DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE
810 First Street, N.E. 2d Floor
Washington, DC 20002

STUDENT, **By and through PARENT,**[1] ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	))))))))))	**Case No. 2012-0542** **Bruce Ryan, Hearing Officer** **Issued: October 31, 2012**

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HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The complaint was filed August 8, 2012, on behalf of a 15-year old student (the "Student") who resides in the District of Columbia and who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. The Student attends her neighborhood DCPS high school ("High School"). Petitioner is the Student's grandmother and legal guardian.

As more specifically set forth below, Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") over the course of many school years, dating as far back as 2001. The alleged denials of FAPE consist of DCPS' failing to (1) timely locate, identify, and evaluate her as a child with a disability in need of special education services, (2) provide her with an appropriate individualized education program ("IEP"), (3) provide her with an appropriate educational placement, (4) conduct re-evaluations on a timely basis, (5) conduct

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

adequate evaluations in all areas of suspected disability, (6) provide parent the right to meaningfully participate in the educational decision making, (7) provide all of her educational records, and (8) provide parent an independent education evaluation. *See Administrative Due Process Complaint,* pp. 3-7; *Prehearing Order* (Sept. 18, 2012), pp. 1-3.

DCPS filed its Response on August 17, 2012, which denies the allegations that it failed to provide a FAPE. DCPS also asserts (*inter alia*) that a number of the claims are barred in whole or in part by the IDEA's two-year statute of limitations, and that the exceptions to the statute of limitations do not apply. DCPS later moved to dismiss on that ground, which Petitioner opposed, and the Hearing Officer deferred ruling until a factual record could be developed at hearing. *See Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*"), Section 401 C. 7.

On August 24, 2012, the parties held a resolution meeting, which did not resolve the complaint. The parties also did not agree to end the 30-day resolution period early. Accordingly, the resolution period ended and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") began on September 7, 2012.

On September 10, 2012, a Prehearing Conference ("PHC") was held to discuss and clarify the issues and requested relief. At the PHC, the parties agreed to schedule the due process hearing in three sessions, on October 9, 11 and 15, 2012. A Prehearing Order ("PHO") was issued on September 18, 2012. The parties then filed their five-day disclosures, as required, by October 1, 2012. Written objections were filed by both sides on October 4, 2012.

The Due Process Hearing was held as scheduled on October 9, 11 and 15, 2012. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence:

<u>Petitioner's Exhibits</u>: P-1 through **P-65;** and **P-67** through **P-71.** [2]

<u>Respondent's Exhibits</u>: R-1 through R-11. [3]

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[2] The Hearing Officer sustained DCPS' objection to Exhibit P-66 (DC Community Service Agency Progress Notes). DCPS withdrew its objections to Exhibits P-1 through P-3, P-10 through P-16, and P-39. The Hearing Officer overruled the remainder of DCPS' objections, for the reasons stated on the record.

[3] The Hearing Officer overruled Petitioner's objections to Exhibits R-5 and R-8, for the reasons stated on the record.

In addition, the following Witnesses testified on behalf of each party:

> **Petitioner's Witnesses**: (1) Petitioner; (2) Educational Advocate ("EA"); (3) [redacted] Educational Expert; (4) Aunt; (5) Associate Head, Private School ("Priv. Sch."); and (6) [redacted], Lindamood Bell Learning Center ("LB").
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> **Respondent's Witnesses**: (1) Social Worker, High School ("SW"); (2) Special Education Coordinator, High School ("SEC"); (3) Special Education Teacher, High School ("SET"); and (4) DCPS School Psychologist ("Psych."). [4]

Following hearing, Petitioner filed a consent motion for continuance to extend the HOD timeline from 10/22/2012 to 10/31/2012 in order to allow for submission and consideration of written closing arguments. The motion was granted, for good cause shown, in light of the length and complexity of the issues and record developed over three days of hearings. Both parties then filed written closing arguments on October 22, 2012.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("*SOP*"). The statutory HOD deadline is October 31, 2012.

III. ISSUES AND REQUESTED RELIEF

As specified in the PHO, the issues presented for determination at hearing are:

> **(1) Child Find** — Did DCPS deny the Student a FAPE by failing timely to locate, identify, and evaluate her as a child with a disability in need of special education services
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> **(2) Failure to Develop Appropriate IEP** — Did DCPS deny the Student a FAPE by failing to develop an appropriate IEP for the 2002-03 through 2011-12 school years?

[4] The Hearing Officer overruled Petitioner's objections to the School Psychologist's testimony, for the reasons stated on the record.

(3) Failure to Provide Appropriate Placement — Did DCPS deny the Student a FAPE by failing to provide her with an appropriate educational placement for the 2002-03 through 2011-12 school years?

(4) Re-evaluation — Did DCPS deny the Student a FAPE by failing to re-evaluate her until 2012, when the Student was due for a triennial re-evaluation in 2007?

(5) Failure to Evaluate in All Areas of Suspected Disability — Did DCPS deny the Student a FAPE by failing to conduct adequate evaluations in all areas of suspected disability?

(6) Parental Participation/Observation — Did DCPS deny the Student a FAPE by failing to provide Petitioner the right to meaningfully participate in the educational decision making by (*inter alia*) refusing to permit parent and her independent educational expert ([redacted]) to observe the Student in her classes at High School during the 2011-12 school year?

(7) Failure to Provide Access to Educational Records — Did DCPS deny the Student a FAPE by failing to provide the parent access to all of the Student's educational records?

(8) Independent Evaluation — Did DCPS deny the Student a FAPE by denying Petitioner the right to obtain an independent educational evaluation, as allegedly requested at the April 27, 2012 IEP Team meeting?

The specific issues are discussed in greater detail below. As relief, Petitioner requests that DCPS be ordered: (a) to fund the Student's placement at Private School (where she has been accepted), or another appropriate non-public, full-time special education day school; (b) to convene an MDT/IEP meeting to review and revise the April 2012 IEP to address all her needs; and (c) to provide compensatory education for the harm caused by DCPS' denials of FAPE. *Prehearing Order* (Sept. 18, 2012), p. 3.

As the party seeking relief, Petitioners were required to proceed first at the hearing and carried the burden of proof on each of the issues specified above. 5-E DCMR §3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). Petitioners also had the burden of proposing a well-articulated plan for compensatory education in accordance with *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

IV. FINDINGS OF FACT

Based upon the evidence presented at the due process hearing, this Hearing Officer makes the following Findings of Fact:

1. The Student is a [redacted] student who is a resident of the District of Columbia. Petitioner is the Student's grandmother and legal guardian. *See Pet. Test.; P-71.*
2. The Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA. She was originally found to have a Speech and Language Impairment and later was found to have a Specific Learning Disability. *See P-10; P-25; Pet. Test.*
3. The Student currently attends the [redacted] grade at her neighborhood high school ("High School"), which she also attended during the 2010-11 and 2011-12 school years. Before that, she attended another DCPS school from kindergarten through 8th grade.
4. The Student was first found eligible for special education during the 2002-03 school year and has had a series of individualized education programs ("IEPs") with DCPS since that time. Petitioner participated in the MDT meetings where those IEPs were developed and signed the IEP documents. *See P-10; P-12; P-13; P-14; P-16; P-17; P-18; Pet. Test.*
5. In October 2004, the Student's MDT/IEP Team ordered a psycho-educational assessment and a speech/language evaluation of her. Results from the evaluations showed (*inter alia*) that the Student's receptive and expressive language skills were severely delayed and she was functioning at a kindergarten reading level. With respect to cognitive functioning, her general verbal abilities were found to be in the well below average or intellectually deficient range, but her general non-verbal abilities were found to be in the average range. *See P-2; P-3.* It was recommended that the Student be considered for continued special education services as a language-related learning disabled student. *P-2-4.*
6. The Student was due for triennial re-evaluation in 2007, but DCPS did not conduct or seek consent for any re-evaluations at that time. DCPS continued to conduct annual meetings and generate IEPs for the Student during most school years.
7. On or about March 17, 2010, when the Student was in 8th grade, DCPS convened a meeting of the Student's MDT/IEP Team to review her IEP and progress. As of that date, the Student was making only minimal progress toward her IEP goals and had fallen further behind her age-group peers in academic achievement. Despite that, DCPS

eliminated her 15 hours of pull-out specialized instruction and switched all of her specialized instruction to a General Education setting. *P-18.* The evidence shows that, in this respect, the 03/17/2010 IEP was not reasonably calculated to confer educational benefit on the Student.

