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: November 10, 2012

Hearing Officer: Jim Mortenson

Case No: 2012-0585

OSSE
STUDENT HEARING OFFICE
2012 NOV 13 AM 9:29

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on August 27, 2012. A timely response to the complaint was filed on September 5, 2012. A resolution meeting was convened on September 11, 2012, and resulted in no agreements. The 30 day resolution period was not adjusted and the 45 day hearing timeline began on September 27, 2012. A prehearing conference was convened by the undersigned on September 11, 2012, and a prehearing order was issued on September 12, 2012.

Both parties filed motions on October 3, 2012. The Petitioner filed a motion for partial summary judgment because the Respondent failed to file a complete response to the complaint and the Respondent filed a motion to dismiss based on the two year statute of limitations under

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

34 C.F.R. §§ 300.507(a)(2) and 300.511(e). The Respondent filed a reply to the Petitioner's motion on October 5, 2012. The Petitioner filed a reply to the Respondent's motion on October 10, 2012. An order on the motions was issued on October 12, 2012. In brief, the Petitioner's motion was granted in part and, to protect the rights of the Petitioner based on the right to receive a specifically defined response to the compliant pursuant to 34 C.F.R. § 300.503, the Respondent was prohibited from presenting evidence about:

- Explanations of why the agency proposed or refused to take the actions raised in the due process complaint;
- Descriptions of other options that the IEP Team considered and the reasons why those options were rejected;
- Descriptions of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused actions; and
- Descriptions of the other factors that are relevant to the agency's proposed or refused actions.

The Respondent's motion was denied because additional facts concerning the statute of limitations needed to be established and it was anticipated this would occur at hearing. Upon review of the Petitioner's trial brief for hearing, however, the Petitioner failed to proffer any facts to show either of the exceptions to the two year limitations period would apply. This was discussed at the hearing and, prior to the presentation of cases, the Petitioner's issues were modified to comply with the two year limitations period, effectively granting the Respondent's motion in part.

The Petitioner moved that the undersigned reconsider the determination of the two year limitations period at the conclusion of the hearing. This motion was denied because the evidence produced at hearing only supported the determination that the Petitioner was never prevented from filing a due process complaint for any reason, much less because of specific representations by the Respondent that it had resolved any problem forming the basis of any complaint (no such misrepresentations were demonstrated), or that the Respondent withheld information from the

Petitioner that was required to be provided, under IDEA, which prevented her from filing a complaint.

Both the Petitioner and Respondent filed disclosures for the hearing on October 23, 2012. The hearing was scheduled for October 30, 31, and November 1, 2012. Due to severe weather (Hurricane Sandy), the hearing could not begin until November 1, 2012. The Petitioner provided the undersigned a trial brief on November 1, 2012. Due to the need to reschedule Petitioner's witnesses (November 1 was to be the day for Respondent's case), the hearing was rescheduled to begin on November 5 and conclude on November 6, 2012. (The case was originally scheduled for two and a half days, and the parties now determined they would need only two full days for their cases.)

The hearing was convened approximately 9:00 a.m. on November 1, 2012, in room 2009 at 810 First Street NE, Washington, D.C. Preliminary matters and rescheduling the hearing was discussed. The hearing recessed and was reconvened at 9:20 a.m. on November 5, in room 2003. It recessed again at approximately 5:20 p.m. and reconvened approximately 9:00 a.m. on November 6, 2012, concluding approximately 4:00 p.m. The hearing was closed to the public. The Petitioner was represented by Nakisha Winston, Esq., and the Respondent was represented initially by Lynette Collins, Esq., and by Justin Douds, Esq., on November 5 and 6, 2012. The due date for this HOD is November 10, 2012. This HOD is issued on November 10, 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:[2]

(1) Whether the Respondent failed to sufficiently evaluate the Student resulting in a failure to identify his intellectual disability, speech and language deficits, and occupational therapy needs since August 27, 2010?

(2) Whether the Respondent denied the Student a FAPE when his individualized education program (IEP), since August 27, 2010, lacked: an accurate statement of his present levels of academic achievement and functional performance; appropriate measurable annual goals; appropriate related services including speech and language services; and appropriate supplementary aids and services including breaking down tasks into steps and having the Student master one step at a time, using "hands-on" concrete observable instruction rather than verbal directions or lectures, and using visual aids such as charts, pictures, and graphs?

(3) Whether the Respondent denied the Student a FAPE when the IEP, since the Student turned 16 years of age, lacked appropriate measurable postsecondary goals based upon age appropriate transition assessments?

(4) Whether the Respondent denied the Student a FAPE by significantly impeding the Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE to the Student because it did not share accurate evaluation data with the Petitioner?

The Petitioner was seeking, at the time of hearing, compensatory services in the form of speech at language services and placement at a non-public special education day school.[3]

The Petitioner prevails on Issues 2 and 3 and the Respondent prevails on Issues 1 and 4.

