OSSE
Student Hearing Office
November 26, 2013

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

PETITIONERS,
on behalf of STUDENT,[1]

Petitioners,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: November 26, 2013

Hearing Officer: Peter B. Vaden

Student Hearing Office,
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioners (the "Petitioners" or "PARENTS"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("DCMR"). In their Due Process Complaint, Petitioners allege that Respondent District of Columbia Public Schools ("DCPS") has denied Student a free appropriate public education ("FAPE") by failing to convene an Individualized Education Program ("IEP") meeting requested by the Parents, by not providing

[1] Personal identification information is provided in Appendix A.

Student a high school diploma track schedule for the 2012-2013 school year, by failing to timely conduct a speech-language evaluation and by failing to provide an appropriate school placement for the 2013-2014 school year.

Student, an AGE young woman, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on September 3, 2013, named DCPS as respondent. On September 20, 2013, the parties met for a resolution session and did not reach an agreement. The 45 day time period for issuance of this Hearing Officer Determination started on October 4, 2013. On October 2, 2013, the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. On November 1, 2013, the Hearing Officer granted Petitioners' unopposed motion for a 10 day continuance in order to set a second day to complete the hearing. As a result, the Hearing Officer Determination in this case must be issued by November 27, 2013.

The due process hearing was convened before the undersigned Impartial Hearing Officer on October 31 and November 12, 2013 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Petitioner, MOTHER, appeared in person, and Petitioners were represented by PETITIONERS' COUNSEL. DCPS was represented by DCPS' COUNSEL.

Petitioners called as witnesses Mother, PARALEGAL, NONPUBLIC SCHOOL DIRECTOR, and EDUCATIONAL ADVOCATE. DCPS called as witnesses MIDDLE SCHOOL SPECIAL EDUCATION TEACHER, HIGH SCHOOL SPECIAL EDUCATION TEACHER, and S/L PATHOLOGIST. Petitioners' Exhibits P-1 through P-32 and DCPS' Exhibits R-1 through R-15 were admitted into evidence without objection. Counsel for both parties made opening and closing statements. At the joint request of counsel, I granted the

parties leave to file post-hearing memoranda by November 13, 2013. Counsel for both parties filed post-hearing briefs.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case are:

- Whether DCPS denied Student a FAPE by failing to convene an IEP meeting to review and revise Student's IEP when requested by the Parents' representative, beginning in November 2012;

- Whether DCPS denied Student a FAPE by failing to provide her a DCPS diploma track schedule for the 2012-2013 school year, as originally decided by Student's June 1, 2012 IEP team;

- Whether DCPS denied Student a FAPE by failing to timely conduct a speech-language ("S/L") evaluation after obtaining the Parents' consent in May 2013 and failing to timely convene Student's MDT/IEP team to review the S/L evaluation;

- Whether DCPS failed to provide Student an appropriate placement/location of services for the 2013-2014 school year because, *inter alia*, in her placement at City High School, Student is not taught by content area certified and special education certified teachers in order to make educational progress and to earn Carnegie Units towards graduation; because the City High School self-contained program for Intellectual Disability ("ID") and Autism Spectrum Disorder ("ASD") students is not appropriate for Student; because the instruction models/curricula used for Student are inappropriate; because Student's placement at a large public high school, where she has contact with nondisabled peers, is inappropriate; because Student is not being provided with appropriate supports to address many of the issues that are uniquely related to her disability including (but not limited to) social skills training.

For relief, Petitioners request the Hearing Officer to order DCPS to fund Student's enrollment at Nonpublic School for the remainder of the 2013-2014 school year. In addition, Petitioners seek an award of compensatory education to compensate Student for DCPS' alleged denials of FAPE.

FINDINGS OF FACT

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

1. Student, an AGE young woman, resides with her Parents in the District of Columbia. Testimony of Mother.

2. Student is eligible for special education and related services under the Primary Disability classification ASD. Exhibit R-14. Since the beginning of the 2012-2013 school year, Student has been enrolled at City High School in a self-contained classroom. Testimony of Mother.

