive and unsafe behavior. He was unable to focus after lunch/recess and could not stay in a classroom more than 15-20 minutes at a time. He was on a 1:1 plan in the afternoon. Docket #31-1, p. 15. Katherine Thomas's behavior management program was ineffective with him. Docket #31-1, pp. 15-16. Academically, Katherine Thomas reported that B.D. appeared to be functioning at the kindergarten or first grade level, but could not identify most of his academic strengths or weaknesses with certainty. Docket #31-1, pp. 15-16

In late September/early October 2011, Katherine Thomas prepared a draft IEP for B.D. for use elsewhere. Docket # 31-1, p. 16; Docket #31-7, pp. 33-49. The IEP provided for instruction outside the general education environment 100% of the time, speech/language services, occupational therapy, and behavioral support services. Docket #s 31-7, p. 49; 31-10, p. 46. On October 11, 2011, DCPS proposed placing B.D. at the Children's Guild School ("Children's Guild"), using the Katherine Thomas-developed IEP. Docket #31-1, pp. 17, 41. The Davises did not know before then that DCPS had been considering placing B.D. at Children's Guild. Docket #33-11, p. 38.

The proposed IEP indicated that B.D.'s present levels of academic achievement in math and reading were mostly unknown, due to inability to assess him or keep him in class longer than about 15 minutes. Docket #s 31-1, pp. 17-18; 31-7, pp. 35-37. The same IEP indicated that B.D. could not write a legible sentence and that he needed to work on basic writing skills. Docket #s 31-1, pp. 18-19; 31-7, pp. 37-38.

The Davises objected to the October 11, 2011 IEP and to Children's Guild. Docket #31-1, p. 17. The Davises asked DCPS to resume B.D.'s home tutoring. DCPS refused. Docket #31-1, p. 17. The Davises rejected DCPS's proposal and began providing, at their own expense, home tutoring and occupational therapy for B.D. Docket #31-1, p. 22. Ms. Davis subsequently visited Children's Guild and concluded that it was not appropriate for B.D. Docket #s 33-11, pp. 42-45, 48-50; 33-12, pp. 1-8.

B.D. was a "changed child" following his experience at Katherine Thomas. Docket #31-1, p. 16. He became more compulsive, began "picking" on things, and became more reactive to sound. *Id.* Katherine Phillips, an occupational therapist who worked with B.D. before and after his time at Katherine Thomas, found that his behavior regressed following his Katherine Thomas enrollment. She said his impulsivities had increased, he was very angry at first, his pretend play was around negative emotions, and he resumed obsessive behaviors that had disappeared prior

to his entry into Katherine Thomas. Docket #33-4, pp. 3-23. After leaving Katherine Thomas, B.D. became alarmed in large rooms, and did not like to engage in back-and-forth communication. Docket #33-4, pp. 23-24. He was not able to work with a peer. Docket #33-4, pp. 24-25. He worried about noises, such as fire alarms, loud cars or the sound of backfiring, and the sounds sometimes caused him to yell profanities. Docket #33-4, pp. 25-26. She had to work with him to "unlearn" these new, or newly intensified, post-Katherine Thomas problem behaviors. Docket #31-1, pp. 22-23.

The psychiatric residential treatment facility referral

DCPS convened another IEP meeting on November 29, 2011. Docket #32-1, pp. 16-68. At that meeting, Benjamin Persett, DCPS's designated program manager for B.D., suggested that DCPS refer B.D. to the District of Columbia Department of Mental Health for consideration for admission to a psychiatric residential treatment facility, also known as a "PRTF," and that DCPS prepare the paperwork needed to begin the referral. Docket #32-1, pp. 56, 62, 66. On December 19, 2011, DCPS forwarded to DMH an "Admission to a Psychiatric Residential Treatment Facility Medical Necessity Review Form," signed by Mr. Persett and his supervisor, Joshua Wayne. Docket #31-1, p. 42; Docket #31-9, pp. 24-40; Docket #32-3, p. 21. In the form, DCPS said:

> [B.D.] is not presently ready to be placed in an educational setting. His clinical picture is very complex and until we have a clear assessment of his multiple diagnoses, and how all of these factors are playing out in his functioning we will not be addressing this child's needs due to inability to develop an appropriate educational program absent the needed information. There is also a need to assess his visual problems and to develop elaborate treatment strategies to give him the tools to cope with this impairment. We also need a greater understanding of his anxiety symptomatology and elaborate a proper treatment for them. In addition, there is a great need to assess the proper medication regime that might best be suited for his needs. **The ideal place for this to take place is a therapeutic in-patient treatment facility, where he can be observed, and treated.** In my opinion, placing him in an educational school without further exploring the multiplicity of his impairments, its effects, its treatment, might put him at risk for worsening of his psychological condition. Reintegration into an education setting has failed; a [Psychiatric Residential Treatment Facility] is appropriate to meet [B.D.]'s needs.

Docket #31-1, pp. 24-25 (emphasis ours).

The Department of Mental Health's psychiatric residential treatment facility review committee scheduled a meeting on February 23, 2012 to consider B.D.'s referral. Mr. Persett, who was to present the referral for DCPS, did not notify the Davises of the meeting. Docket #32-4, p. 2. The Davises learned about the meeting one day before it was to occur, when a Department of Mental Health representative contacted them. They were unable to participate on such short notice. The meeting

was therefore postponed to March 8, 2012. Docket #32-3, pp. 33-34; Docket #32-4, p. 2; Docket #33-11, pp. 6-10.

Ms. Davis met with the Department of Mental Health's psychiatric residential treatment facility review committee as scheduled. Docket #s 38-5, pp. 3-5; 39-1, p. 10. The committee determined that B.D. required placement in a residential treatment facility and forwarded its decision to Mr. Persett. Docket #s 38-5, p. 3; 39-1, pp. 10-11. DCPS notified the Davises of the March 8, 2012 Department of Mental Health decision on March 29, 2012, but did not mention the Department of Mental Health action at B.D.'s post-2012 decision IEP meeting on March 20, 2012. Docket #s 38-5, p. 2; 39-1, pp. 10-11.

Because DCPS did not act on the Department of Mental Health decision and disclaimed any responsibility to do so, Ms. Davis attempted to work with the Department of Mental Health directly, but was unable to identify a facility that met the Department of Mental Health's requirements, and was further informed by the Department of Mental Health that its role was principally limited to determining B.D.'s need for psychiatric residential treatment facility placement; it was the job of the referring agency (here, DCPS) to act on the Department of Mental Health's certification once it was made. Docket #s 38-5, p. 2; 38-6, pp. 2-3; 39-1, pp. 11-13. The Department of Mental Health re-certified B.D.'s need for placement in a

psychiatric residential treatment facility on May 7, 2012, again sending the certification to Mr. Persett. Docket #38-10, pp. 2-4.

In administrative proceedings, DCPS initially denied that it had referred B.D. to the Department of Mental Health, but at the due process hearing, Mr. Persett acknowledged that he had prepared the first draft of the psychiatric residential treatment facility referral to the Department of Mental Health, and that both he and his supervisor signed it on December 15, 2011. Docket #s 33-3, pp. 8-9; 33-3, 21-22. According to Mr. Persett, the referral was intended to get necessary medical information and intervention to stabilize B.D. Docket #33-3, pp. 18-22.