IV. EVIDENCE

Seven witnesses testified at the hearing, six for the Petitioner and one for the Respondent.

The Petitioner's witnesses were:

1) The Student's Mother, Petitioner. (P)

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[2] Issue 1 and 2 were modified to conform to the two year limitations period, following the Undersigned's ruling on November 5, 2012.

[3] Petitioner had specifically sought to have the Student placed at High Road Academy, and was informed, shortly before the hearing, that High Road would no longer accept the Student due to a compliance issue with OSSE.

2) [redacted] Psychologist. (O.L.) Expert in neuropsychology, school psychology, evaluation and identification of attention deficit hyperactivity disorder (ADHD), intellectual disability, and multiple disabilities, providing an expert opinion on the educational impact of the alleged inappropriate identification of the Student's disability, best practices of school psychologists, and what will be necessary to put the Student in the place he would have been educationally but for the alleged violations. Witness recommendations concerning the Student are given only limited weight because she has no firsthand knowledge of the Student other than her review of reports and having spoken with an evaluator of the Student.

3) [redacted] Psychologist. ([redacted])

4) [redacted] Ed. D. ([redacted] Expert in language impairments. Opinions about what the Student specifically requires given limited weight because the witness lacks firsthand knowledge about the Student, other than a review of Student records.

5) [redacted] Social Worker. ([redacted])

6) [redacted], Independent Assessor, (C.P.) Expert in area of transition planning. Witnesses recommendations for Student given limited weight because despite conducting a transition assessment of the Student, the witness could not identify postsecondary goals for the Student, which is the primary purpose of a transition assessment under 34 C.F.R. § 300.320(b).

The Respondent's witness was [redacted], 10th grade coordinator for Ballou Senior High School. (A.B.)

34 exhibits were admitted into evidence of 36 disclosures from the Petitioners.[4] The

[4] Petitioners also moved two of the Respondent's exhibits into evidence as the Respondent, despite the order of the undersigned dated September 12, 2012 requiring disclosures to be moved into evidence prior to the presentation of

Petitioners' exhibits are:

Ex. No.	Date	Document
P 1	4/12/99	Georgetown University Pediatric Mobile Clinic Speech and Language Evaluation
P 2	3/15/00	DCPS Notice of eligibility and proposed change in educational placement
P 3	3/31/00	Occupational Therapy Evaluation Report, Georgetown University Medical Center
P 4	4/3/00	Pediatric Mobile Van Clinic Speech and Language Evaluation Report, Georgetown University Medical Center
P 5	2/13/02	Observation, District of Columbia Public Schools, [redacted]
P 6	4/19/02	Annual Status Report, Lourie Center School
P 7	4/19/02	Individualized Educational Program, District of Columbia Public Schools
P 8	3/18/03	Annual Status Report, Lourie Center School
P 9	4/28/03	Psycho-educational Evaluation, District of Columbia Public Schools, [redacted]
P 10	6/18/03	Clinical Evaluation, [redacted] Ph.D.
P 11	3/3/04	Woodcock-Johnson III Tests of Achievement report
P 12	3/12/04	Confidential Report of Clinical Update, District of Columbia Public Schools, [redacted]
P 13	3/18/04	Annual Status Report, Lourie Center School
P 14	3/25/04	Individualized Education Program, Lourie Center School
P 15	6/16/04	Prior Notice-Taft
P 16	10/7/04	Pupil Health Notice - Taft
P 17	3/9/04	Criteria for Decreasing Services
P 18	3/17/05	Taft IEP - 2005
P 19 A	3/1/06	Educational Evaluation
P 19 B	11/17/06	Psychological Evaluation (This evaluation report is not accurate as it contains numerous inconsistencies both internally and when viewed in relation to other records for the Student. Thus, it cannot be relied on.)
P 19 C	11/17/06	Psychoeducational Evaluation
P 19 D	11/30/06	Educational Evaluation
P 19 E	11/30/06	Occupational Therapy Re-Evaluation
P 20 A	3/31/06	IEP meeting notes
P 20 B	10/16/06	Reval Prep Meeting Notes/SEP/Notice of Intent to reevaluate
P 20 C	12/5/06	Taft IEP
P 20 D	10/25/07	MDT Notes/Documented level of service/IEP
P 20 E	6/18/08	MDT notes
P 21 A	10/30/08	IEP Notes/IEP

cases, initially refused to do so. The two documents, R 10 and R 13, were admitted during the presentation of the Petitioner's case. The Respondent objected. However, the Respondent subsequently offered all of its disclosures into the record without objection from the Petitioners.