8. On or about September 29, 2010, when the Student was in 9th grade, DCPS convened another meeting of the Student's MDT/IEP Team to review her IEP and progress at High School. Despite having only 30 days to observe the Student in a more demanding academic environment, DCPS further reduced the amount of specialized instruction she was receiving even in the General Education setting from 15 to 7.5 hours per week. *P-19.* DCPS took such action in the face of evidence that the Student had not mastered any of her prior IEP goals and had received three Ds on her latest academic progress report, and at the same time that her teachers were recommending after-school tutoring to keep up. *See P-20* (9/29/2010 MDT meeting notes). The evidence shows that, in this respect, the 09/29/2010 IEP was not reasonably calculated to confer educational benefit on the Student.
9. On or about April 4, 2011, near the end of 9th grade, DCPS convened another meeting of the Student's MDT/IEP Team to review her IEP and progress. DCPS developed an IEP that carried forward essentially the same contents as the September 2010 IEP. *P-21.* The evidence shows that, in this respect, the 04/04/2011 IEP was not reasonably calculated to confer educational benefit, since it continued to contain the same unachieved goals without adequate services and support for the Student to attain them or to make progress in the general education curriculum.
10. During this general time period (approximately 9th-10th grade), Petitioner began to have increasing concerns about the Student's educational program at High School. *See Pet. Test.; see also Aunt Test.* (noting difficulties with homework). Petitioner believes the Student learns best in small settings, including with one-to-one instruction, and has shared that concern with her teachers and the DCPS special educators. *Id.* In July 2011, and again in September 2011 and February 2012, Petitioner requested access to the Student's educational file; and she also requested to observe a classroom in June 2012. *Id. See also EA Test.*

11. On or about February 22, 2012, during 10th grade, DCPS convened another meeting of the Student's MDT/IEP Team to review her IEP and progress. The Team also reviewed an updated Woodcock-Johnson academic achievement test administered the day before the meeting. The new Woodcock-Johnson showed that the Student was performing at approximately the 3d-4th grade level academically, despite having received over nine years of special education services from DCPS. The IEP developed at this meeting contained goals and objectives that were not reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum. It also failed to provide an appropriate level of specialized instruction and related services.
12. Also at the February 22, 2012 meeting, DCPS agreed to conduct an updated psychological evaluation and an updated speech and language evaluation, as had been requested by Petitioner. *See EA Test.; P-24* (meeting notes). The speech/language evaluation was completed on April 2, 2012. *See P-5.* The evaluation indicated that the Student's language skills ranged from average to below average. *Id.,* p. 7. Her language content and receptive language scores were considered very low. *Id.* Her delays were found to "impact her note-taking, retaining lengthy lectures/instructions/verbal expression, and comprehension of verbal and written text." *Id.,* p. 8.
13. On or about April 23, 2012, an updated Comprehensive Psycho-educational Re-evaluation was completed. *See R-4; see also P-6.* [5] The report found that the Student's overall cognitive ability was within the borderline range; that her achievement in reading, math and writing were well below average; and that her social/emotional functioning was still hindered by mild inattention, hyperactivity, impulsivity and delayed adaptive skills. *P-6,* p. 12. The evaluator found that she continued to qualify for specialized instruction as a student with a specific learning disability ("SLD") in reading, math and written language, and that she should continue to receive psychological counseling. *Id.* The evaluator also made a number of educational recommendations to help address her academic deficits, including that instructional material should be delivered to the Student at her learning pace and through simplified and repeated directions. *Id.,* pp. 14-15. *See also R-4, p. 035.*

[5] The report contained at Exhibit P-6 is dated 10/05/2011, but the parties stipulated that the report was actually written on 04/23/2012 and was discussed at the 04/27/2012 meeting.

14. On or about April 27, 2012, the Student's MDT/IEP Team reconvened to review the results of the updated speech/language and psychological assessments. The team agreed that the Student remained eligible for special education services as a child with SLD, based on the psychological results. The DCPS speech/language pathologist stated her view that the Student was also eligible for speech and language services due to the significant difference between her expressive and receptive language scores. *See R-3* (4/27/2012 meeting notes), p. 018.
15. The 04/27/2012 IEP provides 7.5 hours per week of specialized instruction in an inclusion (general education) setting, plus one hour per week of counseling and 30 minutes per week of speech/language consultative services. It provides no pull-out instruction or direct speech/language pathology services.
16. At the April 27, 2012 meeting, Petitioner stated that she wished to obtain an independent psycho-educational evaluation, as she disagreed with the DCPS assessment because of its failure to use sufficient non-verbal assessment tools or to account for the significant changes in scores between 2004 and 2012. *See EA Test.*
17. The IEP developed at the 04/27/2012 meeting was inadequate to serve the Student's needs and is not reasonably calculated to confer educational benefit because it provides an inappropriate amount of hours and setting for specialized instruction and related services, including no direct speech/language services. The IEP also fails to provide the low student/teacher ratio that the Student requires to access her education, and failed to provide Extended School Year ("ESY") services to prevent regression during the 2012 summer.
18. Petitioner informed DCPS at the 04/27/2012 meeting that she believed High School could not meet the Student's IEP needs or her need for a full-time special education placement. DCPS disagreed and declined to propose an alternative placement.
19. The evidence shows that DCPS' placement of the Student in a general education setting and program at her neighborhood high school, with only part-time inclusion support, was not reasonably calculated to confer educational benefit during the 2010-11 and 2011-12 school years, and is not reasonably calculated to confer educational benefit during the present 2012-13 school year. This setting and placement also does not constitute the

Student's least restrictive environment under the circumstances. As a result, it does not constitute an appropriate special education program and school for her.

20. Private School is a non-public school located in the District of Columbia that provides full-time special education to students with disabilities, primarily learning disabilities. It is able to provide the special education program and placement that the Student needs to access her education and is reasonably calculated to confer educational benefit on her. Private School is the only placement currently before the Hearing Officer that is suited to meet all of the Student's unique needs.

V. DISCUSSION AND CONCLUSIONS OF LAW

As the party seeking relief, Petitioner carries the burden of proof. *See* 5-E DCMR §3030.3; *Schaffer* v. *Weast,* 546 U.S. 49 (2005). "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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a Free Appropriate Public Education (FAPE)." 5-E DCMR §3030.3. The hearing officer's determination is based on the preponderance of the evidence standard, which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

For the reasons discussed below, the Hearing Officer concludes that Petitioner has met her burden of proof ***in part*** on **Issues 2, 3 and 5**, but has failed to meet her burden of proof on the remaining issues presented for hearing. Petitioner's claim under Issue 1, as well as portions of her claims under Issues 2, 3 and 4, are also barred by the applicable statute of limitations.