In the district court, the District at first reverted to the position that DCPS had nothing to do with the Department of Mental Health psychiatric residential treatment facility referral, but ultimately reversed itself on summary judgment, claiming instead that it had always worked collaboratively with the Department of Mental Health. Docket #s 30, p. 4; #31-10, pp. 46-49; 41, p. 24. The District offered, as purported proof of its efforts in this area, an April 4, 2014 letter of acceptance from the Eagleton School ("Eagleton"), which the District alleged constituted an appropriate therapeutic residential placement for B.D. Docket #s 41, p. 25; 41-3.

The administrative proceedings

The Davises initiated due process proceedings under IDEA on January 9, 2012. They sought, *inter alia,* a finding that DCPS had denied B.D. a FAPE, starting with his placement at Katherine Thomas in August 2011; short-term placement at Meridell Achievement Center ("Meridell Center"), a residential diagnostic and treatment center; development of a new IEP for B.D. upon receipt of Meridell Center's diagnostic and evaluative reports; consideration of compensatory education services in developing the new IEP; and reimbursement of the costs they had incurred in providing educational and related services for B.D. Docket #31-10, pp. 23-30.

DCPS's January 19, 2012 response contended that it had provided a FAPE for B.D. and that its IEP for B.D. was adequate, and further denied Meridell Center's appropriateness. Docket #31-10, pp. 46-49.

The hearing took place on February 27-29, 2012. Docket #31-1, p. 9. Ms. Davis testified that when she first arranged for tutoring following the October 11, 2011 IEP meeting, B.D. was tutored five to six hours per week, at her family's expense. The family also paid for occupational therapy for B.D. Docket #33-12, pp. 15-16. The tutoring hours were limited by financial constraints and concern that he could not then tolerate more hours, even though before he entered Katherine Thomas he had received 15 hours of tutoring per week. Docket #33-12, pp. 18-20. The

Davises did not provide psychological counseling because the family could not afford that service and because it was difficult to fit it into B.D.'s schedule of tutoring and occupational therapy. Docket #33-12, pp. 20-22.

At the time of the hearing, Judith Ross, the tutor, was working with B.D. two to three times per week, typically in two-hour sessions. Docket #33-9, p. 14. He was not tutored on any day when either Ms. Ross or Ms. Davis was unavailable; there had been weeks when he had been tutored only once. Docket #33-12, pp. 18-19. The Davises would have liked to increase the tutoring, but could not afford to do so. Docket #33-12, pp. 19-20.

Ms. Ross testified that B.D. had "a lot" of gaps in his knowledge due to missed school and information, and needed to catch up. She recommended a baseline assessment to determine his present level of functioning. Docket #s33-8, p. 39; 33-9, p. 8. Based upon her ongoing informal assessments of B.D., she believed he was functioning at many different levels in various areas (writing, reading, decoding, and multiple types of math). Docket #33-9, pp. 9-10.

Ms. Ross reported that as of February 2012, B.D. was able to tolerate about two hours of instruction in a day, but needed breaks approximately every 20 minutes. He did better in the mornings. For more challenging matters, he could only work for 10 to 15 minutes at a time. Docket #33-9, pp. 14-17. It was hard for Ms. Ross to tell

where B.D. was academically. Docket #33-9, p. 26. She recommended a school environment with 1:1 instruction, "calm" children, and a very small classroom environment. Docket #31-1, p. 26. Lacking formal assessments, Ms. Ross was not following a defined educational program with him, instead selecting daily activities according to B.D.'s ability to concentrate and his interest. Docket #33-9, pp. 10-14.

Ms. Ross said B.D. needed to learn to be back in school, and to fill in his academic gaps. Docket #33-9, pp. 26-30. She described her tutoring as a "small baby step" toward B.D.'s return to the classroom, saying that although she believed he had derived educational benefit from her work with him, it was not enough. Docket #33-9, pp. 30-31.

Ms. Phillips, B.D.'s occupational therapist, recommended intensive therapy to get B.D. back to a point where he could be successful outside of his home and therapy offices, and described a program to accomplish this. Among the program's goals was "regulating" B.D. to allow him to interact with peers and sit in a classroom, both of which were difficult for B.D. at that point. Docket #33-4, pp. 29-30. As of the hearing, Ms. Phillips believed that B.D. could not successfully attend school, at least not for long and not without 1:1 trained adult support. Docket #33-4, pp. 31-32, 35-36.

Meridell Center representatives testified to the clinical and educational programs available if B.D. were to go there. Docket #s 33-6, pp. 18, 22-43; 33-10, pp. 14-38. They explained that Meridell Center offers diagnostic testing, evaluations and treatment for children with emotional and behavioral disabilities and mental health problems. Docket #33-6, p. 24. The typical patient stay at Meridell Center is three months. Docket #33-6, p. 30. Meridell Center patients attend the University of Texas Charter School while there. Docket #33-6, p. 31. During the patient's stay at Meridell Center, it tries to get a clearer picture of the patient's deficits, and develops a treatment plan to be used following discharge. Docket #33-6, pp. 30-31.

The 2012 decision

Mr. Lazan found that DCPS had denied B.D. a FAPE while enrolled at Katherine Thomas and since October 11, 2011 through the date of his decision. Docket #31-1, pp.27-31. He found that the tutoring and occupational therapy services for which the Davises had arranged had benefitted B.D., and ordered DCPS to reimburse the Davises for the expenses they had incurred in providing those services from October 11, 2011 through the date of his decision. Docket #31-1, pp. 31-32. He also ordered DCPS to prospectively fund portions of Ms. Phillips's proposed occupational therapy program for five hours per week for three months, to help B.D.

"unlearn" some of the behavioral difficulties that resulted from his stay at Katherine Thomas. Docket #31-1, pp. 32-34.

Mr. Lazan recharacterized the proposed Meridell Center placement as a request for another type of compensatory education,[2] and denied it; however, he agreed that B.D. required diagnostic and evaluative services, and ordered DCPS to determine, and then complete, the necessary assessments within 60 days. Docket #31-1, pp. 34-37. Mr. Lazan did not otherwise address the Davises' request for compensatory education. Docket #31-1, pp. 32-36. He further ordered DCPS to:

- immediately reconvene B.D.'s IEP team to determine the antecedents to B.D.'s behavior at school;
- develop a behavioral plan to allow B.D. to attend school;
- determine appropriate services for B.D. to receive until the assessments were completed, such services to include 1:1 home instruction for two hours per day,

---

[2] Regarding Meridell Center, the Davises' actual requested relief was an order directing DCPS to place and fund B.D. there for diagnosis and evaluation, to develop a new IEP for B.D. upon receipt of Meridell Center's diagnostic and evaluation material, and to consider, in developing the new IEP, compensatory services B.D. might require to address the failure to provide a FAPE since August 2011. Docket #31-10, p. 27. The Davises did not present Meridell Center itself as the proposed compensatory service.

five days per week, with consideration given to attempting to move the instruction into a school building after 30 days; and

- convene an IEP team meeting within 10 days after the assessments were completed, to create an educational program for B.D.