3. In a September 5, 2011 Comprehensive Psychological Evaluation report, INDEPENDENT PSYCHOLOGIST reported that Student's cognitive testing results indicated that she had a Borderline level of intellectual functioning. Her non-verbal and verbal reasoning skills were both underdeveloped as she was performing below her age and grade equivalents across all subtests. Student's lowest index score was in the area of processing speed suggesting that she had significant weaknesses in her ability to rapidly and accurately process information. Examination of her academic skills using the Woodcock-Johnson Tests of Achievement, Third Edition (WJ-III) indicated that, overall, Student was performing at grade level about 5 years behind her then-current grade enrollment. Her Academic Fluency was in the Very Low range corroborating her poor processing speed. On a test of visual-motor skills, Student performed in the Extremely Low range. Student's overall adaptive functioning, as reported by her then-current teacher, consistently fell within the Extremely Low range and were evidence of Student's continued need for special education services to further develop her functional communication, language abilities, self-help skills and social development. Tests of emotional and social

functioning indicated that Student was socially immature for her age, lacked meaningful and socially rewarding peer relationships, and had limited social skills, all of which significantly interfered with her social functioning. Exhibit P-27.

4. Student attended CITY MIDDLE SCHOOL for the 2011-2012 school year. Testimony of Mother. Middle School Special Education Teacher was her teacher. Testimony of Middle School Special Education Teacher.

5. On May 14, 2012, Student's IEP team convened at City Middle School for Student's annual IEP review. Neither Parent was recorded as having attended this IEP meeting. At the meeting, the IEP team agreed that Student continued to require special education services, including a small student to teacher ratio and specialized support instruction on a full-time basis. Exhibit R-3. In the Least Restrictive Environment (LRE) section of the IEP, the IEP team reported that Student was significantly below grade level and required intensive/individualized attention. The IEP team decided that Student would participate in the DC-CAS Alternate Assessment and that she required Extended School Year ("ESY") services to address regression concerns. The IEP provides no indication of a projected "Exit Category" for Student, that is, graduation with a High School Diploma or otherwise. Exhibit R-2.

6. Mother and Paralegal attended a meeting for Student on June 1, 2012 to discuss Student's high school placement. DCPS AUTISM PROGRAM COORDINATOR and Middle School Special Education teacher also attended. At the meeting, Mother asked why City High School had been chosen for Student and was informed the choice was based upon Student's home address. The participants discussed Mother's concerns about the class, the teachers and the instruction. Autism Program Coordinator stated that Student would be in an autism program and each student would have an individualized program and work on individual goals. Exhibit

P-7. At the due process hearing, Paralegal testified that she shared at the meeting that Mother wanted Student to be on a high school diploma track. There is no mention of that request in Paralegal's meeting notes. Testimony of Paralegal, Exhibit P-7. Middle School Special Education Teacher testified that there was no discussion at the June 1, 2012 meeting about Student's being on the diploma track. Testimony of Middle School Special Education Teacher. The hearing record contains Paralegal's meeting notes from February 1, 2012, March 19, 2012, and June 1, 2012. There is no record in these notes of a request that Student be on a high school diploma track. Exhibits P-5 through P-7. Also, the May 14, 2012 IEP provides that Student would participate in the DC-CAS Alternate Assessment. Most children who participate in the DC-CAS Alternate Assessment are not pursuing a regular high school diploma. Testimony of Middle School Special Education Teacher. I find, by the preponderance of the evidence, that prior to the beginning of the 2012-2013 school year, Student's IEP team never considered and addressed whether in high school, Student would pursue the regular high school diploma track or a non-diploma track program.

7. Student matriculated to City High School at the beginning of the 2012-2013 school year. Student's City High School Multidisciplinary Team ("MDT") met on October 4, 2012 to discuss concerns about Student's missing 3rd period class and to discuss strategies to deal with Student's behavior issues. Mother attended the meeting. After discussing the behavior concerns, the MDT team discussed homework, Student's preference for being on the computer, a proposed goal for Student to read novels, Student's testing performance, Mother's concerns about challenging Student, and Student's reading and comprehension. Mother indicated that she found the meeting productive. Exhibit R-5.

