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District of Columbia
Office of the State Superintendent of Education

Student Hearing Office
810 First Street, N.E., Suite 2001
Washington, DC 20002

STUDENT[1], **By and through PARENT #1,** ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	Impartial Hearing Officer: Charles M. Carron Date Issued: February 15, 2013

HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND

This is a Due Process Complaint ("DPC") proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed December 20, 2012, on behalf of the Student, who resides in the District of Columbia, by Petitioner, the Student's Parent, against Respondent, District of Columbia Public Schools ("DCPS").

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

On December 21, 2012, the undersigned was appointed as the Impartial Hearing Officer.

On January 10, 2013, Respondent filed its Response, which was 11 days late, stating that Respondent has not denied the Student a free appropriate public education ("FAPE").

A Resolution Meeting was held on January 11, 2013, but it failed to resolve the Complaint. The statutory 30-day resolution period ended on January 19, 2013. The 45-day timeline for the Hearing Officer's Determination started to run on January 20, 2013 and will conclude on March 5, 2013.

The Impartial Hearing Officer held a Prehearing Conference ("PHC") by telephone on January 23, 2013, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by January 29, 2013, and that the Due Process Hearing ("DPH") would be held on February 5, 2013, continuing on February 11, 2013. The undersigned issued a Prehearing Order ("PHO") on January 23, 2013.

On January 29, 2013, Respondent filed a motion to dismiss the DPC on the grounds of collateral estoppel.

Petitioner filed a response to the motion on January 31, 2013.

On February 1, 2013, the undersigned issued an Order denying the motion.

The DPH was held on February 5 and 11, 2013, at the Student Hearing Office, 810 First Street, NE, Suite 2001, Washington, DC 20002. Petitioner elected for the hearing to be closed. At the DPH, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-33

Respondent's Exhibits: R-1 through R-21

Impartial Hearing Officer's Exhibits: HO-1 through HO-9

Petitioner objected to Respondent's proposed Exhibit R-22, the *curriculum vitae* of [redacted] whom Respondent intended to call as an expert witness. This exhibit was not included in Respondent's five-day disclosure and was identified by Respondent's counsel at the first day of the DPH, February 5, 2013. Based upon Petitioner's right under 42 C.F.R. § 300.512(a)(3) to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing, the undersigned sustained the objection because even the second day of the hearing was four business days later, February 11, 2013. In addition, the disclosure of Exhibit 22 failed to meet the deadline established at the PHC and in the PHO.

The following witnesses testified on behalf of Petitioner at the DPH:

1. [redacted], special education advocate
2. Parent #1
3. [redacted], independent tutor
4. [redacted], [redacted]
5. [redacted] [redacted] ("Monroe")
6. [redacted] [redacted] [redacted]

Petitioner sought to call Parent #2 as a witness. However, Parent #2 had not been disclosed in Petitioner's five-day disclosures as required by the PHO; accordingly, the undersigned ruled that Parent #2 could not testify.

Respondent's counsel objected to the qualification of [redacted] and [redacted] as expert witnesses. After *voir dire*, the undersigned qualified and

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[2] Unless an educational advocate is qualified and admitted as an expert witness, the advocate's opinion testimony is "inadmissible to prove anything." *Gill v. District of Columbia*, 770 F. Supp. 2d 112 (D.D.C. 2011).

accepted [redacted] as an expert in special education programming and placement for students with learning and emotional disabilities, and [redacted] as an expert in transition services and planning for students with disabilities.

The following witnesses testified on behalf of Respondent at the DPH:

1. Attending School Special Education Coordinator ("SEC")
2. Previous School #2 SEC
3. Teacher and Case Manager, Previous School #2

Respondent had intended to call [redacted] as an expert witness. However, his *curriculum vitae* had not been disclosed within the deadline established by the PHO, and that document had been excluded based upon Petitioner's objection as discussed *supra.* Accordingly, the undersigned ruled that [redacted] could testify only as a fact witness. Respondent chose not to call [redacted] to testify as a fact witness.

The parties did not file written closing arguments or briefs.

II. JURISDICTION

The DPH was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA's implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029 and E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. § 1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures.*

III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the Complaint are as follows:

The Student is female, Current Age, and attends Current Grade at a public school ("Previous School #2"). The Student has been determined to be eligible for special

education and related services under the IDEA as a child with a Specific Learning Disability.

Petitioner claims that Respondent has denied the Student a FAPE because Respondent failed to fund an independent vocational or transitional assessment, because the Student's Individualized Education Program ("IEP") does not contain an appropriate transition plan, and because Respondent assigned the Student to attend a school that is not appropriate for her.

IV. ISSUES

As confirmed at the PHC, in the PHO, and at the DPH, the following issues were presented for determination at the DPH:

(a) Did Respondent deny the Student a free appropriate public education ("FAPE") by failing to develop an appropriate Individualized Education Program ("IEP") for her on or about December 3, 2012, because her IEP failed to contain an appropriate transition plan?[3]

(b) Did Respondent deny the Student a FAPE by failing to fund an independent vocational or transitional assessment as requested by the Parent?