Ex. No.	Date	Document (cont.)
P 21 B	9/30/09	Disability Worksheet
P 21 C	10/1/09	IEP—Transition Academy
P 21 D	5/5/10	Least restrictive environment — behavioral support
P 21 E	5/6/10	IEP —Transition Academy
P 21 F	12/13/10	MDT notes
P 21 G	2/25/11	MDT Notes/IEP
P 22	11/22/11	Independent Educational Evaluation Authorizing Letter
P 23	12/6/11	Schedule
P 24	12/6/12	DCPS Notes
P 25	12/6/11	Behavioral support Service Tracker, [redacted]
P 26	1/10/12	Confidential Psychoeducational Evaluation, Child Guidance Clinic, [redacted]
P 27	2/9/12	Subpoena for records
P 28	2/22/12	Draft FBA, Individualized Education Program, District of Columbia Public Schools
P 29	3/06/12	Analysis of Existing Data, District of Columbia Public Schools
P 30	3/15/12	Behavioral Support Tracker, [redacted]
P 31	3/15/12	Eligibility Meeting Notes, [redacted]
P 32	3/15/12	Individualized Education Program, District of Columbia Public Schools
P 33	3/30/12	Email communication with Ballou
P 34	3/30/012	Email Communication with DCPS Student Placement Office
P 35	4/9/12	Competency Evaluation, Patton Consulting, LLC, [redacted]
P 36	04/23/12	Speech and Language Evaluation, District of Columbia Public Schools, [redacted]
P 37	4/25/12	Data Evaluation Review, District of Columbia Public Schools, [redacted]
P 38	5/10/12	Notes from Eligibility Meeting
P 39	5/10/12	Disability Worksheet: Intellectual Disability, District of Columbia Public Schools
P 40	5/13/12	Evaluation Summary Report, District of Columbia Public Schools
P 41	5/13/12	Final Eligibility Determination Report, District of Columbia Public Schools
P 42	5/15/12	DCPS response to subpoena
P 43	5/24/12	Email from acessors
P 44	5/25/12	Individualized Education Program, District of Columbia Public Schools
P 45	5/25/12	Email to DCPS requesting for Help
P 46	6/6/12	Speech-Language Service Tracker
P 47	6/14/12	Report to Parents on Student Progress, Ballou SHS, District of Columbia Public Schools
P 48	6/29/12	Competency Evaluation, Child Guidance Clinic
P 49	7/10/12	Correspondence with the Resolution Team
P 50	7/12/12	Email requesting records
P 51	7/24/12	Email requesting records

Ex. No.	Date	Document (cont.)
P 52	9/11/12	Notice of Disciplinary Action
P 53	9/19/12	Notice of Disciplinary Action
P 54	9/20/12	Email Communication
P 55	9/20/12	Transcript
P 56	9/20/12	Letter of Understanding
P 57	9/20/12	Ballou Schedule
P 58	9/21/12	Email regarding safety concerns
P 59	10/17/12	High Road Acceptance letter
P 60	4/11/90	Letter to Borucki, Office of Special Education Programs
P 61	(Undated)	CV/Resumes of expert witnesses
P 62	8/14/12	Transition Assessment Report

The Petitioner also provided several demonstrative exhibits which were graphs that compared real evidence from exhibits P 1, P 4, P 6, P 9, P 13, P 26, P 36, and P 37.

One exhibit was admitted into evidence of the Respondent's 13 disclosures.[5] The Respondent's exhibit is: R 1, June 4, 2012, IEP.

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 credible. 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 17 year old learner currently enrolled at Ballou Arts and Technology Academy (BATA).[6] The Student is currently repeating the 10th grade for the fourth time.[7] The Student

[5] R 9 was the CV of a witness the Respondent did not call. All of the other documents were duplicates of Petitioner disclosures.
[6] Testimony (T) of A.B., P 57.

has been eligible for and receiving special education and related services since at least March 2000, at which time he had deficits identified in the areas of cognitive skills, motor integration, and emotional/social/coping skills.[8] Over time, the following issues have been identified for the Student: speech and language problems (including auditory processing problems), intellectual disability, attention deficit hyperactivity disorder, learning disorder, motor integration problems, and emotional behavioral disorders.[9]

2. The Student's disabilities affect his involvement and progress in the general education curriculum by making it difficult for him to learn as a result of not being able to attend to academic tasks, not understanding what he hears or reads, not acquiring various functional and academic skills including basic mathematical skills, becoming anxious and frustrated and then acting out (including fighting and being generally obnoxious) or leaving class, not being able to express himself appropriately verbally or in writing, and not being able to comprehend even modestly complex concepts.[10] He can perform basic math, such as addition and subtraction facts through 18, has decoding and fluency skills in the 8th grade range, and typically refuses to participate in writing exercises.[11]
3. The Student's academic functioning is at an elementary school level (While different assessments have calculated him to be performing at varying elementary grade levels, a reasonable finding is that he performs at the 3rd to 4th grade level, currently).[12] He becomes overwhelmed in unstructured school and classroom environments and shuts down, misbehaves or is disruptive, or leaves the area, and even when working in small classroom