8. On November 2, 2012, Paralegal, an employee of Petitioners' Counsel, wrote the

City High School principal to request a 30-day review meeting with Student's special education team. Paralegal provided no reason for requesting this IEP meeting. The same day, Paralegal requested copies of Student's educational records. Paralegal did not receive a response to her November 2, 2012 letters and sent a renewed request by email to the principal and to the City High School Special Education Coordinator on February 11, 2013. SPECIAL EDUCATION COORDINATOR replied by email the next day that she had not received the November 2, 2012 request, but that Mother had "met with us two months ago, so we are informing her of her daughter's progress." The Special Education Coordinator stated that she would inform Student's case manager of the request to schedule a meeting. On March 11, 2013 and on April 12, 2013, Paralegal followed up with additional reminder emails about the special education meeting request. This was followed by an email on April 22, 2013 from Petitioners' Counsel. On April 22, 2013, Special Education Coordinator advised Petitioners' Counsel by email that DCPS had been attempting to schedule an email with "the parent" and had not received a response. An IEP meeting was finally scheduled for May 10, 2013. Exhibit P-3.

9. Student's IEP team convened at City High School on May 10, 2013 for the annual IEP review. Mother, Paralegal and Educational Advocate attended. Mother and her advocates requested that Student be placed on the high school diploma track. Exhibit P-8. At a follow up meeting on June 19, 2013, Mother and Paralegal again requested that Student be placed on a high school diploma track where she could earn Carnegie Units, in a small setting, outside of general education. Special Education Coordinator agreed to provide Student a schedule that included classes with only disabled peers and where Student would receive content courses toward diploma track Carnegie Units on a full time basis. Exhibit R-9. At the June 19, 2013 IEP

meeting, there was no discussion of providing Student instruction via an internet-based learning system. Testimony of Educational Advocate.

10. The resulting June 19, 2013 IEP provided that Student would receive full-time Specialized Instruction in the Outside General Education setting and 120 minutes per month of Speech-Language Pathology Outside General Education. The IEP identified Student's proposed Exit Category as "H.S. Diploma" and provided that she would participate in the Regular Statewide DC-CAS Assessment with accommodations. Exhibit R-10.

11. For the 2013-2014 school year, Student is in a self-contained class at City High School. There are five students in the class. The teaching staff are High School Special Education teacher and a classroom teaching assistant. Testimony of High School Special Education Teacher.

12. High School Special Education Teacher is not certified as a teacher in the District of Columbia. She has completed all of the requirements for certification as a special education teacher in D.C. She applied for D.C. teacher certification in December 2012 and is awaiting approval. Testimony of High School Special Education Teacher.

13. In the current term of the 2013-2014 school year, Student is in a self-contained, blending-learning program[2] at City High School. Student is currently taking, on a block schedule, English I, Read 180, World History, Algebra I, Biology and an elective. For core academic courses required for Carnegie Unit credits, Student receives instruction via the internet-based Plato Learning system. Class periods are 90 minutes long, of which 20-30 minutes per class is spent on computer. When students are working on the Plato Learning

[2] "Blended learning" is described as a "pedagogical approach that combines the effectiveness and socialization opportunities of the classroom with the technologically enhanced active learning possibilities of the online environment." Dziuban, C. D., Hartman, J. L., & Moskal, P. D., *Blended Learning*, p. 3, Educause Center for Applied Research Bulletin, March 30, 2004.

system, High School Special Education Teacher, or the teaching assistant, is available to assist, as needed. No teacher, currently teaching Student, is content-certified. Testimony of High School Special Education Teacher.

14. This school year, Student is a delight to have in class. She is progressing in all of her subjects. She is very bright and motivated to learn. For the most part, Student does well on the Plato Learning system. She obtained the highest scores in her class on all of her Plato pre-tests. Testimony of High School Special Education Teacher.