(c) On or about December 3, 2012, did Respondent deny the Student a FAPE by proposing to place her at the Attending School because (i) that school and program are designated for Students with Emotional Disturbance, and (ii) that

[3] In the DPC, and at the PHC, as reflected in the PHO, Petitioner also asserted that Respondent denied the Student a FAPE because her IEP developed or about December 3, 2012 inappropriately reduced her hours of specialized instruction from 26.5 to 23.5 per week. However, at the beginning of the DPH, the parties stipulated that the reduction in hours stated on the IEP was an error, and that Respondent did not intend to reduce the hours. However, at the DPH, Petitioner's counsel stated that the Student's IEP has not yet been corrected to reflect 26.5 hours. In Section X *infra*, Respondent is ordered to correct the Student's IEP.

school and program cannot implement 26.5 hours per week of specialized instruction in an out of general education setting?[4]

V. RELIEF REQUESTED

Petitioner has requested the following relief:

(a) a finding that Respondent denied the Student a FAPE;

(b) an Order that Respondent fund placement of the Student at [redacted] or [redacted] with transportation;

(c) an Order that Respondent fund a vocational/transitional evaluation;

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[4] At the DPH, Petitioner's counsel sought to challenge the ability of the Attending School to implement the Student's IEP on the grounds that the Student's teachers at the Attending School lacked licenses or special education certification. However, the Student's IEP did not specify that she needed to be instructed by teachers with any particular licenses or certifications, nor was this issue raised in the DPC, at the PHC, or in the PHO. Accordingly, the undersigned declined to hear such a challenge at the DPH. Moreover, although a State Educational Agency ("SEA"), which in this case is the Board of Education of the District of Columbia (DCMR § 5-E3001.1), "must establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities" (34 C.F.R. § 300.156(a)), no provision of IDEA or its implementing regulations requires that specialized instruction be delivered by a licensed or certified special education teacher. Nor is there a right of action for the failure of a particular SEA or Local Educational Agency ("LEA") employee to be "highly qualified" (*Id.*).

[5] The undersigned had established a deadline of 6:00 p.m. on January 22, 2013 for Petitioner to notify Respondent and the undersigned of the school(s) and/or program(s) that Petitioner would seek as placement(s) for the Student as a remedy in this case. Petitioner met that deadline with regard to identifying Monroe, but did not identify [redacted] until the PHC. Although Respondent claimed prejudice from this one-day delay, in view of the parties' agreement that the DPH would require two days, and in view of the parties' agreement to schedule the second day on February 11, 2013, the undersigned determined that Respondent was not prejudiced by Petitioner's one day delay in identifying [redacted]

(d) an Order that Respondent reconvene the Student's Multidisciplinary Team ("MDT") upon completion of the vocational/transitional evaluation to review that evaluation and revise the Student's transition plan as appropriate;

(e) an Order that Respondent amend the Student's IEP to provide for 26.5 hours per week of specialized instruction in an out of general education setting;

(f) an Order of compensatory education in the form of five hours per week of independent tutoring for six weeks commencing June 17, 2013; and

(g) an Order that all meetings be scheduled through the Parent's counsel, in writing, via facsimile.

VI. FINDINGS OF FACT

Facts Related to Jurisdiction

1. The Student is a female, Current Age. P-11-1.[6]

2. The Student resides in the District of Columbia. *Id.*

3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with a Specific Learning Disability. *Id.*

2010-2011 School Year[7]

4. During the 2010-2011 school year, the Student attended Previous School #1.

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[6] When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

[7] Facts relating to events predating November 12, 2012, are recited here only to the extent necessary to inform resolution of the issues in the instant proceeding concerning events occurring on or after that date.

5. On June 10, 2011, Respondent issued a prior written notice informing Petitioner that the Student would attend the Previous School #2 for the 2011-2012 school year. HO-8-11.

August – December, 2011

6. On August 10, 2011, Petitioner filed a DPC in Case No. 2011-0833. HO-8-1.

7. On or about September 30, 2011, the Parent filed a DPC in Case No. 2011-0983 challenging Respondent's alleged failure to provide Petitioner access to the Student's educational records and failure to comprehensively evaluate the Student in all areas of suspected disability. HO-8-2. This case was consolidated with Case No. 2011-0833. *Id.*

8. On or about October 23, 2011, an HOD was issued in Cases Nos. 2011-0833 and 2011-0983, concluding that Respondent had failed to develop an appropriate IEP for the Student for the 2011-2012 school year and had failed to provide an appropriate placement for the Student for that school year. HO-8-14.

9. Respondent was ordered to revise the Student's IEP to provide for 26.5 hours per week of specialized instruction in an out of general education setting; to conduct a comprehensive psychological evaluation including an adaptive measure of the Student; to fund an independent speech and language assessment and a compensatory education assessment of the Student; and to convene an IEP meeting to review the assessments, review and revise the Student's IEP to reflect the recommendations in the assessments, and develop a compensatory education plan for the Student. HO-8-18, -19.

10. On November 15, 2011, the Parent obtained an independent speech and language evaluation. HO-9-4.

11. The November 15, 2011 evaluation was conducted by [redacted], [redacted] who issued a Speech-Language (IEE) Evaluation Report on the Student. P-18.

12. [redacted] recommended that the Student receive one hour of speech-language service per week as well as an auditory processing evaluation (to rule out auditory processing deficits) and an audiological evaluation (to rule out hearing loss). HO-9-4, P-18-6 and -7.