A. Statute of Limitations

The IDEA provides that a "parent or agency shall ***request an impartial due process hearing within 2 years*** of the date the parent or agency ***knew or should have known*** about the alleged action that forms the basis of the complaint...." 20 U.S.C. §1415(f)(3)(C) (emphasis added). IDEA also provides two exceptions to that mandatory timeline.[6] Specifically:

[6] DCPS has the burden of proof on statute of limitations as an affirmative defense, *see Schaffer v. Weast,* 546 U.S. 49, 57 (2005); *J.L. v. Ambridge Area School District,* 50 IDELR 219 (E. D. Pa. 2008), but Petitioner has the burden to show that an exception to the statute of limitations applies for any claims accruing prior to August 8, 2010. *See Hammond v. District of Columbia,* 2001 U.S. Dist. LEXIS 25846 (D.D.C. 2001); *J.L. v. Ambridge Area School District, supra.*

> "The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to —
>
> (i) ***specific misrepresentations*** by the local educational agency that it had resolved the problem forming the basis of the complaint; or,
>
> (ii) the local education agency's ***withholding of information*** from the parent that was required under this subchapter to be provided to the parent

20 U.S.C. §1415(f)(3)(D); *see also* 34 C.F.R. §300.511(e), (f); *SOP* §301.2(B).

Because Petitioner requested a due process hearing on August 8, 2012, the IDEA statute of limitations generally would limit her claims to DCPS' actions after ***August 8, 2010***. *See, e.g., D.K. v. Abington School District,* 59 IDELR 271 (3d Cir. Oct. 11, 2012). However, as the U.S. Department of Education explained in adopting the IDEA regulations, "hearing officers will have to make determinations, on a case-by-case basis, of factors affecting whether the parent 'knew or should have known' about the action that is the basis of the complaint." 71 *Fed. Reg.* 46,706 (Aug. 14, 2006).[7] In addition, if the claims (or some portion of them) accrued before August 8, 2010 – because Petitioner knew or should have known of their basis – then the Hearing Officer must consider whether the claims are still timely under either statutory exception.

In this case, Petitioner alleges that DCPS denied the Student a FAPE through various actions over the past ***10 years***, beginning in ***2001*** when she was in kindergarten. She is now an 11th grader at High School. All of the actions occurring prior to the 2010-11 school year took place more than two years before the complaint was filed.

DCPS argues that Petitioner should have known of each denial of FAPE alleged in the complaint – including the failures to provide appropriate IEPs during the 2002-03 through 2009-10 school years – when they occurred. *See, e.g., DCPS Motion to Dismiss, p. 3.* DCPS also maintains that neither exception applies in this case. Thus, DCPS argues that all claims based on actions occurring prior to August 8, 2010, are now time-barred.

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[7] *See also, e.g., J.L. v. Ambridge Area Sch. Dist.,* 49 IDELR 224 (E.D. Pa. 2008 ("any inquiry into the application of the statute of limitations requires a highly factual determination as to whether the parent 'knew or should have known' of violations that formed the basis of their complaint").

Petitioner argues that the evidence shows that she "did not know and could not have known the harm that DCPS' educational programming was causing [Student] until she received [Student's] scores on the Woodcock Johnson Achievement Test at the 2/22/12 IEP meeting." *Pet's Closing, pp. 1-2; see also Pet's Reply to DCPS' Motion to Dismiss, p. 2.* Based upon that "discovery" date, Petitioner asserts that her entire case is timely since she has filed her complaint within two years of such date, without even considering the statutory exceptions. *See Pet's Closing, p. 2.*

The Hearing Officer must consider these respective arguments on a claim-by-claim basis. Issues 1 through 4 include claims based on actions occurring prior to August 8, 2010, while Issues 5 through 8 consist entirely of claims arising since that date.

Accrual of Claims vs. Two-year Timeline

Under **Issue 1**, Petitioner claims that DCPS should have evaluated and determined the Student to be eligible for special education when Petitioner requested such action in 2001 – when she was in kindergarten at her neighborhood DCPS elementary school, over a year prior to her initial eligibility date of December 2002 – and that this failure constituted a violation of DCPS' "child find" responsibilities to locate, evaluate and identify the Student as a child with a disability. *See Prehearing Order* (Sept. 18, 2012), ¶6 (1); *Complaint,* pp. 3, 7. Petitioner alleges that DCPS first declined to evaluate Student, and then incorrectly deemed her ineligible for special education services upon reviewing Petitioner's independent educational evaluation during the 2001-02 school year. *Complaint,* p. 3. Based on the evidence adduced at hearing, the Hearing Officer concludes that Petitioner knew or should have known about these alleged actions at the time they occurred, or certainly well prior to August 8, 2010.

Under **Issue 2,** Petitioner claims that a series of IEPs developed over the course of many years – spanning the 2002-03 through 2011-12 school years – were not reasonably calculated to provide educational benefit to the Student. Specifically, Petitioner alleges that by at least the Student's second or third year of special education, she should have been provided full-time specialized instruction, plus related speech-language and counseling services, in a 100% outside general education setting. *See Prehearing Order* (Sept. 18, 2012), ¶6 (2) (as further clarified by Petitioner's counsel via email correspondence on 09/21/2012). Based on the evidence adduced at hearing, the Hearing Officer concludes that Petitioner knew or should have known about these

alleged IEP inadequacies generally at the time they occurred. The parent participated in numerous MDT/IEP meetings at which the Student's academic progress (or lack of progress) was discussed; she signed most of the IEPs; and she received notices of procedural safeguards from DCPS.

Under **Issue 3**, Petitioner similarly claims that DCPS denied the Student a FAPE by failing to provide her with an appropriate educational placement for the 2002-03 through 2011-12 school years. For the same reasons as discussed under Issue 2, the Hearing Officer concludes that Petitioner knew or should have known about these alleged failures generally at the time they occurred.

Under **Issue 4**, Petitioner claims that DCPS denied the Student a FAPE by failing to re-evaluate her as required. Specifically, Petitioner alleges as follows: "Although [Student] was due for triennial re-evaluations in 2007, at no time did DCPS convene a meeting to discuss triennial evaluations, seek consent for triennial evaluations, or conduct triennial evaluations" until 2012. *Complaint,* p. 4. The Hearing Officer concludes that Petitioner knew or should have known that DCPS was not conducting such evaluations between 2007 and August 8, 2010, and thus (absent an applicable exception to the two-year timeline), this claim must be limited to any alleged failure to re-evaluate occurring after August 8, 2010.

Statutory Exceptions

Petitioner next asserts that one or both of the statutory exceptions to the two-year timeline should apply in this case. With respect to the first exception (specific misrepresentations), Petitioner argues that "DCPS has repeatedly promoted [Student] from grade to grade from 2002-present, thereby intentionally insinuating to [Petitioner] that [Student] could do grade level work." *Pet's Closing,* p. 2. Petitioner also asserts that DCPS sent progress reports indicating that Student was making progress toward goals and doing satisfactory work in reading and math, which misled Petitioner. *Id.,* pp. 2-3.