15. At the May 10, 2013 IEP meeting, Mother requested DCPS to conduct an educational reevaluation and an S/L reassessment of Student. Exhibit P-3. S/L Pathologist conducted the S/L reevaluation on August 2, 2013 and issued her report on August 14, 2013. Due to S/L Pathologist's absences on medical leave, the August 14, 2013 report was not reviewed by Student's IEP team until October 2, 2013. At the October 2, 2013 meeting, Student's IEP was amended to increase S/L services from 120 minutes per month to 150 minutes per month. Testimony of S/L Pathologist, Exhibits R-13, R-14.

16. Nonpublic School is a private day school in suburban Maryland that serves children with moderate to severe learning disabilities, high-functioning autism and sensory deficits. There are 71 students in grades 9 through 12. Students at Nonpublic School do not have interaction with nondisabled peers. At the secondary school level, Nonpublic School is a high school diploma based program. The average class size is 8 students. Most teachers are content-certified in the areas in which they teach. Nonpublic School has a current Certificate of Approval from the D.C. Office of the State Superintendent of Education. The tuition cost is approximately $29,000 per year. Testimony of Nonpublic School Director.

17. In October 2013, Student visited Nonpublic School for two days. She met with the reading teacher and a related services provider. Nonpublic School staff determined that Student would be a good candidate for its program. Testimony of Nonpublic School Director.

CONCLUSIONS OF LAW

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

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioners in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

The issues raised by Petitioners in this case concern alleged denials of FAPE relating to Student's special education programming for the 2012-2013 and 2013-2014 school years and DCPS' response to Mother's May 2013 request for reevaluations. With regard to the programming issues, the Petitioners claim (i) that DCPS denied Student a FAPE for the 2012-2013 school year, because DCPS provided Student a certificate track academic schedule, when her IEP team had agreed that she would earn a regular high school diploma, (ii) that DCPS failed to convene an IEP meeting to review Student's IEP when requested by the Parents, beginning in November 2012, and (iii) that Student's placement in the blended learning program at City High School for the 2013-2014 school year does not meet the requirements of her IEP.

A.

i. Certificate Track vs. Diploma Track

The IDEA "focuses on ensuring that children with disabilities achieve to high academic standards and have access to the same curriculum as other children." *See* Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46556 (August 14, 2006). If the child's disability makes it necessary, her IEP team must examine whether adaptations in content, methodology, or delivery of instruction to address the child's unique needs are necessary to ensure the child's access to the general curriculum. *See Letter to Anonymous*, 51 IDELR 194 (OSEP May 6, 2008). In the present case, the Parents claim that DCPS effectively denied Student access to the same curriculum as other children, by not offering her a diploma track schedule for the 2012-2013 school year. DCPS responds that, prior to the 2012-2013 school year, Student's IEP team did not discuss Student's pursuing a high school diploma.

Pursuant to the DCMR, DCPS has established the requisite course work, measured in Carnegie Units, which students must successfully complete to earn a regular high school diploma (the "Diploma Track"). *See* 5E DCMR § 2203.2. Under the DCMR, the Diploma Track is the default general curriculum for high school students. DCPS has also established an alternative program for students with special needs to receive a Certificate of Individualized Educational Program (IEP) completion (the "Certificate Track"), instead of a regular high school diploma. For those students, the DCMR requires that the decision to pursue a non-diploma program, leading to an IEP Certificate of Completion, must be made by the Student's IEP team including the parents and, where possible, the student. That decision shall be made no earlier than the 9th grade and must be attached in writing to the student's (IEP). *See* 5E DCMR §

2203.6.

In the present case, Student's IEP team met on May 14, 2012 to develop her IEP for the 2012-2013 school year. Parents did not attend the May 14, 2012 IEP meeting. A second meeting was convened on June 1, 2012 to discuss Student's high school placement. There was no discussion at the May 14, 2012 IEP meeting or at the June 1, 2012 school placement meeting about Student's pursuing a non-diploma program instead of a regular high school diploma. Nor was a written IEP team decision that Student would pursue a Certificate Track program ever attached to any of Student's IEPs. Nonetheless, when Student matriculated to City High School for the 2012-2013 school year, DCPS placed her in a non-diploma Certificate Track program. I find, therefore, that DCPS violated the requirements of 5E DCMR § 2203.6 by unilaterally placing Student on the Certificate Track, in the absence of a decision by her IEP team that she would not pursue a regular high school diploma.