13. On November 22, 2011, Petitioner submitted to Respondent a written request for the audiological and auditory processing evaluations recommended by [redacted] in the Student's independent speech and language evaluation. HO-9-6.

14. On December 19, 2011, Respondent conducted a comprehensive psychological reevaluation of the Student, concluding that a verbal processing deficit affected the Student's achievement in reading, math and written language, but that the Student's social emotional development and adjustment were functional and age-appropriate. HO-9-4, P-15-13 and -16. The reevaluation also concluded that the Student did not have an intellectual disability or Emotional Disturbance ("ED"). P-15-14.

January 3, 2012 Meeting

15. On or about January 3, 2012, a meeting was held to review the assessments and update the Student's IEP. HO-9-4, R-9-1.

16. Respondent agreed to request an independent auditory processing assessment if Respondent could not provide one. HO-9-4, R-9-2.

17. The Student's IEP was revised to provide full-time (26.5 hour per week) of specialized instruction and 60 minutes per week of speech-language pathology, all in an outside of general education setting; and the IEP Team determined to place the Student in all available resource classes to accommodate the IEP. HO-9-4, -5; P-13-9; R-9-2.

18. Petitioner requested a change of schools because Petitioner did not believe that Previous School #2 could implement the Student's IEP. R-9-1.

March 21, 2012 Meeting

19. On or about March 21, 2012, an IEP Team[8] meeting was held to discuss compensatory education, location of services, and other issues for the Student. HO-9-5, R-7-1.

20. At the March 21, 2012 meeting, Respondent issued a Compensatory Education Services Authorization for the Student, authorizing the Student to receive 24 hours of speech language services and 144 hours of specialized instruction services from an independent provider of Petitioner's choice, to remediate any educational harm through March 21, 2012. *Id.*

21. At the March 21, 2012 meeting, Respondent's members of the IEP Team determined that Previous School #2 could implement the Student's IEP and was, in fact,

[8] The meeting notes refer to this meeting as a Multidisciplinary Team ("MDT") meeting. R-7. The difference in terminology is not material to resolution of the issues in the instant case.

implementing that IEP; Petitioner and Petitioner's advocate disagreed that Previous School #2 could implement the Student's IEP. HO-9-5, R-7-1 and -2.

June 27, 2012 through November 5, 2012

22. On June 27, 2012, Petitioner asked Respondent to fund an independent auditory processing evaluation because Respondent had not completed such an evaluation. HO-9-5. Petitioner expressed concern that the Student was not receiving a full-time out of general education program at Previous School #2. *Id.*

23. On or about August 29, 2012, Petitioner filed a DPC in Case No. 2012-0596, asserting that Respondent had denied the Student a FAPE by failing to provide Petitioner with access to records, by failing to conduct a comprehensive psychological evaluation, by failing to conduct audiological and auditory processing evaluations recommended by the speech/language evaluation, by failing to implement a revised IEP for the Student and/or provide the Student with 26.5 hours per week of specialized instruction in an out of general education setting, by failing to provide the Student a location of services capable of implementing her January 3, 2012 IEP, and by failing to provide the Student with Extended School Year ("ESY") services for summer 2012. HO-9-1, R-10.

24. The DPC in Case No. 2012-0596 did not challenge the post-secondary transition plan in the Student's January 3, 2012 IEP. R-10.

25. On August 31, 2012, the Student completed the independent tutoring sessions that had begun in April 2012. HO-9-6.

26. On September 24, 2012, a Resolution Session Meeting was held in connection with the then-pending DPC. R-6.

27. During the 2012-2013 school year through November 5, 2012, the Student took mostly general education classes and received specialized instruction outside of general education in only two or three classes. HO-9-7.

November 12, 2012 HOD

28. On November 12, 2012, an HOD was issued in Case No. 2012-0596 concluding that Previous School #2 was unable to provide the Student with all classes outside general education because Previous School #2 lacks teachers with the dual certification in special education and the various content areas required to provide the Student with Carnegie units while also providing her with special education services. HO-9-7, -12.

29. Respondent was ordered to provide the Student with compensatory education in the form of five hours per week of independent one-on-one tutoring for 30 weeks to remediate harm between March 22, 2012 and November 5, 2012[9]; to fund independent audiological and auditory processing assessments; and to convene an IEP Team meeting to review the Student's December 2011 psychological evaluation and revise the Student's present levels of performance to incorporate the results of that evaluation, and to identify an appropriate alternative setting to implement the Student's IEP, *i.e.,* a school that can provide her with 26.5 hours per week of specialized instruction outside of general education while also providing her the opportunity to earn the Carnegie units she needs to graduate. HO-9-10 though -13. The deadline for the meeting was fifteen school days after the issuance of the HOD. HO-9-13.

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[9] Respondent promptly authorized this tutoring. R-3.

30. Because of the Thanksgiving holiday, the fifteenth school day after issuance of the HOD in Case No. 2012-0596 was December 5, 2012.

November 2012 Evaluations

31. On November 15, 2012, Respondent provided Petitioner an Independent Educational Evaluation ("IEE") Authorization letter for the Student to receive an audiological evaluation and a central auditory processing assessment. P-8-2.

32. On November 20, 2012, the Student was administered Woodcock-Johnson III achievement tests and her scores were more than five grade levels below Current Grade. P-17.