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[7] P 55.
[8] P 2.
[9] P 1, P 2, P 3, P 4, P 5, P 6, P 7, P 9, P 13, P 25, P 26, P 35, P 37, P 41, P 48, P 62.
[10] P 1, P 2, P 3, P 4, P 5, P 6, P 7, P 9, P 13, P 25, P 26, P 29, P 35, P 37, P 41, P 48, P 62, T of P, T of J.L., T of C.P.
[11] P 29.
[12] P 26, P 48, P 62.

settings will shut down if not appropriately guided.[13] The Student often fails to attend class, is making little to no academic progress, and has refused related services, such as occupational therapy and speech and language therapy, in the past.[14]

4. The Respondent stopped providing the Student with speech and language services and occupational therapy in 2006 because he was refusing to participate in the services.[15]
5. In November 2006 evaluations were conducted by the Respondent.[16] The evaluation reports may not include data about the Student as they are internally inconsistent and are inconsistent with prior evaluation data about the Student.[17]
6. The Student has been evaluated or assessed in multiple areas over 18 times in the last 13 years by multiple agencies and personnel.[18] There have been at least eight evaluations in the last year alone.[19]
7. The Student has a history of using marijuana and it has been recommended he participate in drug rehabilitation, however there is no evidence his drug use has directly affected his education and appears to be more likely a result of his educational experience (lack of appropriate skills and frustration with school).[20]
8. The Student began the 10th grade in the 2009-2010 school year, and attended the Transition Academy at Shadd.[21] He failed a music class and a career exploration class, and was to repeat the 10th grade for the 2010-2011 school year.[22]

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[13] P 26, P 29, P 62, T of A.B., T of J.L., T of C.P. T of P.
[14] P 20, P 37, P 40, P 47, P 55.
[15] P 20.
[16] P 19 B, P 19 C.
[17] P 19 B, P 19 C, T of O.L.
[18] P 1, P 3, P 4, P 9, P 10, P 11, P 12, P 19A, P 19D, P 19E, P 26, P 29, P 35, P 36, P 37, P 40, P 48, P 62.
[19] P 26, P 29, P 35, P 36, P 37, P 40, P 48, P 62.
[20] P 26, P 37, P 40, P 62.
[21] P 55.
[22] P 55.

9. The Student failed four classes during his second year of 10th grade in 2010-2011: Extended Literacy, Geometry, English II, and Health and Physical Education.[23] He attended both Transition Academy at Shadd and Spingarn High School.[24] Again, he was required to repeat 10th grade for the third time in the 2011-2012 school year, this time at a different school, Ballou Arts and Technology Academy (BATA).[25]
10. The Student's third time in 10th grade, now at BATA, resulted in all "Fs" but for one of his 10 classes, Physical Education.[26] He is currently repeating the 10th grade for a fourth time, during the 2012-2013 school year, again at BATA.[27]
11. BATA is a self-contained special education program housed at and administered by Ballou Senior High School.[28] Its classes are comprised of only children with IEPs, although some of those children also attend regular education classes, pursuant to their IEPs.[29] BATA is designed for students with behavioral needs.[30] Classes are staffed by a regular education teacher, special education teacher, teacher aide, and behavioral staff and other related service providers are available.[31] There are only 12 to 15 students assigned to each class at BATA, and of those only one to five students are typically in class.[32]
12. In May 2010, near the conclusion of the Student's first year of 10th grade, his IEP was revised.[33] It included 12 academic goals in the areas of math, reading, writing, and two

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[23] P 55.
[24] P 55.
[25] P 55, T of A.B.
[26] P 55.
[27] P 55.
[28] T of A.B.
[29] T of A.B.
[30] T of A.B.
[31] T of A.B.
[32] T of A.B.
[33] P 21.

functional goals in the area of emotional, social, and behavioral development.[34] The Student was to be provided specialized instruction outside of the general education setting for 31 hours per week, behavioral support services outside of the general education setting for one hour per week, a host of six supplementary aids and services to be provided in the classroom, transportation, and extended school year (ESY) services.[35] Postsecondary goals were based on a "Career Interest Inventory" conducted in August 2009 and a "Student interview" conducted May 3, 2010.[36]

13. The IEP was next revised in February 2011 (the first revision within the two year limitations period, prior to the filing of the complaint) while the Student was in his second year of 10th grade.[37] The only revisions made were: one math goal was changed from working on one-step word problems to two-step word problems, 30 minutes per week of specialized instruction were added, and ESY services were dropped.[38]

14. The IEP was next revised during the Student's third year in 10th grade, starting March 15, 2012 (only a draft), and underwent two additional revisions, including on May 25, 2012, and June 4, 2012.[39] The math goals were revised, the reading goals went from four to three and one remained the same, and the writing goals remained exactly the same as they had been the prior two IEP revisions (at least since May 6, 2010).[40] The functional goals also remained exactly the same as the prior two years, and the special education and related services were not changed from the prior year.[41] The supplementary aids and services were reduced to five

[34] P 21 E.
[35] P 21 E.
[36] P 21 E.
[37] P 21 G.
[38] P 21 G.
[39] P 32, P 44, R 1.
[40] P 21 E, P 21 G, P 32.
[41] P 21 E, P 21 G, P 32.

items.[42] New transition assessments had been conducted (a Brigance Transition Skills Inventory was used on February 22, 2012, and an "Interest Inventory" on February 9, 2012), which resulted in postsecondary goals in the areas of postsecondary education and training, employment, but not independent living.[43] No assessment reports from these instruments were part of the record.