Courts and administrative adjudicators have generally concluded that, for this exception to apply, "the alleged misrepresentation ... must be intentional or flagrant rather than merely a repetition of an aspect of the FAPE determination." *D.K. v. Abington School District, supra,* slip op. at 8 (citations omitted); *I.H. v. Cumberland Valley Sch. Dist.,* 842 F. Supp. 2d 762, 775

(M.D. Pa. 2012).[8] Moreover, the language of the exception – *i.e.*, that the LEA "had resolved the problem forming the basis of the complaint" – again suggests more than simply being misled about a student's academic progress, but rather about a specific grievance. Petitioner has not pointed to a specific misrepresentation by DCPS that it had resolved any problem that now forms the basis for any of her claims. *Cf. Swope v. Central York Sch. Dist.*, 796 F. Supp. 2d 592 (M. D. Pa. 2012). Thus, the Hearing Officer finds that Petitioner has failed to satisfy her burden of showing that the "specific misrepresentations" exception applies in this case.

With respect to the second exception (withholding of required information), Petitioner argues that DCPS failed to provide prior written notice on several occasions and also failed to provide an opportunity to inspect and review educational records. *Pet's Closing,* pp. 3-5. Again, the statutory exception has been construed narrowly, as indicating that "only the failure to supply statutorily mandated disclosures can toll the statute of limitations." *D.K. v. Abington School District, supra,* slip op. at 9.[9] Considering all the evidence adduced at hearing, the Hearing Officer finds that Petitioner's challenge to the 03/17/2010 should not be time-barred since (*inter alia*) DCPS withheld a required written notice when it changed her educational placement by changing the setting for all of her specialized instruction from outside general education to general education in March 2010. However, DCPS' alleged failure to provide access to educational records primarily relates to the 2011-12 time period, and Petitioner has otherwise failed to meet her burden of showing that the "withholding information" exception applies to any other conduct.[10]

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[8] *See also* U.S. Dept. of Ed., 71 *Fed. Reg.* 46706 (Aug. 14, 2006) ("We do not believe it is appropriate to define or clarify the meaning of 'misrepresentations,'.... Such matters are within the purview of the hearing officer.").

[9] *See also School District of Philadelphia v. Deborah A*, 2009 WL 778321 (E. D. Pa. Mar. 24, 2009) (second exception refers to "withholding of information regarding the procedural safeguards available to a parent under [IDEA]"); *D.G. v. Somerset Hills School Dist.*, 559 F. Supp. 2d 484 (D. N. J. 2008) (failure to provide required written notice of refusal to evaluate and procedural safeguards); *Natalie M. v. Department of Education, State of Hawaii*, 2007 Westlaw 1186835 (D. Hawaii 2007) (parents received notice as required by IDEA through receipt of revised procedural safeguards statement); U.S. Dept. of Ed., 71 *Fed. Reg.* 46706 (Aug. 14, 2006) ("exceptions include situations in which the parent is prevented from filing a due process complaint because the LEA withheld from the parent information that is required to be provided to parents under these regulations, such as failing to provide prior written notice or a procedural safeguards notice.").

[10] While it appears that DCPS also failed to provide prior written notice of the 10/18/2004 elimination of speech/language services, the evidence shows that Petitioner participated in numerous subsequent meetings prior to August 8, 2010, which served to communicate such information. She also regularly received notice of procedural safeguards and signed subsequent IEPs containing such information, well before August 8, 2010.

Accordingly, the Hearing Officer concludes that Petitioner's claims under Issue 1 are time-barred; that her claims under Issues 2 and 3 are time-barred, except insofar as they concern the IEPs developed beginning March 2010 and the placements for the 2010-11 and 2011-12 school years; and that her claims under Issue 4 are time-barred to the extent they allege a failure to re-evaluate prior to August 8, 2010. [11]

B. Analysis of Issues/Denials of FAPE

Issue 1: Child Find

As noted above, the Hearing Officer has concluded that Petitioner's child-find [12] claim dating back to 2001 is barred by the applicable statute of limitations, and accordingly it will not be adjudicated.

Issue 2: Failure to Develop Appropriate IEPs

FAPE means "special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the

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[11] Finally, even assuming *arguendo* that Petitioner did not acquire the necessary facts to show that the Student had been injured by DCPS' decade-long series of actions until she obtained an educational evaluation in February 2012, Petitioner would face a separate statutory hurdle under 20 U.S.C. §1415 (b) (6) (B) and 34 C.F.R. §300.507 (a). Subject to the same exceptions, Section 300.507 (a) by its terms provides that a due process complaint "must allege a ***violation that occurred not more than two years before*** the date the parent knew or should have known about the alleged action that forms the basis of the due process complaint."34 C.F.R. §300.507(a) (emphasis added); *see also* 20 U.S.C. §1415(b)(6)(B). Accepting Petitioner's "discovery" date of February 22, 2012, this would mean that Petitioner could only allege claims dating back to February 22, 2010. Presumably, Congress and the DOE determined that repose must enfold a child's educational program at some point, and that it would be unfair to require agencies to defend their actions more than four (two plus two) years after the fact. Since Petitioner has been found entitled to challenge the March 2010 IEP under an applicable exception to the two-year timeline, the result under Petitioner's accrual argument would not materially alter the scope of justiciable claims.

This also distinguishes the *Draper* case cited by Petitioners, where a claim of inappropriate placement between 1999 and 2002 was held not barred by the statute of limitations because the parent only learned of the student's injury when he was re-evaluated in 2003. *See Draper v. Atlanta Indep. Sch. Sys.,* 518 F. 3d 1275 (11th Cir. 2008).

[12] The "child find" provisions of the IDEA require each State to have policies and procedures in effect to ensure that "[a]ll children with disabilities residing in the State ... who are in need of special education and related services, are identified, located, and evaluated." 20 U.S.C. §1412(a) (3) (A); 34 C.F.R. §§300.111(a). These provisions impose an affirmative duty on States to identify, locate, and evaluate such children. *Reid v. District of Columbia,* 401 F.3d 516, 518-19 (D.C. Cir. 2005); *Hawkins v. District of Columbia,* 539 F. Supp. 2d 108 (D.D.C. 2008). In the District of Columbia, OSSE regulations require LEAs to ensure that such procedures are implemented for all children residing in the District. *See* 5-E DCMR §3002.1(d).

State involved; and are ***provided in conformity with the individualized education program (IEP)...***" 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1 (emphasis added). The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia,* 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe,* 484 U.S. 305, 311-12 (1988)). *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. "The IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid v. District of Columbia,* 401 F. 3d 516, 519 (D.C. Cir. 2005), *quoting Board of Education* v. *Rowley,* 458 U.S. 176, 200, 207 (1982); *see also Kerkam v. McKenzie,* 862 F. 2d 884 (D.C. Cir. 1988).

Judicial and hearing officer review of IEPs is "meant to be largely prospective and to focus on a child's needs looking forward; courts thus ask whether, at the time an IEP was created, it was 'reasonably calculated to enable the child to receive educational benefits.'" *Schaffer* v. *Weast,* 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley,* 458 U.S. at 207); *see also Lessard v. Wilton Lyndeborough Coop. Sch. Dist.,* 518 F.3d 18, 29 (1st Cir. 2008) (IEP viewed "as a snapshot, not a retrospective"). An LEA also must periodically update and revise an IEP "in response to new information regarding the child's performance, behavior, and disabilities."*Maynard v. District of Columbia,* 54 IDELR 158 (D.D.C. 2010), *slip op. at* p. 6; *see* 34 C.F.R. 300.324.

As discussed above, the claims properly before the Hearing Officer under Issue 2 concern the IEPs developed in March 2010, September 2010, April 2011, February 2012, and April 2012. With respect to each of these five IEPs, Petitioner alleges that the IEPs were not formulated to provide educational benefit in accordance with *Rowley*. Petitioner claims that, "[s]tarting on March 17, 2010, DCPS began a practice of drastically reducing [Student's] special education services absent any evidence that [Student] was making meaningful progress, thereby producing a series of IEPs that were not reasonably calculated to confer any educational benefit." *Pet's Closing,* p. 12. Petitioner's specific challenges to each IEP will now be addressed.