November 26, 2012 Meeting

33. On or about November 26, 2012, a meeting was held to comply with the November 12, 2012 HOD but the meeting was unable to proceed due to the absence of a psychologist to review evaluations in order to update the Present Levels of Performance ("PLOP"s) in the Student's IEP. P-7-2.

34. Petitioner requested that Respondent provide the transition assessments to be completed that week. *Id.*

December 3, 2012 Meeting

35. On or about December 3, 2012, another meeting was held to comply with the November 12, 2012 HOD in Case No. 2012-0596. P-11-1, R-12-1.

36. The MDT updated the Student's PLOPs. R-12-2.

37. Some members of the MDT expressed concern that the Student lacked self-advocacy skills. R-12.

38. Previous School #2 SEC, who counseled the Student, believes that she has adequate self-advocacy skills. Testimony of Previous School #2 SEC.

39. The MDT reviewed the transition assessment provided by the Teacher and Case Manager, which consisted primarily of a one-page career interest inventory (P-12-2) and updated a few goals in the transition plan with the assistance of Petitioner and Petitioner's attorney (R-12-2).

40. The Student's class schedule included a career exploration learning lab for special education students. Testimony of Teacher and Case Manager.

41. In addition to the career exploration learning lab, the transition plan developed for the Student provided one hour of transition services per year. P-11-16.

42. The Parent does not recall any discussion of transition services. Testimony of Parent.

43. The undersigned finds that the Parent tacitly agreed to the transition plan.

44. Respondent proposed to place the Student at the Attending School (P-12-3) to which Petitioner objected because the Attending School classes combine students with ED and students with learning disabilities (R-12-2, testimony of Parent).

45. The Parent was concerned that if there were disturbances in the Student's classes, she would "shut down." Testimony of Parent.

46. Respondent declined to delay the Student's placement at the Attending School because Previous School #2 could no longer implement the Student's IEP. R-12-2.

December 4-19, 2012

47. On December 4, 2012, Respondent emailed Petitioner's counsel several documents for signature—the IEP signature page, the Prior Written Notice ("PWN"), and the final version of the Student's IEP. R-5.

48. The PWN identified the Attending School as the location of services for the Student. R-19.

49. On December 17, 2012, pursuant to the HOD in Case 2012-0596, Respondent issued a Compensatory Education Services Authorization for the Student, authorizing the Student to receive five hours per week of one-on-one tutoring for the 30-week period beginning November 26, 2012, and ending with the week of June 17, 2013, for a total of up to 150 hours, from an independent provider of Petitioner's choice. P-9-1.

50. On December 19, 2012, Petitioner made a written request for an independent transition/vocational evaluation of the Student. *Id.,* P-4-1.

51. Later on December 19, 2012, Respondent authorized an Independent Educational Evaluation ("IEE") for the Student. P-6-2. However, that IEE did not include an independent vocational evaluation. *Id.* Respondent advised Petitioner's counsel that Respondent had not agreed to complete an independent vocational evaluation, because the IEP was agreed to at the [December 3, 2012] meeting. *Id.*

52. On or about December 19 or 20, 2012, the Student ceased attending Previous School #2. Testimony of Previous School #2 SEC.

January 3-29, 2013

53. On January 3, 2013, [redacted] issued an Audiological (IEE) Assessment Report on the Student. P-10-1 through -4.

54. On January 10, 2013, Respondent advised Petitioner's counsel that Respondent had received the IEEs, and that the Student needed to enroll at the Attending School before a meeting could be scheduled to review the IEEs and update the Student's IEP as necessary. P-22-2.

55. On January 10, 2013, Petitioner's counsel replied that the Parent had filed a new DPC to challenge the appropriateness of the Attending School but that the Parent and counsel were willing to meet at the Attending School or another location to review the IEEs. *Id.*

56. On Friday, January 11, 2013, a Resolution Session Meeting was held in connection with the instant DPC. R-20.

57. The Attending School SEC was notified that the Student would be attending the Attending School but did not participate in the development of her December 3, 2012 IEP or the decision to assign her to the Attending School. Testimony of Attending School SEC.

58. Another Special Education Coordinator at the Attending School had been consulted by telephone and had confirmed that the Student's IEP could be implemented at the Attending School. *Id.*

59. Sometime between January 14 and January 24, 2013, the Student began attending the Attending School. Stipulation of Counsel at the DPH.

60. Initially there may have been some confusion regarding the Student's transportation, and she may not have known that she was being transported to the Attending School. Testimony of Previous School #2 SEC.

61. The Student's program at the Attending School is a self-contained full-time outside-of-general education program. Testimony of [redacted]

62. The Attending School provides approximately 26 hours of specialized instruction per week.[10] Testimony of Attending School SEC.

63. The undersigned finds that the shortfall of half an hour per week of specialized instruction is not a material deviation from the Student's IEP.