15. The May 25, 2012, IEP revision added a math goal, revised most of the reading goals, but included the same writing goals without a change in services.[44] Speech and language goals were added back in, as were the services to reach those goals.[45] The emotional, social, and behavioral development goals still did not change, nor did the behavioral support services.[46] The supplementary aids and services all remained the same.[47]

16. In May 2012, the Student's IEP team changed the IDEA category of disability under which the Student was determined eligible as a child with a disability from emotional disorder to mental retardation (called intellectual disability by the Respondent).[48] The Student's educational needs were no different, as he had always had cognitive deficits, speech and language issues, motor skills needs, and behavioral problems.[49]

17. Only minor changes to the statement of present levels of academic achievement and functional performance were made between the May 25 revision and June 4 revision of the IEP.[50] The Petitioner was not involved in the June 4, 2012, revision.[51]

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[42] P 21 G, P 32.
[43] P 32.
[44] P 32, P 44.
[45] P 44.
[46] P 21, P 32, P 44.
[47] P 32, P 44.
[48] P 37, P 38, P 39, P 40, P 41, P 44.
[49] P 1, P 2, P 3, P 4, P 5, P 6, P 7, P 9, P 13, P 25, P 26, P 35, P 37, P 41.
[50] P 44, R 1.
[51] T of P.

18. The Student's behavior, including attendance, avoidance, and occasional fighting, have not improved over the last several years.[52]

19. An independent transition assessment was conducted during 2012 and a report generated on August 13, 2012.[53] The report was comprehensive in addressing the Student's academic and functional skills and relating them to his transition to postsecondary life, including creating a transition plan for the Student.[54] The transition assessment report did not address, nor could the evaluator address, what the Student's postsecondary goals in the areas of postsecondary education, training, employment, and independent living should be, however.[55]

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).

[52] P 37, P 47.
[53] P 62.
[54] P 62.
[55] P 62, T of C.P.

2. Relevant to this complaint is the requirement that the Respondent must ensure that a child with a disability is periodically reevaluated "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities[,]" and that the "the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. §§ 300.303, 300.304(c)(4) & (6).
3. The Student in this case has been thoroughly evaluated over the years. The Petitioner claims the Student was only recently identified as a child with an intellectual disability. In fact, the Student's cognitive deficits were known about as early as March 2000, the time of the earliest records from the Respondent in the record. A Court ordered evaluation of the Student that took place in January 2012, resulted in a diagnostic impression that the Student had an intellectual disability. This diagnostic impression is not based on the definition of mental retardation under IDEA at 34 C.F.R. § 300.8(c)(6), but the Student's cognitive impairments had long been identified by the Respondent. Speech and language needs and motor skills needs had also long been identified but services for them were dropped due to the Student not participating (which was not appropriate to do). However, this does not show a failure to sufficiently evaluate, only that appropriate services (for speech and language and occupational therapy) were no longer being provided to ensure the provision of FAPE. The provision of services to ensure FAPE is addressed by Issue 2.
4. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

> special education and related services that –
> (a) Are provided at public expense, under public supervision and direction, and without charge;
> (b) Meet the standards of the SEA, including the requirements of this part;

(c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17. A "determination of whether a child received FAPE must be based on substantive grounds." 34 C.F.R. § 300.513(a)(1). "An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program, *see* Reid v. District of Columbia, 401 F.3d at 519-20; the nature and effects of the child's disability have not been adequately monitored, *see* Harris v. District of Columbia, 561 F. Supp. 2d at 68; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties. *See* Gellert v. District of Columbia Public Schools, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006)." Suggs v. District of Columbia, 679 F. Supp. 2d 43, 53 IDELR 321 ((D.D.C.2010). Involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) is core to the IDEA's purpose. *See:* 34 C.F.R. §§ 300.39, 300.304, 300.305, 300.311, 300.320, 300.321, 300.324, 300.530, 300.704. "[A]n IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State's content standards." 71 Fed. Reg. 46662 (2006). "[T]he system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 203 (1982).