Docket #31-1, p. 39.

Post-2012 decision activities

DCPS convened the first post-2012 decision IEP meeting on March 20, 2012. It authorized a psychological review (of B.D.'s previous evaluations, but no new testing), and speech/language, occupational therapy and social history evaluations. Docket #39-1, p.7. DCPS refused to initiate psychological counseling for B.D., saying the 2012 decision did not require it and that it was inappropriate absent confidence that it would produce immediate benefit. Docket #s 38-38, pp. 4-5; 39-1, p. 8.

DCPS directed Ms. Davis to arrange for continued tutoring and occupational therapy services, and issued letters authorizing payment after the services had been provided. Docket #s 38-24, p. 2; 39-1, pp. 20-21. This arrangement, in which DCPS pays after the fact for services Ms. Davis finds on her own, remains the method by

which DCPS has attempted to comply with the 2012 decision. Docket #s 38-32, p. 2; 38-35, pp. 5-6; 39-1, pp. 20-21.

DCPS did not develop B.D.'s educational program within 10 days after completing assessments (or by May 18, 2012). Docket #39-1, pp. 6-7, 14-23. DCPS's attempted May 18, 2012 IEP meeting was postponed because DCPS provided limited notice of the meeting and refused until one day before the meeting to compensate Ms. Ross and Ms. Phillips, B.D.'s then-current service providers, for their participation, thus causing them to decline to attend.[3] Ms. Phillips was able to attend after the payment issues were worked out, but Ms. Ross was not. Docket #s 38-15, p. 2; 38-16, pp. 2-3; 38-17, pp. 2-4; 38-18, pp. 2-4; 38-19, pp. 2-9; 38-20, pp. 2-4; 38-21, pp. 2-9; 38-22, pp. 2-3; 38-39, pp 3-31; 39-1, pp. 14-18.

DCPS next held an IEP meeting on June 8, 2012. The team reviewed DCPS's assessments and information from B.D.'s then-current service providers and then, over Ms. Davis's objections, changed B.D.'s disability classifications. Docket #s 38-27, pp. 2-3; 38-28, pp. 3-7; 38-40 , pp. 1-54; 38-41, pp. 39-1, pp. 18-19.

---

[3] The student's teacher is a required IEP team member, while related service providers are included at the discretion of either the parent or the agency. 20 U.S.C. §1414(d)(1)(B)(ii) and (vi).

The June 8, 2012 meeting did not reach most of the remaining IDEA-required IEP components, necessitating more meetings.[4] Docket #39-1, pp. 19-23. Before the meeting ended, Ms. Davis asked DCPS to initiate speech/language services and a social skills group, as DCPS's assessments had identified needs for both. Speech/language services were declined because there were no IEP goals to implement, while DCPS agreed to consider providing social skills training but never took further action. Docket #s 38-31, pp. 2-3; 38-41, pp. 13-16; 39-1, p. 20.

DCPS completed most of the 2012 decision-ordered IEP on July 24, 2012. The IEP provided for weekly special education services as follows: specialized instruction completely outside general education, speech/language and occupational therapy, and behavioral support services. Docket #38-53, p. 23. DCPS later added parent counseling and training to the IEP. Docket #42-1, p. 24.

The July 2012 IEP did not identify a location at which it would be implemented.[5] Docket #38-53. The DCPS IEP team members recommended that B.D. attend a nonpublic day program for disabled students; however, no day program

---

[4] *See* 20 U.S.C. §1414(d)(1)(A)(i).

[5] An IEP must identify, *inter alia,* the location at which the services for which it provides will be delivered. *See* 20 U.S.C. §1414(d)(1)(A)(VII); *A.K. v. Alexandria City School Board,* 484 F.3d 672 (4th Cir. 2007).

accepted him. Docket #38-35, p. 7. In October 2012, DCPS and the Office of the State Superintendent of Education ("OSSE") began searching for a residential facility for B.D. Docket #38-35, p. 7.

Three residential facilities expressed interest in B.D. in fall 2012. The offer of admission to one expired, the second did not accept B.D. because DCPS would not fund a trip there for an in-person interview, while the third withdrew an offer because it objected to Ms. Davis's questions about its program. Docket #38-35, pp. 7-13.

B.D. did not receive tutoring on the schedule ordered by the hearing officer. Ms. Ross could not meet it, and the Davises were unable to find a substitute. Docket #39-1, pp. 5-6. Additional gaps in B.D.'s tutoring and occupational therapy resulted from Ms. Ross's and Ms. Phillips's unwillingness to work at the rates DCPS authorized, and in no case without first receiving written authorizations of payment for the continued services. Docket #38-35, p.6.

In July 2012, DCPS authorized speech/language and psychological services for B.D. under the same arrangement as for tutoring and occupational therapy: Ms. Davis was to find the service providers, who would be paid after they rendered the services and submitted invoices to DCPS. Docket #38-52, pp. 2-3. She was unable to find service providers who would work with B.D. at the approved rates, but DCPS refused to authorize higher amounts. Docket #38-35, pp. 5-6.

In March 2013, DCPS terminated B.D.'s 2012 decision-ordered services because it had proposed placement in a residential treatment facility. Because the Davises had concerns about this facility, they declined the proposal and instead sought home instruction for B.D. through his neighborhood school. DCPS had not responded as of May 10, 2013, when a hearing officer presiding over a new due process complaint ordered DCPS to resume B.D.'s 1:1 instruction, as ordered by the 2012 decision. Docket #38-35, pp. 10-11. On September 3 and 4, 2013, DCPS provided home instruction via its own employee, but stopped upon a claim that B.D.'s behavior precluded further home visits. Docket #38-36, pp. 2-3, 7-12. DCPS refused to resume B.D.'s 1:1 home instruction until required to do so by a preliminary injunction entered on November 19, 2013 in *B.D., et al. v. District of Columbia,* Civil Action No. 13-01223 (RJL). Docket #48, p. 10, n. 5.

On April 30, 2013, Elizabeth Stoff, an educational consultant, proposed a compensatory education plan for B.D. Docket #38-55. In it, Ms. Stoff noted the following circumstances that militated in favor of compensatory services:

- The only direct instruction B.D. had received since October 2011 was tutoring, occupational therapy and instruction at Lindamood-Bell Learning Processes™. ("Lindamood-Bell") The instruction has been sporadic and has not been

provided by a special educator. Ms. Ross, his tutor, did not follow a curriculum and received no instructional support from DCPS.

- DCPS authorized Lindamood-Bell services for B.D. in December 2012 due to the continuing absence of a "location" at which B.D.'s IEP could be implemented. B.D. participated in the highly structured Lindamood-Bell program five days each week, and made educational progress, although his performance was inconsistent.
- B.D.'s performance in math was inconsistent, with many gaps. Baseline testing suggested that his skills were at the 1st-2nd grade level.
- B.D.'s written language was at the primary level, and his handwriting was poor.
- B.D. was reading at a 2nd-3rd grade level. While comprehension was a relative strength, it was difficult to get him to focus on topics not of high interest.
- As of July 5, 2012, B.D.'s motor skills were significantly delayed across all areas. There were clinical occupational therapy concerns in the areas of inconsistent regulation, poor adaptive coping skills, decreased body awareness and sequencing skills, and sensory processing difficulties.
- B.D. had not received other services required by his IEP, and therefore deemed necessary to his educational progress, due to lack of authorization from DCPS

> for parent training, lack of authorization for sufficient payment to secure speech/language and behavioral therapy providers, and logistical problems in taking B.D. to all of these separate services.