64. Speech-language pathology services are provided during instructional time. *Id.*

65. The undersigned finds that to the extent the Student's 240 minutes per month of speech-language pathology services displace approximately one hour per week of

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[10] The Attending School SEC was uncertain as to the daily schedule of classes or the length of the lunch period. No other witness testified to the Attending School class schedule. On cross-examination of the Attending School SEC and in argument at the DPH, Petitioner's counsel attempted to establish that it would be impossible for the Attending School to provide more than 23.5 hours per week of specialized instruction because the school day begins at 8:45 a.m. and ends at 3:15 p.m. However, those 6.5 hours per day readily accommodate at least 26 hours per week of instruction. Assuming a thirty minute lunch period and fifteen minutes for changing classes, each school day provides 5.75 hours of instructional time. Accordingly, each five-day school week provides 28.75 hours of instructional time. Even if the lunch period were an hour, there would remain 26.25 hours of instructional time. In any event, it was Petitioner's burden to prove that the Attending School cannot provide the hours of instruction in the Student's IEP, not Respondent's burden to prove that it can. *See*, Section VII *infra*.

specialized instruction,[11] the shortfall is not a material deviation from the Student's IEP.[12]

66. The Student informed the Parent that at the Attending School, she does not understand the work, no one talks to her, she is unhappy, the teachers are not saying anything to her, and other students are bringing cell phones to class. Testimony of Parent.

67. On January 24, 2013, noting that the Student had enrolled at the Attending School, Respondent invited Petitioner and Petitioner's counsel to review the IEEs. P-22-1.

68. Petitioner's counsel responded with available dates and stated that according to the Student, she had been placed in all general education classes and was not receiving any work. *Id.*

69. In fact, none of the Student's classes at the Attending School are general education classes; her only interaction with non-disabled peers is at lunch. Testimony of Attending School SEC.

70. On January 28, 2013, educational advocate [redacted] interviewed the Parent. Testimony of [redacted].

71. On January 29, 2013, [redacted] met with the Student at a public library for approximately one hour. *Id.*

72. At that meeting, [redacted] conducted an informal assessment of the Student, using instruments that do not require any particular training or protocol. *Id.*

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[11] Respondent's counsel asserted at the DPH that the speech-language pathology services comprise specialized instruction. There was no testimony to this effect.

[12] A contrary finding would render inappropriate every placement and location of services for a student that prescribed "full time" specialized instruction and also prescribed hours of related services.

73. [redacted] was under the impression that the Student had been attending the Attending School since December, 2012 (*Id.*) when in fact the Student had begun attending the Attending School between January 14 and January 24, 2013 (*see*, Finding of Fact 59, *supra*).

74. The Student told [redacted] that she was attending general education classes, that she did not like the Attending School, that she did not understand the work, that her grades were bad, and that other students used their cell phones in class. Testimony of [redacted].

75. [redacted] prepared a report with recommendations for the Student (P-33), based upon the following: her meeting and informal assessment of the Student; her review of the Student's education records; her interviews of the Student's parents and the Student's tutor; and her discussions with the Attending School SEC, two teachers at the Attending School, and the former principal of Previous School #1. Testimony of [redacted].

76. [redacted] identified the following impediments to the Student's learning: learning disabilities, cognitive processing disorders, audiological deficits, borderline intellectual capacities, and low achievement levels. *Id.,* P-33.

77. [redacted] recommended "a full-time, out of general education, specialized, intensive educational placement that is focused solely and specifically on helping students with learning problems make important and immediate gains." P-33-7.

78. [redacted] opined that it would be distracting for the Student to be in a placement where some students had ED, and that the Student could be subject to

exploitation or other harm in clashes with children with ED. Testimony of [redacted].

79. Because [redacted] assessment was conducted when the Student had been attending the Attending School for no more than two weeks (*see,* Finding of Fact 59, *supra)*, the undersigned finds that [redacted] did not have a basis for her conclusions that (a) the Attending School is an inappropriate placement for the Student, (b) the Student is likely to suffer harm from placement with children with ED, or (c) an alternative placement in a non-public school is necessary to provide the Student a FAPE.

80. According to the Attending School SEC, the Student's teachers have reported no problems regarding the Student or her transition to the Attending School. Testimony of Attending School SEC.

81. The Attending School SEC would be aware of any problems with the Student. *Id.*

82. The Attending School SEC asked the Student how things are going and whether she needed anything, and the Student responded that things were "fine." *Id.*

83. No educational advocate or tutor has contacted the Attending School SEC regarding the Student. *Id.*

84. The Attending School has not experienced problems resulting from students with learning disabilities and students with ED being taught together. *Id.*

85. Previous School #2 SEC, who had taught at the Attending School for at least four years before becoming an SEC, did not experience any difficulty teaching students with learning disabilities and students with ED "coexisting." Testimony of Previous School #2 SEC.

86. In the absence of any evidence that the Student's classmates with ED engage in behaviors that interfere with her education, the undersigned finds that it is not inappropriate for the Student to be taught in the same classroom with students with ED. To infer that all students with ED are disruptive, exploitative, and harmful to their peers reflects an unacceptable prejudice.

87. Based upon all of the testimony and exhibits in evidence, the undersigned finds that the Attending School can implement the Student's IEP.[13]

Transition/Vocational Assessment

88. The transition/vocational assessment conducted by the Student's Teacher and Case Manager (P-12-2) was not adequate for the Student because the instrument used is just an inventory of the Student's employment interests rather than an assessment of the Student's employment abilities. Testimony of [redacted]

89. The assessment conducted by the Student's Teacher and Case Manager reported her academic functioning but failed to address her employment and independent living/life skills. *Id.*

90. Given the Student's low academic skills, it is critical to know her independent living skills, such as whether she can read the instructions on a medicine bottle or tell time in order to get to work on time. *Id.*

91. A comprehensive transition assessment identifies stages of employment--decision, applying, and keeping—and determines the student's readiness for each. *Id.*

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[13] In addition, because the instant DPC was filed before the Student began attending the Attending School, it is premature as a challenge to the implementation of the Student's IEP at the Attending School.