5. The Respondent did not provide the Student with special education and related services that included an appropriate secondary school education, denying him a FAPE. The clearest

evidence of this is the fact that the Student has failed the 10th grade three times, made no progress in functional skills, and made little if any progress in academic skills over at least the last two years. Also, only minor changes to his IEP have been made over the last two years. His behavioral goals and writing goals have been identical since at least May 2010. The services to reach the annual goals were only altered in minor ways, including dropping ESY services (despite the Student's very low academic performance) and increasing his specialized instruction by 30 minutes per week. Some supplementary aids and services were removed during the time period as well. All the while, the Student continued to fail, repeating the same grade four times so far. Over the last two years he was making little, if any, progress toward his annual IEP goals and was not involved and progressing in the general education curriculum. His behaviors continued and were exacerbated by his desire to get out of the classroom where he was not finding success. Leaving class or acting out resulting in removal from class were effective coping mechanism for the Student, but did not result in educational progress. The Student was denied a FAPE at least as far back as two years prior to the filing of the complaint, and probably longer.[56]

6. "Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include —

   (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

[56] Any denial prior to August 27, 2010, is not addressed because of the two year limitations period and the Petitioner did not file a complaint prior to August 27, 2012, nor was she prevented from doing so.

(2) The transition services (including courses of study) needed to assist the child in reaching those goals." 34 C.F.R. § 300.320(b)

Data must be collected on the child's strengths, preferences, and interests. 34 C.F.R. § 300.43(a)(2). A functional vocational evaluation must be considered, if appropriate. Id.

7. The Student turned 16 years of age in December 2010. His IEP at that time had been revised in May 2010. The transition assessments the postsecondary goals in the IEP at that time were based on a "Career Interest Inventory," and a "Student interview." These "assessments" were not, alone, appropriate for the Student because of his low cognitive skills and academic functioning. "[S]pecific transition assessments used to determine appropriate measurable postsecondary goals will depend on the individual needs of the child, and are, therefore, best left to States and districts to determine on an individual basis." 71 Fed. Reg. 46666 (2006). Thus, he was not provided with an IEP that met the requirements of 34 C.F.R. § 300.320(b), and was denied a FAPE. More comprehensive transition assessment tools were used in 2012, particularly the Brigance Transition Skills Inventory as well as an "Interest Inventory." While the Petitioner's expert did not necessarily like these assessments, she did not clearly establish that they were inappropriate assessments for the Student. However, the lack of a postsecondary goal concerning the Student's independent living, in the 2012 revisions of the IEP, is problematic, given his significant needs. Thus, because he required but did not have a postsecondary goal in the area of independent living, his IEP is not in conformity with 34 C.F.R. § 300.320(b) and he was denied a FAPE. The independent transition assessment the Petitioner obtained for the Student was fairly comprehensive. However, it's purpose was limited to determining the Student's "current skill levels and. . . strengths and weaknesses." It did not address the primary purpose of a transition assessment under the IDEA, which is to

determine postsecondary goals. The Student's IEP requires a postsecondary goal addressing independent living. Without appropriate postsecondary goals the transition services, including courses of study, the special education and related services, supplementary aids and services, personnel supports, and program modifications, cannot be reasonably calculated to enable the Student to be involved in and progress in the general education curriculum and thus receive educational benefit.

8. There are three reasons a procedural violation will result in a finding of a denial of FAPE. At issue here is whether a procedural violation, failure to provide accurate evaluation data to the Petitioner significantly impeded her ability to participate in the decision-making process regarding the provision of FAPE to the Student. *See* 34 C.F.R. § 300.513(a)(2)(ii). The Respondent changed the Student's eligibility classification to mental retardation (intellectual disability) in 2012, following team discussion of an assessment report completed for Court purposes. It is not clear why or whether the Student's disability classification should have changed under IDEA since his cognitive deficits were long known, but it cannot be concluded that the evaluation data was inaccurate. Even assuming the Respondent had inaccurate evaluation data (and the evidence supports that it did back in 2006, but the Petitioner filed no timely complaint on that point and did not demonstrate she never received the evaluation report), this does not mean the Parent's opportunity to participate in the decision-making process regarding the provision of FAPE was significantly impeded. Indeed, the entire team could be led astray by incorrect evaluation data, not merely the parent. As a team member, however, the Parent has a role to play in catching obvious errors, which she did in this case, albeit late. More importantly, the IEP revisions, at least for the past two years are not appropriate, as considered above. The reasons for this are not important here. It is

only determined that the Petitioner was consistently involved in the decision-making process regarding the provision of FAPE and she has not shown that any procedural error denied her that opportunity in such a significant fashion that it denied the Student a FAPE. The Student was denied a FAPE primarily because his program was not appropriate to enable him to make progress toward his annual goals and enable him to be involved and make progress in the general education curriculum.

9. 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). 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).