DCPS' failure to ensure that Student's IEP team decided whether she would pursue a diploma or a non-diploma program was analogous to a procedural violation of the IDEA. *Cf. Eley v. District of Columbia*, 2012 WL 3656471, 7 (D.D.C. Aug. 24, 2012) (Generally, when the school district violates the procedural requirements of IDEA by failing to develop an IEP in the manner specified, the purposes of the Act are not served, and the district may have failed to provide FAPE.") Because this was a procedural violation, to establish a denial of FAPE, Petitioners were required to show that DCPS' omission affected Student's substantive rights. *See, e.g., Taylor v. District of Columbia*, 770 F.Supp.2d 105, 109-110 (D.D.C.2011) (IDEA claim is viable only if DCPS' procedural violations affected the student's substantive rights.) Here, because DCPS unilaterally put Student on a Certificate Track schedule, Student was denied the opportunity to earn Carnegie Units toward high school graduation for the 2012-2013

school year. I find that this violation clearly affected Student's substantive rights and denied her access to the same curriculum as her nondisabled peers. Student was, therefore, denied a FAPE for the 2012-2013 school year.

ii. Failure to convene an IEP meeting when requested by the Parents

Beginning in November 2012, and repeatedly thereafter, Paralegal, on behalf of Parents, sought to have City High School convene an IEP meeting to conduct a 30-day review of Student's IEP. For weeks, City High School did not respond to the meeting requests. Special Education Coordinator acknowledged the meeting request on February 12, 2013, but the IEP review meeting was not convened until May 10, 2013.

While City High School's delay in responding to the Parent's request for an IEP meeting is censurable, I do not find there was a violation of the IDEA. The IDEA requires that an LEA must ensure that the IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address, *inter alia*, information about the child provided to, or by, the parents, the child's anticipated needs; or other matters. *See* 34 CFR § 300.324(b). Student's IEP team conducted an annual review of her IEP on May 14, 2012 and had a follow up meeting on June 1, 2012. After Student matriculated to City High School, that school convened an IEP meeting, which Mother attended, on October 4, 2012. The IEP team reviewed Student's progress at the meeting. Paralegal provided no reason in her subsequent communications to City High School for convening another 30-day IEP review meeting. City High School did hold a timely meeting for the annual review of Student's IEP on May 10, 2013. I conclude, therefore, that Petitioners have not shown that DCPS violated the IDEA, or denied Student a FAPE, by not holding an additional IEP meeting when requested by Paralegal beginning in November 2012.

iii. Student's Placement in the City High School Blended Learning Program for the 2013-2014 School Year

Student's IEP for the 2013-2014 school year was revised on June 19, 2013 and October 2, 2013. Parents do not contest the appropriateness of this IEP, which provides for full-time specialized instruction outside of general education and stipulates that Student will pursue a regular high school diploma. For the 2013-2014 school year, Student is served in a self-contained classroom at City High School, with other children with ASD and ID disabilities. The classroom offers a blended learning program, consisting of "virtual" classes delivered through the internet-based Plato Learning system and direct instruction by High School Special Education Teacher. Student receives instruction in the core academic subjects required for Carnegie Unit credits – English I, World History, Algebra I, and Biology – via the Plato Learning system. There is no content-certified teacher to assist with teaching the core academic subjects.

Petitioners contend that Student is being denied a FAPE in the blended-learning program at City High School for a host of reasons, including that her special education teacher is not yet licensed or certified in the District of Columbia; that Student is not being taught by content-certified teachers for her core curriculum courses; that Student is higher functioning than her classmates; that the instruction models/curricula used for student are inappropriate; that, outside of class, Student has contact with nondisabled peers and that Student is not being provided with appropriate supports to address many of the issues that are uniquely related to her disability including social skills training.