Docket #38-55, pp. 6-8. Ms. Stoff calculated that B.D. had not received appropriate instruction from at least the date of the 2012 decision through March 29, 2013. She recommended a comprehensive compensatory services plan that incorporated Lindamood-Bell instruction and all of the IEP-designated therapies and services, all initially to be provided 1:1. Docket #38-55, pp. 9-15.

Proceedings in the district court

The Davises initiated this action in the district court on June 7, 2012. Their complaint asked the court to reverse the 2012 decision's failure to award B.D. compensatory services other than occupational therapy, enforce the rest of the 2012 decision (including awarding B.D. additional compensatory services to address DCPS's noncompliance), and order DCPS and DMH to work collaboratively to develop the programs that B.D. needed and to implement DMH's finding that B.D. required a PRTF. Docket #1, pp. 1-17. The complaint was amended twice, to supplement the factual allegations and relief sought, and to add a count for an award

of legal fees and expenses as prevailing parties in an IDEA action.[6] Docket #29, pp. 1-23.

The parties cross-moved for summary judgment. Docket #s, 38, 39, 41, 42, 44, 45 & 47. On December 3, 2014, the district court (Leon, J.) granted the District's motion as to Counts One, Two and Three of the second amended complaint, and denied the Davises' cross-motion on those counts. Judge Leon granted the Davises' motion as to Count Four, and denied the District's cross-motion on that count. Docket #49.

Judge Leon upheld Mr. Lazan's decision to award only occupational therapy in compensatory services, found as a matter of law that the Davises were not entitled to enforce the 2012 decision in court and that their only remedy for DCPS'S noncompliance was an administrative complaint to OSSE, further found that any required exhaustion of administrative enforcement was not futile because DCPS had "largely complied" with the 2012 decision, and found the allegations about DCPS's and the Department of Mental Health's failure to find an appropriate therapeutic residential placement for B.D. moot because DCPS recommended placement in such

---

[6] *See* 20 U.S.C. §1415(i)(3)(B)(i).

a facility in October 2012, and identified a specific one in April 2014.[7] The district court did not address the Davises' argument that delayed compliance gave rise to a claim for compensatory education, negating mootness. Docket #44, pp. 19-21. The district court awarded the Davises their "prevailing party" legal fees and expenses. Docket #48, pp. 11-13. The Davises timely appealed from the judgment.

STANDARD OF REVIEW

A party challenging the administrative determination in an IDEA case bears the burden of persuading the court that the hearing officer was wrong, and a court

---

[7] We accept, solely for purposes of this appeal, the district court's comment that both the October 2012 IEP and the April 4, 2014 acceptance by a residential school (the Eagleton School) were appropriate for B.D. As noted in the district court's opinion, however, the October 2012 IEP was challenged in a separate due process complaint filed on April 8, 2013, and litigation resulting from that complaint is currently pending in the district court in a separate action, *B.D., et al. v. District of Columbia,* Civil Action No. 13-01223 (RJL) ("*B.D. II*"). Docket #48, p. 10, n. 4.

The district court also said in its opinion (Docket #48, p. 10, n. 5) that Eagleton's appropriateness is at issue in Civil Action No. 13-01223 (RJL). That is not correct. The proposal to place B.D. at Eagleton arose following the due process hearing that gave rise to *B.D. II*, and was not considered in that action. This can be verified by reviewing the records of Civil Action No. 13-01223 (RJL). Eagleton surfaced as the District's proposed placement when it moved the district court to vacate its November 19, 2013 preliminary injunction. That motion was denied.

This Court may take judicial notice of the records of another court.

upsetting the officer's decision must at least explain its basis for doing so. *Reid ex rel. Reid v. District of Columbia, supra,* citing *Kerkam v. McKenzie,* 274 U.S. App. D.C. 139, 862 F. 2d 884 (1989) ("*Kerkam I"*). The hearing officer's decision is, however, entitled to less deference than is conventional in administrative proceedings. *Id.* A hearing officer's determination that lacks reasoned and specific findings deserves little deference. *Reid ex rel. Reid v. District of Columbia, supra,* citing *Kerkam v. Superintendent, D.C. Public Schools,* 289 U.S. App. D.C. 239, 931 F.2d 84 (1991) ("*Kerkam II").*

When the district court, as here, reviews the hearing officer's decision solely on the administrative record, without receiving additional evidence, this Court's standard of review is the same as in any summary judgment case: *de novo.* The Court applies the same non-deferential standard the district court should have applied. *Id.*

Although in this case the district court received additional evidence, that evidence applied exclusively to Counts Two and Three of the second amended complaint, which addressed events that occurred after the 2012 decision issued. Count One–the Davises' appeal from the adverse portion of the 2012 decision–was decided solely on the administrative record. Accordingly, this Court reviews all aspects of the district court's decision under the *de novo* summary judgment standard.

SUMMARY OF ARGUMENT

The right to a free appropriate public education ("FAPE") guaranteed to disabled students by the Individuals with Disabilities Education Act ("IDEA") is frustrated if, once it is determined that a public agency denied a disabled student a FAPE, the student is not awarded compensatory education services sufficient to place the student in the position he would have occupied had he received a FAPE on time. The hearing officer in B.D.'s administrative case–affirmed by the district court–erred when he awarded compensatory services only to remediate the negative behavioral impact of the FAPE denial, but did not otherwise address the educational loss B.D. suffered during more than six months without a proper educational plan.

Following the administrative decision, the District of Columbia Public Schools did not comply with various requirements imposed by the decision, causing B.D. further losses. The district court's decision to deny B.D. and his parents an opportunity to enforce that decision in court further frustrated IDEA's most fundamental objectives, by effectively leaving them without a remedy for noncompliance with the parent- and child-favorable portions of the administrative decision. The First, Third and Ninth Circuits have all held that IDEA due process determinations are enforceable in court. This Circuit should join their well-reasoned decisions and hold similarly for the District of Columbia.

A two- or more-year delay (until 2014) in identifying a therapeutic residential placement for a student for whom such a placement was identified as educationally necessary in 2011 does not moot a claim for injunctive relief to effectuate the needed placement. The student is entitled to pursue compensatory educational services to make up for the substantial delay in acting on the recognized need.

ARGUMENT

I. Upon finding that B.D. was denied a FAPE for more than six months, the hearing officer should have considered the compensatory education required to place him at the educational level he would have achieved had he received appropriate educational services; awarding only occupational therapy to address deteriorating behavior did not satisfy the legal standard.