March 2010 IEP

On March 17, 2010, when the Student was nearing completion of the 8th grade, DCPS ***eliminated all 15 hours of pull-out specialized instruction*** that the Student had been receiving

and relegated her to getting special education support within the general education classroom. At the time DCPS made this change, the Student's most recent progress report indicated only minimal progress toward IEP goals since April 2009, and she was preparing to move into a more rigorous high school program. *See P-18; P-29* (2/6/2010 progress report); [redacted] *Test.* Under these circumstances, Petitioner asserts that "DCPS should have increased rather than decreased [Student's] time in the special education setting." *Pet's Closing,* p. 12. DCPS does not offer any convincing response. *See DCPS' Closing,* pp. 2-3.

The Hearing Officer agrees that eliminating all of the Student's pull-out specialized instruction in March 2010 was not reasonably calculated to confer educational benefit based on the information available to the IEP Team at that time. The March 2010 IEP was also inappropriate because it did not recognize the Student's speech/language deficits or provide goals or services to address them; and because it provided math and reading goals that were not specific enough and tailored to her particular needs. *See* [redacted] *Test. (*discussing goals in 03/17/2010 IEP).

September 2010 IEP

On September 29, 2010, DCPS developed the Student's next IEP at a 30-day review meeting after she began the 9th grade at High School. In this IEP, DCPS further ***reduced in half*** the amount of specialized instruction that the Student would receive in the general education setting, from 15 to 7.5 hours per week. DCPS argues that this significant reduction in hours was "[b]ased on her performance in all of her classes during that short period." *DCPS' Closing,* p. 3. However, the evidence shows that DCPS took such action in the face of evidence that the Student had not mastered any of her prior IEP goals and had received three Ds on her latest academic progress report, and at the same time that her teachers were recommending after-school tutoring to keep up. *See P-20-2* (9/29/2010 MDT meeting notes); *see also Iseman Test.*[13]

The Hearing Officer agrees with Petitioner that this evidence showed an insufficient level of progress to justify such a significant reduction in services, especially without benefit of any

[13] Petitioner also challenges DCPS' refusal to provide Extended School Year ("ESY") services in the September 2010 IEP, but the Hearing Officer concludes that it was not unreasonable for the IEP team to decide to reconvene before the end of the school year to consider that issue. *P-20.*

updated assessments. It also continued the same inappropriate goals. *See* [redacted]. For these reasons, the 09/29/2010 IEP failed to confer meaningful educational benefit.

April 2011 IEP

On April 4, 2011, DCPS developed another IEP, which carried forward the same content as the September 2010 IEP. *P-21;* [redacted] *Test.* Petitioner claims that this IEP was not reasonably calculated to confer educational benefit, since it continued to contain the same unachieved goals without adequate services and support for the Student to attain them or to make meaningful progress in the general education curriculum. The Hearing Officer agrees, and concludes that the April 2011 IEP suffers from essentially the same defects as the two prior IEPs.

2012 IEPs

DCPS developed the Student's latest IEPs in February and April 2012, during her 10th grade year. Petitioner's educational expert testified that both these IEPs failed to address the Student's most severe needs, namely her difficulties with language and her inability to access information in a general education classroom without adequate supports. *See* [redacted]*; Pet's Closing, p. 13.* The Hearing Officer found this testimony to be very credible and supported by specific and reasoned analysis.[14] DCPS did not successfully counter this testimony.

For example, [redacted] testified that while the February 2012 goals are more curriculum-based, they are still not tailored to the Student's individual needs and lower functioning levels. [redacted] (discussing reading, math, and written language goals at *P-23-3, P-23-4* and *P-23-5*). In addition, both the February and April 2012 IEPs continue to provide an insufficient level of specialized instruction (only 7.5 hours) and in the wrong (general education) setting. The IEPs also provide no speech/language goals and no direct speech/language pathology services. And they fail to provide the low student/teacher ratio that the Student

[14] DCPS correctly points out that [redacted] testimony is offered in hindsight without the benefit of having attended the IEP meetings, speaking with the student's teachers, or reviewing work completed at the time. *DCPS' Closing, p. 2.* However, [redacted] testified that she had reviewed all of the Student's educational records, including all of her assessments, progress reports and IEPs, and she offered her expert opinion based on over 40 years of experience in the field of special education. [redacted] holds a Masters in Special Education and a Ph.D in Human Development; she has taught college-level courses in special education and educational psychology; she has delivered presentations on special education evaluations, development and interpretation of IEPs, and compensatory education; and she has evaluated over several hundred high school students with learning disabilities and/or speech/language impairments over the course of her career. *See P-68; Iseman Test.* She was accepted as an expert.

requires to access her education, as well as Extended School year ("ESY") services to prevent further regression. *Id.* Petitioner has shown that these IEP services are insufficient to enable the Student to access and make progress in the general education curriculum at High School, and hence are not reasonably calculated to confer meaningful educational benefit.

Issue 3: Failure to Provide Appropriate Placement

Petitioner next claims that DCPS has denied the Student a FAPE by failing to provide her with an appropriate placement. Under the IDEA, "[d]esigning an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP." *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). In so doing, DCPS must also ensure that its placement decision is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA. *See* 34 C.F.R. §§ 300.114-300.116. Moreover, statutory law in the District of Columbia mandates that DCPS place a student with a disability in "***an appropriate special education school or program***" in accordance with the IDEA. D.C. Code 38-2561.02 (emphasis added).[15] "If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school." *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991).

In this case, Petitioner argues that the Student has "required a much more restrictive and specialized placement that could address the variety and extent of her special education needs." *Pet's Closing,* p. 15, *citing* [redacted] According to Petitioner, the Student "is now so far behind academically, and is lacking many of the fundamental skills that form the basis of student knowledge and learning, if there is any hope of moving her toward self-sufficiency or a high school diploma, she needs an intensive full-time special education program that can provide her integrated academic support and direct related service provision, access to extended school year services, and vocational training support that would start immediately and be available to her throughout her remaining time in special education." *Id.* Petitioner argues that the Student's current placement in a part-time inclusion program at High School is unable to provide her this required level of support.

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[15] *See also Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), *citing McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming "placement based on match between a student's needs and the services offered at a particular school").

DCPS primarily argues that the Student's transcript indicates that she "is accessing the curriculum in her classes" since she has received passing grades in most of her core courses. *DCPS' Closing,* p. 5; *see P-34.* However, the testimony elicited at hearing largely discredited this argument. While these grades may have been accurately reported, the testimony showed that the Student has not demonstrated the skills needed to earn a C in Geometry or 11th grade English. [redacted] (redirect); *see also P-6-5.* Nor is she being meaningfully exposed to the general education curriculum in her high school classrooms. For example, the Special Education Teacher testified that because the Student is so low functioning, she does not expect her to do the same work as her non-disabled peers. *SET Test.* Indeed, the teacher conceded that the Student's grades are based mainly on how much effort she exerts toward her IEP goals, rather than the actual content knowledge she is acquiring in classes, given her low level of academic functioning. *Id.* (according to the teacher, if student is punctual, completes all assignments and hard-working, she can earn a grade of C or higher). [16]

The Hearing Officer agrees with Petitioner. The Student is now in 11th grade. After nine years of special education, she is only functioning at a 3d to 4th grade level in all academic areas. She can only decode 3d grade level reading and add two single-digit numbers in math. *See* [redacted]*; P-7; P-44.* Yet her IEP goals include grade-level geometry and writing multi-paragraph essays. *P-25.* At the same time, the Student has demonstrated the cognitive ability and potential to learn and make academic progress toward a high school diploma if she can receive the necessary supports.