92. The assessment conducted by the Student's Teacher and Case Manager failed to provide baselines against which to measure the Student's progress in post-secondary transition. *Id.*

93. Based upon the testimony of [redacted], the evaluations and assessments of the Student to date, and the Student's current IEP, the undersigned finds that the assessment conducted by the Student's Teacher and Case Manager (a) was superficial and incomplete, and inadequate for the Student because it is apparent from her low levels of academic functioning that she needs to be prepared for employment and independent living as an alternative to post-secondary education; and (b) fails to provide a basis to determine whether the transition plan in the Student's current IEP is adequate, or, if not, how it should be revised.

Tutoring

94. On or about December 14 or 15, 2012, the Student phoned her independent tutor, [redacted], to advise her that she had been transferred to the Attending School. Testimony of [redacted].

95. From on or about December 14 or 15, 2012 until the date of the DPH, February 5, 2013, the Student did not bring any homework to her tutoring sessions with [redacted]. *Id.*

96. The Student informed [redacted] that she was not aware of the types of classes she was taking or what she was working on in school, that she had no homework, that she did not know anyone at the Attending School, and that she wanted to go to a different school. *Id.*

97. From on or about December 14 or 15, 2012 until the date of the DPH, instead of tutoring the Student on work brought from school, [redacted] worked with the Student on her academic subject areas, including reading and math, and has provided her with homework. *Id.*

98. [redacted] has not observed the Student in class, has not spoken with the Student's teachers at the Attending School, and has only a general idea of the accommodations that the Student receives in her classes. *Id.*

99. The undersigned finds that [redacted] has no basis for determining whether the Student has received or is receiving the services specified in her IEP.

100. Accordingly, the undersigned finds that [redacted] conclusion that the Student requires 30 to 48 additional hours of one-on-one tutoring as compensatory education (Testimony of [redacted]) is without foundation, as well as self-serving because it likely would result in continued funding for [redacted] services to the Student.[14]

[redacted]

101. [redacted] is a graded diploma program "with a college prep component" (P-27-1) for up to 40 students with Specific Learning Disabilities (Testimony of [redacted]).

102. [redacted] is located in the District of Columbia. Testimony of [redacted]

[redacted]

[14] Petitioner introduced no other testimony regarding the Student's educational deficits that allegedly resulted from placement of the Student at the Attending School, or the compensatory education required to restore the Student to the position she would have been in absent the alleged denial of FAPE.

103. Ninety percent of the students at [redacted] have Specific Learning Disabilities. *Id.*

104. Some [redacted] students have Multiple Disabilities or Other Health Impairment ("OHI"). *Id.*

105. Some [redacted] students have ED, but only if the condition is mild and the students do not have behavior concerns. *Id.*

106. [redacted] has a Certificate of Approval from the District of Columbia. *Id.*

107. The teacher-student ratio at [redacted] is between 1-5 and 1-7 depending upon the class. *Id.*

108. [redacted] has two specialized reading programs. *Id.*

109. [redacted] provides all "related services" that a student requires, including occupational therapy and speech-language pathology. *Id.*

110. [redacted] provides a wide range of transition services, including SAT/ACT preparation, college tours, part-time employment with a grocery store, and training in independent living skills for students who are not going to college to transition to independent living. *Id.*

111. [redacted] assists its students in obtaining services from the Rehabilitation Services Administration. *Id.*

112. [redacted] students receive 26.5 hours per week of specialized instruction, which includes academic courses and "specials" such as physical education. *Id.*

113. Based upon the uncontroverted testimony of [redacted] the undersigned finds that [redacted] capable of implementing the Student's IEP.

114. High School Program is a non-public day school in Rockville, Maryland that "is tailored for students with moderate to severe language and learning disabilities and/or high functioning autism." P-26-1; testimony of .

115. Some students have ED, but not as their primary disability. Testimony of .

116. has a Certificate of Approval from the District of Columbia and offers all courses required for a District of Columbia high school diploma. *Id.*

117. provides "intensive remediation and instruction in reading, oral and written expression, and math ...." P-26-1; testimony of .

118. The typical student is of average intelligence or higher. P-26-1.

119. The teacher-student ratio at is 6-1. Testimony of

120. provides all "related services" that a student requires, including occupational therapy, physical therapy, and speech and language therapy. *Id.*

121. provides a wide range of transition services, including a job interest inventory in the ninth grade, a job internship program in the 11th grade, and a support person working with students and their families to obtain social services and benefits. *Id.*

122. students receive 32.5 hours per week of specialized instruction. *Id.*

123. Based upon the uncontroverted testimony of , the undersigned finds that is capable of implementing the Student's IEP.