When a school district denies a child a FAPE, the courts have "broad discretion" to fashion an appropriate remedy. *Boose v. District of Columbia, supra; Florence County School District Four v. Carter, supra*. This includes the power to order "compensatory education," defined as educational services designed to make up for past deficiencies in the child's program. *Boose v. District of Columbia, supra; Reid ex rel. Reid v. District of Columbia, supra.* The hearing officer in this case found that DCPS denied B.D. a FAPE and consequently awarded him compensatory

education services, but limited that service to three months of occupational therapy to help him "unlearn" the interfering behaviors that developed during B.D.'s inappropriate placement at Katherine Thomas. The decision did not address B.D.'s affirmative loss of educational ground, although there was ample evidence to show that this loss occurred.

Mr. Lazan found that DCPS first denied B.D. a FAPE from August 29, 2011 through October 11, 2011, via the inappropriate Katherine Thomas placement. The evidence at the hearing showed that B.D. likely made no academic progress during that time, and regressed behaviorally. According to Katherine Thomas, it was not even able to fully assess B.D. in order to determine his current levels of academic performance.

Mr. Lazan further found that DCPS denied B.D. a FAPE from October 11, 2011 through the date of his decision, via an inappropriate IEP and the proposal to send him to the inappropriate location, Children's Guild. The evidence at the hearing showed that although the Davises provided some educational services during the October 11, 2011 time through the hearing, the scope of services was dictated by financial and logistical concerns. The total "program" the Davises were able to provide was not sufficient to meet B.D.'s needs, and did not pretend to do so.

Before entering Katherine Thomas, B.D. had received a home-based program that consisted of 15 weekly hours of instruction, plus six weekly hours of three different supportive therapies designed to enable him to benefit from the instruction. Following his Katherine Thomas departure, B.D. received no more than six hours of instruction per week, occupational therapy, and nothing else. The instruction, moreover, was provided by a general educator, who followed no defined curriculum and instead worked on reading, writing and mathematics with B.D. according to his daily interest and receptivity.

While the hearing officer correctly found that B.D. benefitted from his tutoring, it in no way provided the structured, organized and consistent program he should have received. As Ms. Ross testified, the long-term absence of formal assessments made it impossible to determine how much progress B.D. had made under her guidance.

Recognizing that the absence of solid evaluative information concerning B.D.'s present academic levels and the best approach to address the many behavioral triggers that impeded his learning prevented crafting both an appropriate IEP and an effective compensatory education plan for B.D., the Davises asked the hearing officer to order comprehensive evaluations that would serve as the springboard to design both the IEP and the compensatory education plan. *See, e.g., Boose v. District of Columbia, supra*

(designing a satisfactory prospective IEP does not guarantee undoing damage done by prior violations and does not take the place of adequate compensatory education). They suggested placement at Meridell Center, to take advantage of its comprehensive diagnostic and evaluation capabilities, to achieve that end.

The hearing officer disagreed with the Meridell Center recommendation; however, he misunderstood the Davises' request to send B.D. there as one for compensatory education itself, rather than for the tools to craft a compensatory education plan. He then analyzed the Meridell Center proposal as if the Davises wanted it as an educational placement or, alternatively, as a related service incident to an educational program. Docket #31-1, pp. 34-36. He relied, for example, on *Mary T. v. School District of Philadelphia,* 575 F.3^{d} 235 (3^{d} Cir. 2009), which addressed when a residential facility qualifies as a special education placement. Because the Davises were not seeking placement at Meridell Center to deliver a FAPE to B.D. prospectively, this was error.

Assuming, *arguendo,* that the hearing officer correctly understood the Meridell Center request, B.D. could not be denied compensatory education merely because the decision maker disagreed with how the Davises wanted it provided. In *Reid ex rel. Reid v. District of Columbia, supra,* this Court rejected the parents' proposed formula of one hour of service for every missed day of school, but remanded the case to the

district court to receive additional evidence and construct a compensatory education plan specifically designed to meet that student's unique needs. Thus, once the hearing officer found that B.D. had been denied a FAPE (over a total time period, as of the date he issued his decision, of more than six months), he should have proceeded to craft an appropriate compensatory education plan, or direct the parties to obtain the information needed to craft one. *See, e.g.,* 34 C.F.R. §300.502(d) (hearing officer may request an independent educational evaluation as part of a hearing on a due process complaint).

The hearing officer's misperception of the Davises' compensatory education request, and failure to apply the appropriate (*Reid*) standard for determining the scope of a compensatory education award, led him to award occupational therapy as B.D.'s sole compensatory service. Although continued intensive occupational therapy was essential to help B.D. "unlearn" the detrimental behaviors he had acquired during his time at Katherine Thomas, remediating the behaviors was only a first step toward educating B.D. The 2012 decision contained nothing else directed toward putting B.D. in the educational position he would have occupied had he not been denied a FAPE beginning in August 2011.

The district court perpetuated the hearing officer's mistake, calling the request for placement at Meridell Center a "remedy." Docket #48, p. 7. The court agreed

with the hearing officer that Meridell Center was not an appropriate educational placement for B.D., disregarding the Davises' argument that Meridell Center was proposed as primarily a diagnostic and evaluative placement, not an educational one (although there was testimony at the hearing that Meridell Center would have provided educational services for B.D. while he was there).

The district court found the hearing officer's compensatory education discussion adequate because it occupied six pages of the decision and explained Mr. Lazan's reasoning. That reasoning–at least as to the request for Meridell Center's services–did not address the issue presented. A hearing officer's decision that does not make reasoned and specific findings on the issues presented is entitled to little deference. *Kerkam II, supra.*

Neither the hearing officer nor the district court considered the full amount or panoply of compensatory services B.D. required to make up for more than six months of educational loss. Both penalized the Davises for their inability to place before the hearing officer a fully formed compensatory education plan, encompassing all elements of B.D.'s needed services–academic instruction, occupational therapy, speech/language therapy, and psychological services. Ms. Davis testified at the hearing, without question or contradiction from DCPS, that her family had reached the limits of its financial and logistical resources, and therefore had not been able to

provide more for B.D. than the tutoring and occupational therapy he received after October 11, 2011.

The hearing officer, and thus the district court, focused on their disapproval of the setting in which the Davises wanted DCPS to take the next step in providing a FAPE for B.D., as opposed to his need for compensatory services and how the scope of those services was to be determined. Both therefore failed to apply the proper standard for awarding compensatory services, warranting reversal. *Kerkam I; Kerkam II.* B.D.'s remedy for DCPS's past failure to provide a FAPE thus depended entirely on his parents' ability to front the cost of private instruction–a result this Court has held "manifestly incompatible with IDEA's purpose of 'ensur[ing] that *all* children with disabilities have available a free appropriate public education'." *Reid ex rel. Reid, supra,* at 522-523, quoting 20 U.S.C. §1400(d)(1)(A), noting the holding of *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts,* 471 U.S. 359 (1985). *See also Boose v. District of Columbia, supra* (purpose of compensatory education is to make up for past deficiencies).

II. Parents who prevail in special education due process hearings may enforce their decisions in court, without exhausting further administrative remedies.

DCPS did not comply with the 2012 decision. It did not develop an educational program for B.D. by May 18, 2012 (10 days following the 60-day period allowed for evaluations) and did not authorize any services for B.D. during the assessment period other than those identified by name in the 2012 decision (tutoring and occupational therapy), despite the 2012 decision's mandate to immediately convene an IEP team to determine the services B.D. would receive, including (but not limited to) tutoring.