With her history of language-based learning problems and very low academic functioning, the Student's needs are now too significant and complex for a part-time inclusion program in a regular education classroom, which is all that DCPS has offered. The evidence shows that substantial remediation is essential to bridge her huge gap in academic achievement, and that to be effective it must be delivered in a full-time special education setting with individual attention and a small student/teacher ratio. The Student also requires integrated

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[16] DCPS also argues that the Student's attendance has effectively prevented her from making academic progress over the 2011-12 school year. *DCPS' Closing, p. 5.* Although some problems remain with respect to skipped classes, *R-3, pp. 018-019,* the overall evidence does not appear to support DCPS' position. *See, e.g, P-24* (2/22/2012 meeting notes); *R-5, p. 25* (4/23/2012 comprehensive psychological evaluation, noting that her "attendance and discipline records are near-perfect"); *SW Test.* (no current attendance problems).

speech and language services (both inside and outside the classroom) to address her significant language deficits, as well as vocational training in an appropriate setting. *See* [redacted]; *P-7; P-44.* DCPS witnesses also testified that High School cannot accommodate a student who needs 26 hours of specialized instruction, but is on a diploma track. *See SET Test.*

In short, the evidence shows that DCPS' current placement of the Student in a general education setting and program at her neighborhood high school, with only part-time inclusion support, is not reasonably calculated to confer educational benefit. Nor does it constitute her least restrictive environment under the present circumstances.

Issues 4 and 5: Re-evaluation; Failure to Evaluate in All Areas

Under Issue 4 (as limited by the applicable statute of limitations), Petitioner claims that DCPS should have conducted a comprehensive re-evaluation at least by August 2010, given the lapse of time since the Student's last assessments. And under Issue 5, Petitioner claims that "even when DCPS finally conducted a re-evaluation in 2012 at [Petitioner's] request, it failed to assess [Student] in all areas of need because the psychological evaluation performed in 2012 did not include a non-verbal IQ assessment." *Pet's Closing,* p. 8. These issues will be discussed together, consistent with Petitioner's written closing argument.

The IDEA and its implementing regulations provide that a public agency "must ensure that a reevaluation of each child with a disability is conducted" if either (1) the public agency determines that the educational or related services needs ... of the child warrant a reevaluation" or (2) "the child's parent or teacher requests a reevaluation." 34 C.F.R. §300.303 (a). The regulations further provide (as a "Limitation") that such a reevaluation: "(1) ***may occur*** not more than once a year, unless the parent and the public agency agree otherwise; and (2) ***must occur*** at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary." *Id.* §300.303 (b). [17] Moreover, the reevaluation must be conducted in accordance with §§300.304 through 300.311, which includes the requirement that the evaluation be

[17] "IDEA and its implementing regulations do not set a time frame within which an LEA must conduct a reevaluation after one is requested by a student's parent." *Smith v. District of Columbia,* Civ. Action No. 08-2216 (RWR) (D.D.C. Nov. 30, 2010), slip op. at 6. In light of the lack of statutory guidance, *Herbin* concluded that "[r]e-evaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." 362 F. Supp. 2d at 259 (quoting *Saperstone,* 21 IDELR 1127, 1129 (OSEP 1995)).

"sufficiently comprehensive to identify all of the child's special education and related services needs...." §300.304(c) (6); *see, e.g., Herbin v. District of Columbia*, 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005) (giving effect to clear statutory language, without triggering conditions); *Letter to Tinsley*, 16 IDELR 1076 (OSEP June 12, 1990) (triennial reevaluation "must be a complete evaluation of the child in all areas of the child's suspected disability....").

As part of either an initial evaluation or re-evaluation, DCPS must ensure that the child "is assessed in all areas related to the suspected disability," and that 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. §300.304 (c) (4), (6); *see also Harris v. DC,* 561 F. Supp. 2d 63, 67-68 (D.D.C. 2008). Thus, evaluations are to be conducted to determine both a child's disabilities and the content of the child's IEP. 34 C.F.R. §300.304 (b) (1). Moreover, IDEA makes clear that DCPS "must use a variety of assessment tools" and must "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child." 34 C.F.R. § 300.304 (b)(1), (2). Finally, where an IEP team determines that additional data is not needed, parents have a right to request particular assessments to determine whether their child has a disability and the child's educational needs. *See, e.g.,* 34 C.F.R. 300.305 (d); *see also Herbin v. District of Columbia,* 362 F. Supp. 254, 43 IDELR 110 (D.D.C. 2005).

The Hearing Officer concludes that DCPS should have commenced a re-evaluation of the Student by August 2010, given that at least three years had passed since the last evaluation or re-evaluation. "A failure to timely reevaluate is at base a procedural violation of IDEA." *Smith v. District of Columbia,* slip op. at 8 (citing *Lesesne v. D.C.,* 2005 WL 3276205 (D.D.C. 2005), and distinguishing *Harris v. DC,* 561 F. Supp. 2d 63, 68-69 (D.D.C. 2008)). Procedural delays give rise to viable IDEA claims only where such delays affect the student's substantive rights. *See Lesesne v. District of Columbia,* 447 F. 3d 828 (D.C. Cir. 2006); 34 C.F.R. 300.513 (a) (2). In this case, Petitioner has carried her burden of proof because she has shown that the procedural delay in obtaining a timely and comprehensive re-evaluation (a) impeded the Student's right to a FAPE by depriving the IEP team of relevant information that could have influenced development of the Student's IEP, and (b) significantly impeded the parents' opportunity to participate

meaningfully in the decision-making process as to the Student's educational programming. *See* 34 C.F.R. 300.513 (a) (2) (i), (ii); *Smith, supra,* slip op. at 10-12.

The Hearing Officer also agrees with Petitioner that the re-evaluation conducted by DCPS was not sufficiently comprehensive to identify all of the child's special education and related services needs because it failed to include an updated non-verbal IQ assessment. The evidence shows that DCPS administered cognitive tests – *e.g.*, the Reynolds Intellectual Assessment Scales ("RIAs") – that contained non-verbal subtests, but were not standardized to produce a non-verbal IQ score. *See* [redacted] *Test.; Psych. Test.* In order to determine the Student's non-verbal IQ and her actual potential for learning, Dr. Iseman testified that either a C-TONI or Lightner test needed to be administered. [redacted] This information was critical because the Student's non-verbal scores on the other standard measures had plummeted from average to borderline between 2004 and 2012. *Id.; see P-2; P-6.* As [redacted] explained, information concerning the Student's non-verbal performance is key to assessing how to address her significant language impacts and to structure the curriculum to best support her learning. *Iseman Test.* As a result, the IEP Team lacked the information it needed to develop an appropriate IEP.[18]

Issues 6-8: Parental Participation – Observation; Access to Records; IEE

Issues 6, 7 and 8 will be discussed together, consistent with the way they are treated in Petitioner's written closing argument. Although Petitioner's allegations appear to have shifted somewhat between the complaint, PHC and hearing, Petitioner now summarizes her claims as follows: She argues that DCPS has denied her "the right to meaningfully participate in the educational decision making" through a combination of (a) denying her the "ability to obtain a ***privately funded*** independent educational evaluation (IEE)," (b) "withholding records," and (c) "denying her the reasonable accommodation she needs to make her own classroom observation meaningful." *Pet's Closing,* p. 5 (emphasis added). These points are addressed seriatim.