10. The Petitioner has not demonstrated where the Student would have been but for the denials of FAPE in this matter. It is suggested that he would be further along academically and

functionally, and this is reasonable, but the precision with which a compensatory education award requires under *Reid* is not established here. However, the undersigned must use the broad authority provided under the IDEA to ensure the Student is provided FAPE and cannot decline to apply a carefully crafted remedy appropriate to accomplish that purpose. The Student's disabilities are varied, his deprivation of services are long-lived, and it is unclear, even to the experts involved in this case, where his future lies. It is prudent, in this case, to have an appropriately constituted IEP team sit down to review all data on the Student, including making determinations about what additional data, if any, is necessary, and create an IEP that is not built on the prior inappropriate program and placement. In this effort, the undersigned is not merely delegating his role to ensure FAPE to the IEP team. Rather, the purpose is to ensure all of the necessary facts are considered and an IEP constructed to meet the Student's needs, with some specific inclusions that are based on the relatively few findings of fact in this matter. The intent is, with this specific guidance, to ensure the team works cooperatively and that any disputes can be resolved, if necessary, through SEA enforcement based on the dictates of this order. The remedy here, under the broad authority granted under IDEA, may appear to exceed the requirements of IDEA itself, just as an award of compensatory education appears to exceed the requirements of IDEA (but does not, according to the Supreme Court) and are merely intended to ensure denial of FAPE to the Student is corrected. The remedy, in the form of a newly created IEP, is detailed in the order below.

VII. DECISION

1. The Respondent did not fail to sufficiently evaluate the Student or identify an intellectual disability, speech and language deficits, and occupational therapy needs since August 27,

2010. A Court Ordered assessment during the 2011-2012 school year resulted in a diagnostic impression that the Student had an intellectual disability. The IEP team subsequently determined the Student's eligibility classification was mental retardation (also known as intellectual disability) in May 2012."[57] This does not establish that the Student was not sufficiently evaluated and only shows that the IEP team changed the Student's disability classification. The Student's cognitive deficits had long been identified. The Student's speech and language needs had been periodically evaluated, including as recently as April 2012, showing no failure to sufficiently evaluate the Student for lack of a speech and language assessment. The Student's occupational therapy needs also had been identified and the Petitioner has not shown that there was a failure to evaluate those needs, but rather that those needs were no longer being addressed in the IEP as a result of the Student not participating in OT services.

2. The Respondent denied the Student a FAPE when his IEP, since it was revised February 25, 2011, lacked: an accurate statement of his present levels of academic achievement and functional performance, appropriate measurable annual goals; appropriate related services including speech and language services. While an evaluator recommended specific supplementary aids and services (P 40), it is not clear that these services were necessary for the Student to receive a FAPE.

3. The Respondent denied the Student a FAPE when his IEP, since he turned 16 years of age, lacked postsecondary goals based on age-appropriate transition assessments. Specifically, there were not age-appropriate transition assessments completed until 2012. When the IEP was revised in 2012, it lacked a postsecondary goal for independent living.

[57] "*Mental retardation* means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's academic performance." 34 C.F.R. § 300.8(c)(6), D.C. Mun. Regs. 5-E3001.1.

4. The Respondent did not deny the Student a FAPE by significantly impeding his mother's opportunity to participate in the decision-making process regarding the provision of FAPE as a result of sharing inaccurate evaluation data. The Petitioner has not shown the evaluation data the Respondent had was inaccurate (but for the data from 2006, which is outside of the two year limitations period), and even if the Respondent had shared inaccurate evaluation data, that would not be a significant impediment to the mother's opportunity to participate in the decision-making process because she had the right to challenge any data she believed to be inaccurate, including requesting an independent educational evaluation or, if the Respondent refused, the Respondent would have been obliged to request a hearing to prove its evaluation was appropriate.

VIII. ORDER

1. Within 30 days of this order, the Respondent must ensure that the Student's IEP team, including his current special education and regular education teachers, related service providers, a qualified local education representative (who must be knowledgeable about the district's resources, not just the school's resources), the Student, the Parent, and others as determined necessary by either the Respondent or Petitioner, begins with all relevant and current assessment data and writes a new IEP for the Student, not based on a review of the current IEP. (This is to ensure a fresh look at the Student and his needs in order to remedy the denial of FAPE suffered under the prior IEP revisions.)
2. The IEP team will start with determining the Student's postsecondary goals and develop the IEP from there, in order to ensure the program is reasonably calculated to enable the Student

to reach his postsecondary goals.[58] Post-secondary goals cannot be based solely on an "interest inventory" or similar measure, but rather must take into consideration all factors concerning the Student's abilities, interests, and reasonably high expectations for him. The courses of study the Student must pass to help reach his postsecondary goals must also be written.