VII. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR § 5-E3030.3; *Schaffer v. Weast,* 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR § 5-E3022.16; *see also, N.G. v. District of Columbia,* 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

VII. CREDIBILITY

The undersigned found all of the witnesses to be credible, to the extent of their first hand knowledge or professional expertise. However, the undersigned disagrees with several conclusions reached by witnesses, due to lack of foundation, as discussed *supra* (*see,* Findings of Fact 79 and 99).

Respondent's counsel asserted that [redacted] testimony was suspect because she is employed by Petitioner's counsel. However, expert witnesses in court and administrative proceedings typically are compensated by the parties, directly or through the parties' counsel. That financial relationship in itself does not preclude a witness from being qualified as an expert. There was no suggestion that the amount of [redacted] compensation was tied to the outcome of the proceeding. Accordingly, although the undersigned has taken into account [redacted] financial relationship with Petitioner's counsel, the undersigned nevertheless found her testimony credible.

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended "(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected..." 20 U.S.C. § 1400(d)(1). *Accord*, DCMR § 5-E3000.1.

FAPE

2. The IDEA requires that all students be provided with a free appropriate public education ("FAPE"). FAPE means:

> special education and related services that –
>
> > (A) have been provided at public expense, under public supervision and direction, and without charge;
> >
> > (B) meet the standards of the State educational agency;
> >
> > (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> >
> > (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also,* 34 C.F.R. §300.17 and DCMR § 5-E3001.1.

Independent Educational Evaluation

3. A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to exceptions not relevant here.[15] 34 C.F.R. § 300.502(b).

4. The undersigned concludes that Respondent denied the Student a FAPE by failing timely to authorize a vocational/transitional IEE when Petitioner disagreed with the evaluation conducted by the Teacher and Case Manager.

IEP

5. The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the IDEA "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)).

6. The IDEA requires each IEP that is in effect when the child is 16 or older to include:

> (aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; [and]
>
> (bb) the transition services (including courses of study) needed to assist the child in reaching those goals ....

20 U.S.C. §1414(d)(1)(A)(i)(VII).

7. To be sufficient to provide FAPE under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child ... but it need not 'maximize the

[15] In particular, there is no exception when a parent has agreed to a transition plan that was based upon the public agency's evaluation, as argued by Respondent's counsel without any citation of authority.

potential of each handicapped child commensurate with the opportunity presented non-handicapped children.'" *Anderson v. District of Columbia*, 606 F. Supp. 2d 86, 92 (D.D.C. 2009), quoting *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley,* 458 U.S. 176, 200, 207 (1982)("*Rowley*").

> [T]he "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Rowley, 458 U.S. at 201.

8. The only aspect of the IEP that Petitioner challenges in the instant matter is the Student's post-secondary transition plan. However, Petitioner tacitly accepted that plan at the MDT meeting where it was developed (*see,* Finding of Fact 43).

9. The undersigned concludes that Petitioner thereby waived any challenge to the transition plan, pending the receipt of new information (including the results of subsequent vocational or transition assessments).

<u>Appropriateness of the Attending School and of the Schools Proposed by Petitioner</u>

10. A determination of the appropriateness of a special education placement requires consideration of at least the following factors: (a) the nature and severity of the student's disability; (b) the student's specialized educational needs; (c) the link between those needs and the services offered by the school/program; (d) the cost of the placement if it is a non-public school; and (e) the extent to which the placement represents the Least Restrictive Environment (LRE) for the Student. *Branham v. District of Columbia*, 427 F.3d 7 (D.C. Cir. 2005)("*Branham*").

11. In the instant case, the undersigned concludes that the Attending School is able to implement the Student's IEP. Finding of Fact 87.

12. If an appropriate IEP is developed, but the Local Educational Agency ("LEA") fails to implement the IEP fully, the failure constitutes a denial of FAPE only if the failure is "material." *See, e.g., Banks v. District of Columbia*, 54 IDELR 282, 110 LRP 39207 (D.D.C. 2010).

13. The undersigned concludes that any deviation between the hours of specialized instruction required by the Student's IEP and the hours the Attending School can provide consistent with its class schedule, is not a material failure and does not render the Attending School inappropriate.

14. When DCPS makes a special education placement, the following order or priority applies among placements that are appropriate for the student:

> (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
> (2) Private or residential District of Columbia facilities; and
> (3) Facilities outside of the District of Columbia.

DC ST §38-2561.02(c). Although this order of priority is not binding upon a Hearing Officer, a Hearing Officer is not precluded from taking these priorities into consideration in ordering a placement.

15. The IDEA requires that special education be provided in the Student's LRE:

> To the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5)(A). *Accord,* DCMR § 5-E3011.1. *See also,* 34 C.F.R. § 300.114(a)(2).

16. Parental choice does not supersede the LRE requirement. *See* 71 Fed. Reg. 46541 (August 14, 2006).

17. In the instant case, the Attending School is the LRE for the Student because it is only as restrictive as the Student's IEP requires, and it is a public school located in the District of Columbia.[16]

18. In the instant case, [redacted] is not the LRE for the Student because it is more restrictive than the Student's IEP requires (inasmuch as the Student would not be able to interact with non-disabled peers at lunch or during other non-instructional time) and it is a non-public school.

19. In the instant case, [redacted] s not the LRE for the Student for the same reasons that [redacted] is not the LRE, and in addition, because [redacted] is outside the District of Columbia.