No school even expressed interest in enrolling B.D. until October 2012. B.D. never attended any of those schools, and his IEP was never implemented. DCPS relegated to the Davises the job of securing the educational and related services it approved, but those services were provided inconsistently during this period, or not at all. In this regard, DCPS separately violated IDEA, which defines "FAPE" as "special education and related services that" *inter alia,* are "provided at public expense, under public supervision and direction, and without charge." 20 U.S.C. §1401(9)(A). DCPS's approach to 2012 decision compliance met, at best, the "public expense" criterion for special education. By delegating to Ms. Davis the tasks of finding and arranging for all of B.D.'s educational and related services, by providing

no instructional guidance, and by refusing to respond after receiving notice that the allocated payment amounts were insufficient, DCPS abdicated its responsibilities.

B.D. therefore continued to be deprived of the educational services everyone agreed he needed, through March 2013, when DCPS proposed a residential school that became the subject of a second due process hearing. As indicated *supra,* the compensatory education plan that the Davises' educational consultant prepared at the end of this period, in April 2013, noted many ongoing deficiencies in B.D.'s education. The Davises therefore asked the district court to enforce the 2012 decision by awarding B.D. compensatory education, but the court declined to do so.

A. Favorable special education decisions are enforceable in court

The district court held that parents who prevail in special education due process hearings cannot enforce those decisions in court because they are not "aggrieved" by the decisions and therefore cannot invoke IDEA's specific grant of federal jurisdiction, found at 20 U.S.C. §1415(i)(2)(A), to hear appeals by parties aggrieved by administrative decisions. This holding is inconsistent with IDEA's purpose. The district court's rationale has been rejected by the First, Third and Ninth Circuits in well-reasoned decisions that we urge this Court to follow.

IDEA creates a right, enforceable in federal court, to a free appropriate public education. *Smith v. Robinson,* 468 U.S. 992, 1002, n. 6 (1984), *superseded by statute on other grounds by* Pub. L. No. 99-372, 100 Stat. 796 (1986). While exhausting IDEA's prescribed administrative remedies is a prerequisite to filing suit in court to initially challenge the educational program offered to a disabled student, the Davises satisfied that requirement by filing their due process complaint and seeing it through to a final decision. *D.E. v. Central Dauphin School District,* 765 F.3d 260 (3d Cir. 2014); *Porter v. Board of Trustees of Manhattan Beach Unified School District,* 307 F.3d 1064 (9th Cir. 2002). The only question, therefore, is whether the Davises were barred from filing suit to enforce the favorable portions of the 2012 decision they obtained via the administrative process, because they were not "aggrieved" by these parts of the decision.

In *Nieves-Marquez v. The Commonwealth of Puerto Rico,* 353 F.2d 108 (1st Cir., 2003), the United States Court of Appeals for the First Circuit held that IDEA administrative victories may be enforced in court, finding that holding to the contrary creates the unacceptable result of placing a school district that loses a due process case but chooses not to appeal it in a better position than if it won. As the First Circuit reasoned, if the school district wins in due process, parents can appeal their loss to federal court and, if successful, can invoke the full panoply of court

enforcement remedies. If the school district loses and appeals, the court has the power to issue injunctive relief enforcing the decision. *Id.,* citing *Manchester School District v. Crisman,* 306 F.3d 1, 4 & n. 3 (1st Cir. 2002) and *Zobrest v. Catalina Foothills School District,* 509 U.S. 1 (1993) (upholding preliminary injunctive relief in favor of disabled student). If parents cannot enforce their due process wins unless the school district appeals, however, school districts have an incentive neither to appeal nor to comply with a IDEA administrative decision. *Nieves-Marquez v. The Commonwealth of Puerto Rico, supra.*

The First Circuit found this inconsistent with Congress's intent in enacting the IDEA, said it undercut a number of IDEA's statutory policies (including the integrity of the administrative process), and further said it would produce long delays (as happened with B.D.), contrary to IDEA's preference for prompt resolution of disputes in order to expedite the provision of FAPE to disabled children. *Id.* The First Circuit therefore read the provision that "aggrieved" parties may file suit in federal court under IDEA to encompass students and parents who are aggrieved by a school district's failure either to appeal an adverse decision or to comply with it. *Id.*

Other circuit courts have reached the same conclusion. In *Porter v. Board of Trustees of Manhattan Beach Unified School District, supra,* the Ninth Circuit held that once parents have exhausted their administrative remedies and obtained a

favorable administrative decision, they may proceed directly to court on their claim that the school district has violated IDEA through noncompliance with that decision. The Third Circuit agreed in *D.E. v. Central Dauphin School District, supra.*

D.E., supra, the most recent decision on this subject, noted that it would be "anomalous indeed" to bar a judicial remedy to a party who succeeds administratively but is then frustrated by the school district's failure to carry out the decision. *Id.* In that circumstance, the court held, individuals who seek to enforce a favorable decision are "aggrieved" for IDEA purposes and entitled to pursue those claims in court. *Id.*

Given that among IDEA's fundamental purposes are to ensure that children with disabilities receive the free appropriate public educations to which they are entitled, to give parents effective and meaningful tools to participate in developing their children's educational programs and then to secure their children's rights, and to hold school systems accountable when they fail in these objectives, it is implausible to conclude that Congress would create an elaborate administrative mechanism that school districts could ignore with impunity, secure in the knowledge that if they lost administratively, they still did not have to provide necessary services for the children they are charged with serving. *Nieves-Marquez v. The Commonwealth of Puerto Rico, supra.*

IDEA's silence on particular matters has not historically precluded federal courts from interpreting it to fulfil its mandate to improve educational results for children with disabilities. *See* 20 U.S.C. §1400(c)(1). Thus, in *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts, supra,* the Supreme Court found a right to tuition reimbursement following appropriate parent-initiated unilateral placement in a private program even though that remedy was absent from IDEA at the time. Similarly, this Court, along with (to our knowledge) every other federal circuit, has applied *Burlington's* reasoning to find that compensatory education is an available remedy when a student is denied a FAPE–even though compensatory education is not mentioned in IDEA. *Reid ex rel. Reid v. District of Columbia, supra.*

This analysis is consistent with recent Supreme Court precedent. *See, e.g., King v. Burwell,* 576 U.S. ___ (No. 14-114, June 25, 2015), holding it is "implausible" that Congress intended the Patient Protection and Affordable Care Act, 124 Stat. 119, to operate in a way that frustrates one of the Act's prime objectives, *i.e.,* to expand health insurance coverage and make it affordable. As Chief Justice Roberts wrote in *King v. Burwell, supra*, quoting *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 419-420 (1973): "We cannot interpret federal statutes to negate their own stated purposes."