Use of Plato Learning System

Petitioners object to Student's receiving instruction in her core academic subjects via the internet-based Plato Learning system. The IDEA permits the use of such internet based

instruction, if determined to be appropriate by the student's IEP team. *See* 34 CFR § 300.320(a)(4); Assistance to States for the Education of Children with Disabilities, *supra*, 71 Fed. Reg. 46547 ("Whether an internet-based instructional program is appropriate for a particular child is determined by the child's IEP Team, which would determine whether the program is needed in order for the child to receive FAPE.") Here, DCPS unilaterally implemented the Plato Learning system to instruct Student without ensuring that her IEP team first determined that the internet-based program was appropriate for her. This omission was a procedural violation of the IDEA. *Cf. T.B. v. Warwick School Dept.*, 2003 WL 22069432, 13 (D.R.I. Jun. 6, 2003) (If IEP team required to discuss Discrete Trial Training ("DTT"), its failure to do so would be a procedural violation whether or not DTT had to be included in the IEP.) Not every procedural violation of the IDEA results in a denial of FAPE. However, in this case, the decision to provide all of Student's core academic subjects by internet-based instruction was a fundamental educational decision. I find that DCPS' failure to involve Student's IEP team in that decision seriously deprived the Parents of their participation rights and was a denial of FAPE. *Cf., e.g., A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 164 (D.D.C.2005) (noting that procedural violations that seriously infringe upon the parents' opportunity to participate in the IEP formulation process clearly result in a denial of a FAPE.)

The IDEA's Highly Qualified Teacher Requirement

As to the qualifications of High School Special Education Teacher, the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA 2004") requires that all public elementary and secondary special education teachers be "highly qualified" as special education teachers. The definition of "highly qualified special education teachers" in the IDEA [20 U.S.C. 1401(10)] is aligned with No Child Left Behind Act of 2001's highly qualified requirements.

See 20 U.S.C. 7801(23). For special education teachers teaching core academic subjects, the IDEA's "highly qualified" criteria include full state certification as a special education teacher (or having passed state special education teacher licensing examination and holding a license to teach in the state); holding at least a bachelor's degree; and demonstrating subject matter competence in the academic subjects taught to special education students. *See* 34 CFR § 300.18. High School Special Education Teacher, has not received licensure or certification in the District of Columbia in either special education or core subject matter. Therefore, while High School Special Education Teacher has extensive education and experience in special education, she does not meet the IDEA's highly qualified requirement.

Questions about whether a teacher is highly qualified are not ones on which parents or students can get any relief through a due process hearing. *See,* Office of Special Education and Rehabilitative Services (OSERS), *Questions and Answers On Highly Qualified Teachers Serving Children With Disabilities* (Jan. 2007), citing 34 CFR §§ 300.18(f) and 300.156(e).[3] Moreover, the evidence establishes that notwithstanding DCPS' failure to provide teachers who meet "highly qualified" criteria, Student is doing well this year with the internet-based instruction at City High School. Her teacher reports that she is a delight in class, motivated to learn and progressing in all of her subjects. Therefore, I find that Petitioners are not entitled to relief in this due process proceeding for DCPS' failure to comply with the IDEA's highly qualified teacher mandate.

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[3] Rule of construction. Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular SEA or LEA employee to be highly qualified, or to prevent a parent from filing a complaint under §§ 300.151 through 300.153 about staff qualifications with the SEA as provided for under this part.

34 CFR § 100.18(f). *See, also,* 34 CFR § 300.156(e) (identical language).

Remaining IEP Implementation Issues

The remaining issues raised by the Parents in this case concern IEP implementation during the 2013-2014 school year. The IDEA is violated when a school district deviates materially from a student's IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP."); accord *S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F.Supp.2d 73, 75 (D.D.C.2007); *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 275 (D.D.C.2011); *Turner v. District of Columbia* 2013 WL 3324358, 7 (D.D.C. Jul. 2, 2013).