[18] The testimony of the DCPS School Psychologist failed to counter this showing. She testified that a "non-verbal disability" was "ruled out" years before, based on a C-TONI score of 98, and thus she would not continue to keep testing. *Psych. Test.* However, she conceded that non-verbal testing can often provide a better measure of an SLD student's true cognitive ability because other testing is laden with language requirements. *Id.* Hence, it can inform the type of programming that such a student may need.

IEE Request

Petitioner has alleged that she orally requested the opportunity to obtain an independent educational evaluation at the April 27, 2012 MDT meeting, although the official meeting notes do not reflect such request (*P-26*). In early July 2012, Petitioner's counsel followed up in writing on this request, in terms suggesting that a ***publicly-funded*** evaluation was being requested. *See P-62* (stating that Petitioner had "requested that DCPS authorize an independent educational evaluation and independent academic evaluation" due to her "disagreement with the [DCPS] evaluations"). In closing argument, however, Petitioner now says the IEE she seeks is only a "privately-funded" evaluation. *Pet's Closing,* p. 5. Either way, the disagreement appears to focus on the lack of non-verbal assessments. *P-62.*

Because Petitioner does not appear to be requesting a publicly-funded IEE, her right to such evaluation under 34 C.F.R. § 300.502 (b) (1) is not at issue in this case.[19] In any event, a publicly-funded IEE relating to non-verbal IQ assessment is already being granted as appropriate relief under Issues 4 and 5 above.

Of course, parents have the right to obtain an evaluation at private expense, and share such evaluation with the public agency to determine the child's educational needs. *See* 34 C.F.R. § 300.502 (c). *See also* 34 C.F.R. §§300.305 (a) (1), 300.324, 300.502 (c) (IEP teams must consider the results of any evaluations provided by the parents if they are performed by a qualified examiner and otherwise meet agency criteria). To the extent Petitioner complains that DCPS has frustrated her privately-funded evaluation by denying her independent evaluator an opportunity to observe the Student in class, that claim is addressed further below in connection with the classroom observation issue.

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[19] IDEA regulations confer on a parent "the right to an independent educational evaluation [IEE] at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 C.F.R. § 300.502 (b)(1). If a parent requests an IEE, the public agency "must, without unnecessary delay, either – (i) file a due process complaint ***to request a hearing to show that its evaluation is appropriate***; or (ii) ensure that an [IEE] is provided at public expense…." *Id.* § 300.502(b)(2) (emphasis added). The agency "may ask for the parent's reason why he or she objects to the public evaluation," but "may not require the parent to provide an explanation. " 34 C.F.R. § 300.502(b) (4). And a "parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees." *Id.* § 300.502(b)(5).

Records Access

Under Issue 7, Petitioner claims that DCPS denied the Student a FAPE by failing to provide the parents access to all of the Student's educational records. IDEA regulations provide that each agency "must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under [IDEA]." 34 C.F.R. §300.613 (a). "The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing ...." *Id.* This right also includes the "right to have a representative of the parent inspect and review the records." *Id.* §300.613 (b) (3).

Petitioner testified that she requested the educational records in July 2011, and again in September 2011 and February 2012. *Pet. Test.* However, the DCPS special education coordinator testified that she did not receive a request for records until February 2012, shortly before the Student's IEP meeting, and that she then arranged for the parent's review of available records at the IEP meeting. *SEC Test.*[20] Subsequently, the special education teacher faxed additional located records to the parent's representatives and arranged for a review of records at High School prior to the due process hearing. *SET Test.; R-9. See also DCPS' Closing, pp. 8-9.* [21]

Based on all of the testimony and documentary evidence presented at hearing, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof on this issue. DCPS' response has not been shown to have been untimely under the circumstances. Also, the records access rights granted to parents under the IDEA do not ensure the discovery or production of any particular category of documents.

Classroom Observation

As OSEP has explained, "neither the statute nor the regulations implementing the IDEA provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement." *Letter to Mamas,* 42 IDELR 10 (OSEP 2004). However, OSEP and the courts have

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[20] It appears from the testimony that incorrect fax numbers and/or email addresses may have led to the delay in receipt. *See SEC Test.*

[21] The records came from two sources: the "Easy IEP" database; and "IEP folders" with hard copies of certain records. The Special Education Teacher testified that she was not aware of any records contained in these two sources that were not provided to Petitioner. *SET Test.*

recognized that there may be limited circumstances in which access may need to be provided: "[f]or example, if parents invoke their right to an independent educational evaluation of their child, and the evaluation requires observing the child in the educational placement." *School Board of Manatee County, Florida v. L.H.,* 666 F. Supp. 2d 1285 (M. D. Fla. 2009); *Letter to Mamas, supra.*

Petitioner claims that DCPS has unlawfully refused to permit Petitioner's retained expert, [redacted] to observe the Student in her classes at High School. DCPS argues that it properly exercised its discretion to preclude [redacted] observation because it was during the last two weeks of the school year, subsequent to IEP meetings, and was in preparation for the present litigation rather than to evaluate or participate in educational decisions. *DCPS' Closing, p. 8.* DCPS also argues that [redacted] evaluation does not meet DCPS criteria for IEEs as she is not licensed or certified to conduct any specific educational evaluation, nor is it based on any express disagreement with a specific evaluation of the Student. *DCPS' Opp. To Pet's Motion to Compel Classroom Observation,* filed Sept. 25, 2012, pp. 2-3.

The Hearing Officer agrees that this is not the sort of independent evaluation referred to in *Letter to Mamas* and *Manatee County*, and hence DCPS retains discretion to control access to its classrooms.[22] High School does not allow third-party observations, in part to protect the confidentiality of other students. *SEC Test.* The Hearing Officer also agrees that DCPS has not been shown to have denied the parent from making a meaningful observation when it declined to permit her to be accompanied by an "investigator" from the Children's Law Center in June 2012, and when it requested appropriate medical documentation of any health issues justifying her need to be accompanied by another person. Accordingly, Petitioner has failed to meet her burden of proving that DCPS denied a FAPE under Issue 6.

C. <u>Appropriate Relief</u>

The IDEA authorizes the Hearing Officer to fashion "appropriate" relief, *e.g.,* 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 15-16 (1993); *Reid v.*

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[22] There appears to be some uncertainty as to exactly the type of evaluation that [redacted] wants to conduct, and whether she is licensed or certified to conduct it. *See* [redacted] *Test.* In contrast, the qualified examiner for the independent non-verbal IQ assessment authorized in this HOD would be entitled to access if such assessment requires observing the child in the classroom.

District of Columbia, 401 F.3d 516, 521-24 (D.C. Cir. 2005). Petitioner requests that DCPS be ordered: (a) to fund the Student's placement at Private School (where she has been accepted), or another appropriate non-public, full-time special education day school; (b) to convene an MDT/IEP meeting to review and revise the April 2012 IEP to address all her needs; and (c) to provide compensatory education for the harm caused by DCPS' denials of FAPE. *Prehearing Order* (Sept. 18, 2012), p. 3. The Hearing Officer has determined that each of these elements of requested relief is appropriate in this case.

Prospective Placement

With respect to prospective placement, both DCPS and hearing officers are directed to determine an appropriate placement based on a match between a student's needs and the services offered at a particular school. *Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005); *McKenzie v. Smith,* 771 F.2d 1527, 1531 (D.C. Cir. 1985). Based on the consideration of the entire record herein, the Hearing Officer concludes that Private School would be an appropriate educational placement based on the fit between the Student's needs and the services offered at that school/program. *See, e.g., Pet. Test.;* [redacted] *Test.; Priv. Sch. Test.* The Private School can provide a full-time, language-based specialized instruction program within a small, structured setting that is well suited to the Student's particular needs. Moreover, the placement aligns very well with the recommendations made by the Student's evaluators. Considering the nature and severity of the Student's disabilities, her specialized needs, and the link between those needs and the services offered at Private School, the evidence shows that Private School B can provide an appropriate program reasonably "tailored to meet the child's specific needs." *Branham,* 427 F.3d at 11-12.