The district court did not address the Davises' alternative argument that there is general federal jurisdiction to enforce an IDEA decision. Federal courts have original jurisdiction of all civil actions "arising under" the Constitution, laws, or treaties of the United States. 28 U.S.C. §1331. The Davises' IDEA enforcement claim "arises under" a federal law, IDEA, in that the federal right asserted (the right to a FAPE) is intertwined with (is an essential element of) the cause of action asserted. *Local Division 1285, Amalgamated Transit Union, AFL/CIO/CLC v. Jackson Transit Authority,* 650 F.2d 1379 (6th Cir. 1981), *rev'd on other grounds sub nom. Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC,* 457 U.S. 15 (1982). The absence of a specific, IDEA-designated statutory procedure for obtaining judicial review does not defeat a finding that a question "arises under" a federal law, and therefore that the question may be presented to a federal court. *Food Town Stores, Inc. v. Equal Employment Opportunity Commission,* 708 F.2d 920 (4th Cir. 1983), *cert. den. sub nom. Food Lion, Inc. v. Equal Employment Opportunity Commission,* 465 U.S. 2005 (1984).

B. IDEA does not establish a mandatory administrative procedure that must be employed to enforce a favorable due process decision

Over 26 years ago, this Court recognized that the requirement of administrative exhaustion does not apply to IDEA enforcement actions. *Cox v. Jenkins,* 278 U.S. App. D.C. 312, 878 F.2d 414 (1989). Nevertheless, the district court found that the Davises' only means to enforce the parent and child-favorable portions of the March 2012 decision was via an administrative complaint to OSSE, employing the voluntary state complaint procedure available pursuant to 34 C.F.R. §300.151 *et seq.* The court excerpted one sub-subsection of the state complaint regulations in holding that a complaint alleging that a public agency did not comply with a due process hearing decision must be reviewed and resolved by the state complaint office and no one else–OSSE, in the District of Columbia. 34 C.F.R. §300.152(c)(3). This holding ignores the regulatory framework in which the cited provision appears, and imposes an exhaustion requirement Congress never contemplated.

IDEA contains detailed, specific administrative procedures that must be followed by a party who wishes to challenge an action taken during the IEP development process. *See* 20 U.S.C. §1415(a)-(i). These procedures reflect Congress's emphasis upon procedural compliance as means to secure substantive

rights. *Board of Education v. Rowley,* 458 U.S. 176 (1982). These administrative procedures culminate in a decision that becomes "final" if it is not appealed. 20 U.S.C. §1415(i)(1)(A).

In comparison with its elaborate pre-administrative decision requirements, IDEA contains no required administrative procedure to enforce a final administrative decision. Courts cannot create administrative exhaustion requirements that impose additional steps not contemplated by the act. *Porter v. Board of Trustees of Manhattan Beach Unified School District, supra,* citing *Antkowiak v. Ambach,* 838 F.2d 635 (2d Cir. 1988).

At the District's suggestion, the district court found the purported administrative procedural requirement in the regulations implementing IDEA issued by the United States Department of Education, rather than in IDEA itself.[8] The specific provision on which it relied does not, in context, require parents to enforce

---

[8] Whether the court properly considered this argument is questionable. Failure to exhaust administrative remedies is an affirmative defense that must be pled in the answer to the complaint, or is deemed waived. Fed. R. Civ. P. 8(c)(1). The District's answer to the second amended complaint, however, hedged on this defense, saying "Plaintiffs **may have** failed to exhaust their administrative remedies." Docket #30, p. 10 (emphasis ours). The District's sketchy invocation of this defense was not sufficient to preserve it, especially since the district court subsequently granted the District's motion for a protective order and barred all discovery in the case (Docket #25), thus preventing the Davises from learning the facts upon which the District premised its affirmative defenses and then preparing to meet them.

due process decisions solely through the state complaint procedure. The sub-subsection the district court cited is one of three in a subsection that addresses how the state must proceed when it receives a complaint that is also the subject of a due process hearing. Parents are not obligated to file state complaints at any point; the regulations provide that they **may** file written complaints, using the procedures available under 34 C.F.R. §§300.151 through 300.152. *See* 34 C.F.R. §300. 153(a).

If an organization or individual chooses to file a state complaint that is also the subject of a due process hearing, the state must await the outcome of that hearing before acting on the complaint. 34 C.F.R. §300.152(c)(1). If the state complaint involves an issue that was previously adjudicated in due process, the due process decision is binding and the state presumably has no further role to play. 34 C.F.R. §300.152(c)(2). If, however, the complaint alleges that a public agency has failed to implement a due process decision, then the state must resolve the complaint, because there are no further due process proceedings to be had. 34 C.F.R. §300.152(c)(3). The plain language of this regulation, however, nowhere requires parents to file state complaints to enforce due process wins; rather, it guides the state as to when it should await or be guided by developments in another forum before investigating a complaint someone elects to file, and when it must act on that complaint immediately.

The IDEA was last amended in 2004. Before that, at least three sister circuits, the Second, the Third and the Ninth, had ruled that the state complaint review process established in the IDEA regulations was not mandatory and did not require administrative exhaustion as a prerequisite to enforcing a favorable due process decision. *Porter v. Board of Trustees of Manhattan Beach Unified School District, supra; Jeremy H. v. Mount Lebanon School District,* 95 F.3d 272 (3d Cir. 1996); *Mrs. W. v. Tirozzi,* 832 F.2d 748 (2d Cir. 1987). Despite this, Congress did not include in the 2004 IDEA amendments (nor in earlier ones) an enforcement limitation that required resort to the state complaint review process. When Congress enacts a statute that has been judicially interpreted and keeps the interpreted language intact, it is presumed to be satisfied with that interpretation. *Davis v. United States,* 495 U.S. 472 (1990).

The United States Department of Education, author of the very regulation upon which the district court relied in finding an administrative exhaustion requirement, does not interpret this regulation to require administrative exhaustion prior to enforcing a favorable due process decision in court, nor as a mandatory substitute for court enforcement. That department's interpretation is controlling unless it is plainly erroneous or inconsistent with the regulation. *Auer v. Robbins,* 519 U.S. 452 (1997). The United States appeared as *amicus curiae* in *Porter v. Board of Trustees of*

Manhattan Beach Unified School District, supra to advocate its view that the state complaint procedure is intended as an alternative for parents who wish to avoid litigation, but does not stand as a mechanism that must be exhausted in all enforcement cases. *See Porter v. Board of Trustees of Manhattan Beach Unified School District, supra*. The United States, appearing in *Porter,* cited its several statements on the subject, including:

- Assistance to States for the Education of Children with Disabilities, 64 Fed.Reg. 12,406, 12,646 (March 12, 1999) (the state complaint review is intended to allow parents and school district to resolve differences without resort to litigation); and
- Office of Special Education Programs Memorandum 00-20 (July 17, 2000) (state complaint review process is an attempt to provide a less costly and more efficient mechanism for resolving disputes; parents are not required to use the complaint review system in addition to the due process system);
- Letter from Office of Special Education Programs to Johnson, 18 Ind. Disab. Educ. L. Rep. 589, 590 (December 4, 1991) (due process and state complaint review are two separate, distinct, or independent remedies).

See Porter v. Board of Trustees of Manhattan Beach Unified School District, supra.

After receiving the United States' input, the Ninth Circuit concluded in *Porter* that there was no reason to question its interpretation of the state complaint regulations, and therefore agreed that the procedure is a non-mandatory alternative to court enforcement of due process decisions, not a required exhaustion step. The district court below cited no authority to contravene the United States' position.