3. Following determining the Student's postsecondary goals and courses of study the IEP team will write a statement of the Student's present levels of academic achievement and functional performance, which includes: a) the Student's current academic achievement; b) his current level of functional performance; c) what the Student's disabilities are (irrespective of the disability category he was determined eligible for special education services), and d) how each of the Student's disabilities affect his involvement in and progress in the general education curriculum.
4. Once the IEP team has drafted the statement of the Student's present levels of academic achievement and functional performance it will determine and write a statement of the measurable annual academic and functional goals for the Student which will be designed to: a) meet his needs that result from his disabilities in order to enable him to be involved in and progress in the general education curriculum (the academic goals may be aligned with State standards below the Student's current grade or chronological age due to his significantly low academic functioning), and b) meet the other needs that result from his disability. Goals must be specific, including a baseline or starting point, an ending point, and be objectively measurable. The goals will be based on what the Student is expected to complete by the end of the 2012-2013 school year when it will be reviewed and revised again. The IEP will then

[58] The Student's eventual achievement of those goals will not be measured by the Respondent as the Student will no longer be the responsibility of the Respondent.

be reviewed and revised periodically and at least annually at the conclusion of every school year until the Student is no longer under the responsibility of the Respondent.

5. Following drafting the statement of each of the Student's annual measurable goals, the IEP team will draft a statement about how progress toward each goal will be measured. Once the goals are created and measurement technique described, the IEP team will draft a statement that the Petitioner will be provided written reports monthly on the Student's progress toward the goals. Progress reports must describe what was measured, how it was measured, and what that information means in regards to progress toward reaching the goal by the end of the school year. (If progress is not on trajectory toward reaching any goal, the IEP team must meet to review the matter and make changes to the IEP, implementation, or placement, as determined appropriate.)
6. The IEP team will then describe the special education, related services, and supplementary aids and services, based on peer-reviewed research, that will be provided to or on behalf of the Student, and what program modifications or supports for school personnel will be necessary for the Student to advance appropriately toward attaining his annual goals, to be involved in and progress in the general education curriculum and participate in extracurricular and other nonacademic activities, and to be educated and participate with other children with disabilities and nondisabled children in activities. At a minimum, the special education services will include research-based specialized instruction in all academic areas, research-based related services including speech and language, and behavioral support in the areas of both classroom behavior and attendance, and extended school year services for breaks in the regular school year over two weeks long. (ESY services are necessary because the Student is significantly behind in meeting grade-appropriate academic standards and

significant remediation is in order.) ESY services must begin within two weeks of the start of the break, and no sooner than one week from the break, and must continue until within two weeks of the start of the regular school year and last no later than one week prior to the start of the regular school year. (This is in order to provide the Student with some breaks in programming that presumably will not be detrimental to his overall progress.) Behavior support services must include work with both the Student individually and with the Student's classroom teachers (both regular and special education) who must be aware of the Student's needs and how to effectively work with him.

7. Following the statement of the services, the IEP team will draft a statement explaining the extent the Student will not be participating with non-disabled students in the regular classroom and other activities.
8. The IEP team will then include a statement in the IEP about the individual appropriate accommodations necessary to measure the Student's academic achievement and functional performance on District of Columbia-wide assessments.
9. The IEP team will include a statement of the projected date for the beginning of the services and modifications, which will be no later than January 2, 2013, and the anticipated frequency, location, and duration of all of the services (special education, related services, supplementary aids and services, and modifications).
10. The IEP team will then determine any additional transition services not already addressed in the IEP that will be needed to assist the Student in reaching his postsecondary goals, including enlisting the assistance of other agencies in postsecondary transition for the Student.

11. The IEP team will determine, following the drafting of the IEP, the Student's educational placement based on the following: a) the IEP, including the impact of working on academic skills that are far below his chronological age and his behavioral needs; b) be as close as possible to the Student's home; and c) be reasonably selected to promote and ensure attendance, including attendance in each class during the day.
12. If the IEP team determines any additional data is necessary for making determinations about the Student's programming, the Respondent shall ensure the assessments are conducted within 14 school days of that determination, and the assessment report(s) written within one week of the completion of the assessment(s) and that the IEP team is convened to meet within two weeks of the completion of the assessment(s) to review the assessment reports and revise, if necessary, the IEP. (Thus, if the IEP described herein is timely completed, and additional data is necessary, the IEP may again be revised to ensure it is based on accurate and current data.)
13. If, during the course of monitoring the Student's progress on annual goals, the Student is not making appropriate progress toward any goal or goals (a trajectory to achieve the goal(s) by the end of the school year), the IEP team is to convene as soon as possible, and no later than 30 days from the progress report, to review the IEP, its implementation, all progress reports, teacher and service provider observations, and revise the IEP as necessary, or placement, to enable the Student to progress toward the goal(s).
14. The Student's program and placement shall not be presumed to be at Ballou Arts and Technology Academy, despite staff from that school making up the initial IEP team.

15. This order is to be effective for the 2012-2013 school year and any dispute arising from the annual review that is to occur at the conclusion of the current school year shall be subject to new dispute resolution, including hearing.

IT IS SO ORDERED.

Date: November 10, 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).