The Private School Associate Director testified that her school offers a full-time special education that specializes in educating children with learning disabilities and language disorders, and is able to provide Student with the special education placement that she needs to access her education. If Student were to attend Private School, she would be in class with no more than 10 students whose level of academic functioning ranges from the 2nd to 5th grade.[23] To enable such

[23] In addition to all the related service providers who would be working with students in the classroom, there would also at least one dually certified teacher (or a teacher who will become dually certified by the end of the school year in compliance with OSSE's certification standards) and a paraprofessional in each core class. *Priv. Sch. Test.*

students to access the 11th grade curriculum, Private School divides students into "ability groups" with guided notes to teach vocabulary, differentiated reading-level versions of textbooks, and access to Web-based instruction, so they do not have to rely on decoding to access the material. *Priv. Sch. Test.* Private School also employs reading specialists and uses research-based reading and mathematics programs on a daily basis to provide students with the remedial instruction they need. *Id.* Private School also has eight full-time speech language clinicians who assist students with language demands, and can provide the exposure to vocational training that the Student requires. *Id.* The school has both a four-and five-year diploma track program. *Id.*

DCPS notes that the Student has shown the ability for age-appropriate interactions with non-disabled peers and thus may not require specialized instruction in all of her "special" or elective courses. It therefore argues that full-time placement at a non-public special education day school is not the Student's least restrictive environment. *DCPS' Closing, p. 6.* However, DCPS has not offered any placement other than the a part-time inclusion program at High School, so these are the only two options presently before the Hearing Officer as I am charged with fashioning appropriate equitable relief for DCPS' denials of FAPE. Because DCPS has failed to propose an appropriate special education program and placement for the current school year, a private school placement that is "proper under the Act" is an appropriate remedy for the denial of FAPE. *Wirta v. District of Columbia,* 859 F. Supp. at 4-5.

Compensatory Education

Compensatory education is an equitable remedy available to a hearing officer, exercising his authority to grant "appropriate" relief under IDEA. Under the theory of 'compensatory education,' courts and hearing officers may award 'educational services...to be provided prospectively to compensate for a past deficient program.'" *Reid v. District of Columbia*, 401 F. 3d 516, 521 (D.C.Cir. 2005) (quotations omitted). "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." 401 F. 3d at 524; *see also Friendship Edison Public Charter School v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a "'qualitative, fact-intensive' inquiry used to craft an award 'tailored to the unique needs of the disabled student'").

Petitioner presented a well-articulated plan of compensatory education in this case, as contemplated by *Reid.* It consists of a combination of speech/language services and academic tutoring in language arts, designed to remediate the Student's severe academic deficits. *See P-69; Iseman Test.* The tutoring services are proposed to be delivered in one of two ways, or a combination of both: (1) one-to-one tutoring with a special educator; or (2) attendance at a Lindamood Bell remedial reading program. *Id.* However, the plan is based upon alleged denials of FAPE dating back to kindergarten, so requires substantial adjustment given that this HOD only adjudicates denials of FAPE during essentially the past two school years.

Considering all the evidence adduced in this case, the Hearing Officer has attempted to conduct a "fact-specific exercise of discretion" and to craft an award that "aims[s] to place [Student] in the same place [he] would have occupied but for the school district's violations of IDEA." 401 F. 3d at 518; *Henry v. District of Columbia,* Civ. No. 09-1626 (RBW) (D.D.C. Nov. 12, 2010), slip op. at 7. Petitioner has met her burden of establishing the harm caused by the denials since approximately March 2010, and DCPS did not rebut that showing. The most precise available measurement of such harm can be found in Exhibit *P-7*, Dr. Iseman's written report. *P-7* contains an Academic Progress Chart, which compares the Student's Woodcock-Johnson academic achievement scores from the March 2010 IEP to the February 2012 scores. This serves as a reasonable proxy for the period of harm for which Student is entitled to compensatory education. The comparison shows that, during this two-year period, the Student has progressed approximately 0.8 grade levels in reading, progressed approximately 1.3 grade levels in writing, and regressed approximately 0.3 levels in math. *P-7, p. 7.* This suggests that the Student would benefit most from tutoring in both reading and math, designed to place the Student in the position she would have occupied if she had received an appropriate amount of specialized instruction in an appropriate setting during those two years. In addition, she needs to receive a sufficient amount of speech/language therapy services to place the Student in the position she would have occupied if she had received such services under the last several IEPs.

Accordingly, based on careful consideration of all the testimony and evidence adduced in this case, and an assessment of the harm caused to the Student, the Hearing Officer concludes that **300 hours of 1:1 tutoring** in a combination of reading and math and **100 hours of direct speech/language services** would be an appropriate equitable remedy under the circumstances.

VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. Within **30 calendar days** of this Order (*i.e.*, by **November 30, 2012**), DCPS shall place and fund the Student at **Private School** [24] for the remainder of the **2012-13 school year**, with transportation. The parties by mutual agreement may adjust this date if needed to facilitate an efficient transition from High School to Private School.

2. DCPS may cancel the placement ordered under Paragraph 1 by issuing a new notice of placement if the Student does not maintain at least a 90% attendance record in the first three (3) months, excluding illnesses and other excused absences. DCPS may also convene an MDT/IEP Team meeting at the end of the 2012-13 school year to determine whether Private School remains an appropriate placement for the 2013-14 school year.

3. As compensatory education, Respondent shall pay for **300 hours of one-to-one academic tutoring** in a combination of reading and mathematics and **100 hours of direct speech/language services** for the Student. The services shall be performed by qualified independent providers of Petitioner's choice at hourly rates not to exceed the current established OSSE/DCPS market rates in the District of Columbia for such services. Unless the parties agree otherwise, these services shall be completed by no later than **October 31, 2014.**

4. Petitioner shall be authorized to obtain a **psycho-educational assessment that includes an updated non-verbal IQ assessment** of the Student independently, at the expense of DCPS and consistent with DCPS' publicly announced criteria for independent educational evaluations ("IEEs"). Upon completion of the assessment, Petitioner shall submit a copy of the final written report to DCPS. The independent assessment shall be completed and submitted to DCPS no later than **November 30, 2012.**

5. Within **45 days** of the date of this Order (*i.e.*, by **December 14, 2012**), DCPS shall convene a meeting of the Student's MDT/IEP Team (including Petitioner) at Private School. At such meeting, DCPS shall: (a) review the independent psycho-educational assessment; (b) review the educational needs of the Student based on such assessment and all other updated information; and (c) review and revise, as appropriate, the Student's April 27, 2012 IEP. The revisions to the IEP shall include the provision of direct speech/language services, revision of goals, and other changes necessitated by this HOD and consistent with the Student's placement and setting at Private School.

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[24] **Private School** is identified in the Appendix to this HOD.

6. Any delay in meeting any of the deadlines in this Order caused by Petitioner or Petitioner's representatives (*e.g.,* absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadlines by the number of days attributable to such delay.

7. Petitioner's other requests for relief in her Due Process Complaint filed August 8, 2012, are hereby **DENIED;** and

8. The case shall be **CLOSED.**

Dated: October 31, 2012

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).