C. DCPS's alleged "large compliance" with the 2012 decision did not obviate the need to enforce that decision.

In opposing the District's argument concerning the supposed administrative exhaustion requirement, the Davises argued that they were not required to exhaust this supposedly required step, because doing so would be futile. If the complaint were submitted to OSSE for investigation, as the District advocated, OSSE would be investigating itself, and could not be expected to be thorough or objective. As shown above, OSSE was a direct player in the noncompliance (it was charged with finding a nonpublic school for B.D., but did not find one on the 2012 decision's timetable). Docket #45, p. 19. *See Honig v. Doe,* 484 U.S. 305 (1988) (recognizing that futility excuses administrative exhaustion); *Porter v. Board of Trustees of Manhattan Beach Unified School District, supra* (same); *Cox v. Jenkins,supra* (same).

The district court found that because the District had "largely complied" with the 2012 decision, the Davises' futility argument failed. Assuming, *arguendo,* that

the belatedly developed IEP and the even more belated identification of a location to implement that IEP ultimately satisfied the 2012 decision's mandate (issues that were not before the district court in this action and that are not before this Court now), they came many months after the May 18, 2012 deadline in the 2012 decision. During the period of delay, B.D. was deprived of much-needed educational services.

As discussed *supra,* he did not receive all of the tutoring required by the 2012 decision, which itself was less than had been authorized for him pre-Katherine Thomas; he was not instructed by a special educator; his tutor followed no defined plan of study; he received occupational therapy services inconsistently; he received no speech/language or psychological counseling services at all. This situation persisted for more than a year following the 2012 decision's issuance. As was true before the due process hearing, B.D. continued to be denied a FAPE following the 2012 decision, and should have at least received consideration for compensatory education services. *Boose v. District of Columbia, supra; Reid ex rel. Reid v. District of Columbia, supra.*

The district court also misconstrued the parties' July 26, 2012 stipulation (Docket #18), filed to settle the Davises' preliminary injunction motion. One of the issues presented in the motion concerned DCPS's failure to pay B.D.'s tutor and occupational therapist for their services, thus causing the providers to threaten to stop

working with him. *See* Docket #s 7, pp. 18-19; 7-1, pp. 20-22; 7-31, p. 2; 7-32, p. 2; 7-32, pp. 2-4. In the stipulation, the parties agreed that after the motion was filed, DCPS's payments to the tutor and occupational therapist **for their direct services to B.D., that were billed directly to DCPS,** were current. Docket #18, ¶6 (emphasis ours). The Davises' motion for summary judgment, however, sought reimbursement of expenses for which the Davises had paid themselves, not ones that either professional had billed directly to DCPS. Docket #38, p. 14. Thus, the Davises' reimbursement claim presented a live issue.

At minimum, the district court should have recognized that the material facts pertinent to this claim were disputed, as resolving this issue required interpreting the stipulation, understanding precisely which tutoring and occupational therapy invoices were alleged not to have been paid, and then determining whether they were covered by the July 22, 2012 stipulation. Since the material facts were contested, summary judgment was inappropriate. Fed. R. Civ. P. 56(c); *Celotex Corporation v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986).

III. Locating a therapeutic residential facility, even a presumably appropriate one, more than two and one-half years after the need for such a facility was first identified did not moot the claim for placement.

As indicated, DCPS first recognized B.D.'s need to be placed in a therapeutic residential facility in December 2011, when it referred him to the Department of Mental Health's psychiatric residential treatment facility review committee. In the referral, DCPS unequivocally told DMH that B.D. could not benefit from educational programming until his mental health situation was assessed and addressed. The Department of Mental Health acted on that referral in March 8, 2012 and found B.D. eligible for a psychiatric residential treatment facility. DCPS, however, embarked on a course of periodically denying that it had initiated the referral, and always failing to work with the Department of Mental Health to effectuate its recommendations. DCPS wasted B.D.'s educational time with its delayed IEP development and then fruitless recommendation to seek out only day program for B.D. in summer 2012, contrary to the Department of Mental Health's March 8, 2012 recommendation (and contrary to DCPS's December 2011 acknowledgment that B.D.'s profound educational needs could be addressed only following thorough in-patient assessment of his complex psychological needs). Only in October 2012 did DCPS take its first

steps toward compliance with the Department of Mental Health certification it requested 10 months earlier.

Even those steps were insufficient, as all DCPS accomplished at that time was to complete an IEP to be implemented in an unknown location. According to the district court (Docket #48, p. 10), that task was not completed until April 4, 2014. Thus, at least until DCPS proposed the allegedly appropriate therapeutic residential placement, B.D. continued to be deprived of a FAPE.

Eventual compliance with IDEA requirements, or a hearing officer's decision, does not moot a special education case involving denial of FAPE, because the student may be entitled to compensatory education to make up for the time during which he did not receive a FAPE. *Boose v. District of Columbia, supra.* If delayed compliance with IDEA requirements leaves open a question of compensatory education, compliance does not moot the case. *Id.; Lesesne, as parent of B.F. v. District of Columbia, supra*.

Although Count Three of the second amended complaint addressed different District agencies, not merely DCPS, there is no reason not to apply and follow the analysis in *Boose, supra.* The goal of DCPS's psychiatric residential treatment facility referral–as Mr. Persett acknowledged at the due process hearing–was to address underlying conditions that were inhibiting B.D. from benefitting from special

education. Having received an answer, however, DCPS refused to act on it, thus substantially delaying the day when B.D. could successfully participate in a special education program. He remains entitled to compensatory services to put him in the position he would have occupied had DCPS and the Department of Mental Health worked collaboratively and efficiently to find a location that could have met his needs in 2012.

CONCLUSION

This Court should reverse the December 3, 2014 order of the district court and remand the case for further appropriate proceedings.

/s/ *Diana M. Savit*

Diana M. Savit #244970
SAVIT & SZYMKOWICZ, LLP
4520 East-West Highway
Suite 700
Bethesda, Maryland 20814
(301) 951-9191
dms@savitlaw.com
Attorney for plaintiffs-appellants

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 11,356 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally space serif-style typeface using Corel WordPerfect® X5 in Times New Roman 14 point type.

/s/ *Diana M. Savit*
Diana M. Savit

CERTIFICATE OF SERVICE

I hereby certify that, this 15th day of July, 2015, an electronic copy of appellants' corrected opening brief was served through the Court's CM/ECF system upon counsel for the following parties and *amici*:

Richard S. Love, Esq.
Senior Assistant Attorney General
Office of the Solicitor General
Office of the Attorney General
441 4th Street, N.W.
Suite 600S
Washington, D.C. 20001
Attorney for appellee

Melissa Colangelo, Esq.
Allen Snyder, Esq.
Children's Law Center
616 H Street, N.W.
Suite 300
Washington, D.C. 20001
Attorneys for amicus Children's Law Center

and by electronic service via email, by consent, upon:

Jennifer Ancona Semko, Esq.
Jennifer.Semko@bakermckenzie.com
Erin Maus, Esq.
Erin.Maus@bakermckenzie.com
Baker & McKenzie LLP
815 Connecticut Avenue, N.W.
#900
Washington, D.C. 20006
Attorneys for amicus Council of Parent Attorneys and Advocates, Inc.

/s/ *Diana M. Savit*
Diana M. Savit