20. In any event, because the Attending School can implement the Student's IEP, it is unnecessary for Respondent to consider funding the Student's attendance at [redacted] or [redacted]

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[16] District of Columbia law adds another element to LRE, that the placement must be "based upon consideration of the proximity of the placement to the student's place of residence." DC ST § 38-2561.01(6)(C). Implementing regulations in the District of Columbia require that the child be educated in the school that the child would attend if not disabled unless the IEP requires some other arrangement (DCMR § 5-E3013.1); and if a placement outside the LEA is required, the placement must be in the program that meets the requirements of the child's IEP that is closest to the child's residence (DMCR § 5-E3013.7). In the instant case, there was no testimony or documentary evidence regarding the proximity of the Attending School, [redacted] or [redacted] to the Student's residence or what school she would attend if not disabled.

Compensatory Education

21. Under the IDEA, a Hearing Officer has broad discretion to determine appropriate relief, based upon a fact-specific analysis. *Reid v. District of Columbia*, 401 F.3d 516, 521-24 (D.C. Cir. 2005) ("*Reid*").

22. Relief may include compensatory award of prospective services:

> When a school district denies a disabled child of free appropriate education in violation of the Individuals with Disabilities Education Act, a court fashioning "appropriate" relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.

Id.

23. In all cases, an order of relief must be evidence-based. *Branham*. Educational programs, including compensatory education, must be qualitative, fact-intensive, and "above all tailored to the unique needs of the disabled student." *Id.*

24. Mechanical calculation of the number of hours of compensatory education (a "cookie-cutter approach") is not permissible. *Reid.* Rather, compensatory awards "should aim to place disabled children in the same position they would have occupied but for the school district's violation of IDEA." *Id.* Awards compensating past violations must "rely on individual assessments." *Id.*

> Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE.

Id. However, formulaic calculations are not *per se* invalid, so long as the evidence provides a sufficient basis for an "individually-tailored assessment". *Stanton v. District of Columbia*, 680 F. Supp. 2d 201, 206-207 (D.D.C. 2010) *(citing Brown v. District of Columbia*, 568 F. Supp. 2d 44, 53-54 (D.D.C. 2008) (internal quotation marks omitted).

25. The Hearing Officer must base a compensatory education award on evidence regarding the student's "specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.*

26. A student who was denied a FAPE may not be entitled to an award of compensatory education if "the services requested, for whatever reason, would not compensate the student for the denial of a FAPE." *Gill v. District of Columbia*, 751 F. Supp. 3d 104, 44 IDELR 191 (D.D.C. 2010)).

27. In the instant case, the only denial of FAPE established by Petitioner was Respondent's failure to authorize a vocational/transitional IEE. Less than two months have elapsed since that request. Petitioner introduced no evidence of the Student's specific educational deficits flowing from the failure to authorize an IEE, and Petitioner sought no compensatory award for that denial of FAPE.

28. Accordingly, the undersigned concludes that no compensatory award is appropriate and that the Student's transition needs will be met by prompt approval of an IEE and prompt reconsideration of the Student's transition plan by the MDT after receiving the report of that IEE.

Summary

29. Petitioner established that the Student's IEP has not been corrected to reflect that she is to receive 26.5 hours of specialized instruction per week.

30. Petitioner has not established by a preponderance of the evidence that the Attending School is unable to implement the Student's IEP or otherwise is an inappropriate placement for the Student.

31. Petitioner's failure to object at the time to the transition plan in the Student's December 3, 2012 IEP constitutes a waiver of any objection to that plan unless and until additional information supports a revision to the plan, but does not constitute a waiver of Petitioner's right to an IEE.

32. Respondent denied the Student a FAPE by failing to fund an independent vocational or transitional assessment as requested by the Parent.

X. ORDER

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

1. No later than February 28, 2013, Respondent shall correct the Student's Individualized Education Program (IEP) to reflect that she is to receive 26.5 hours per week of specialized instruction and shall provide a copy of the corrected IEP to the Parent.

2. No later than February 28, 2013, Respondent shall issue to the Parent an Individualized Educational Evaluation letter authorizing the Parent to obtain an independent educational evaluation of the Student to assess the Student's post-secondary vocational and transition preparedness and needs (the "Vocational/Transition IEE").

3. Petitioner shall make reasonable efforts to have the Vocational/Transition IEE completed no later than April 1, 2013. Petitioner shall cause a copy of the report to be sent directly to Respondent's Compliance Case Manager.

4. Within 20 calendar days of receiving the report described in the preceding paragraph, Respondent shall convene a meeting of the Student's Multi-Disciplinary Team or Individualized Education Program Team with all necessary members, including the Student and one or both of the Parents, to (a) review the report; (b) review any other

updated information regarding the Student; and (c) review and revise, as appropriate, the Student's IEP, including the goals, services and supports in the Student's transition plan.

5. All written communications from Respondent to Petitioner concerning the above matters shall include copies to Petitioner's counsel by facsimile or email.

6. Any delay caused by Petitioner or Petitioner's representatives (*e.g.*, absence or failure to attend a meeting, or failure to respond to scheduling requests within one business day) shall extend Respondent's deadlines under this Order by the same number of days.

7. Petitioner's other requests for relief are DENIED.

Dated this 15th day of February, 2013.

Charles M. Carron
Impartial Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 1415(i)(2).