Parents have failed to identify how their other concerns about Student's blended learning class at City High School – that Student is higher functioning than her classmates; that, outside of class, Student has contact with nondisabled peers and that Student is not being provided with appropriate supports such as social skills training – constitute a material failure to implement Student's IEP. There is, of course, no provision in Student's IEP which requires her placement with only higher functioning special needs students. Nor does the IEP provide that she will not have interaction in school with her nondisabled peers. With regard to social skills training, the IEP does not include behavioral support goals for social skills. However, the October 2, 2013 IEP notes, as a Communications/Speech and Language area of concern, that Student's classroom behavior is socially inappropriate. S/L Therapist testified that she is working with Student on her main social skills issue, interrupting other students and the teacher, and that Student has shown improvement in this area. I conclude that Petitioners have not shown that there has been

a material failure to implement Student's IEP during the 2013-2014 school year.[4]

B.

Did DCPS Deny Student a FAPE by Failing to Timely Conduct and Review a Speech-Language Evaluation of Student?

Petitioners' remaining claim concerns DCPS' alleged untimely response to Parents' May 2013 request to conduct a S/L reassessment of Student. At the May 10, 2013 IEP meeting, Mother requested DCPS to conduct an educational reevaluation and an S/L reassessment of Student. S/L Pathologist conducted the S/L reassessment on August 2, 2013 and issued her report on August 14, 2013. Because S/L Pathologist was absent from work on medical leave, the August 14, 2013 report was not reviewed by Student's IEP team until October 2, 2013. At that meeting, Student's IEP was amended to increase her S/L services from 120 minutes per month to 150 minutes per month.

The IDEA does not set a time frame within which an LEA must conduct a reevaluation after receiving a request from a student's parent. *See Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005). In light of the lack of statutory guidance, *Herbin* concluded that "[r]eevaluations should be conducted in a 'reasonable period of time,' or 'without undue delay,' as determined in each individual case." *Id.* (quoting Office of Special Education Programs Policy Letter in Response to Inquiry from Jerry Saperstone, 21 IDELR 1127, 1129 (1995)). *See, also, Smith v. District of Columbia*, 2010 WL 4861757, 3 (D.D.C. Nov. 30, 2010).

In this case, Student's S/L reassessment was conducted over the DCPS summer break and the reassessment was reviewed by Student's IEP team at a meeting on October 2, 2013.

[4] S/L Pathologist testified that Student missed S/L services in September 2013 because S/L Pathologist was absent on medical leave. Speech-Language Pathologist stated that make up sessions are being scheduled. Petitioners have not raised the failure to provide S/L services to Student in September 2013 as an IEP implementation issue in this case.

Both the delay in conducting the S/L reassessment and the delay in reconvening Student's IEP team were due to the limited availability of Student's DCPS S/L Pathologist who was on medical leave. S/L Pathologist has been Student's S/L services provider since the beginning of the 2012-2013 school year and enjoys a good working relationship with her. Under the circumstances, considering the advantage to having Student's current provider conduct the S/L reassessment and report to the IEP team, considering that the current provider was unavailable due to medical leave, and considering that most of the delay in completing Student's S/L reassessment was during the DCPS 2013 summer break, I conclude that the interval between Parents' request for the S/L reassessment and consideration of the reassessment by Student's IEP team, was a reasonable period of time.

REMEDY

In this decision, I have found that DCPS denied Student a FAPE by (1) denying her a regular high school Diploma Track curriculum in School Year 2012-2013 and (2) unilaterally deciding to provide Student internet-based instruction in her core academic courses for the 2013-2014 school. To address the second violation, I will order DCPS to convene Student's IEP team to consider the appropriateness of internet-based instruction for Student.

Remedying DCPS' failure in the last school year to provide Student a Diploma Track curriculum is more problematical. Petitioners request two remedies – private school placement and compensatory education. As to DCPS funding for private school,"[i]f no suitable public school is available, the school system must pay the costs of sending the child to an appropriate private school. . . but, if there is an appropriate public school program available . . . the District need not consider private placement, even though a private school might be more appropriate or better able to serve the child." *Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir.1991) (citations omitted). Here, notwithstanding DCPS' procedural violation of unilaterally instituting

internet-based instruction for Student, the evidence does not establish that the blended learning classroom at City High School is not a suitable placement for Student. According to High School Special Education Teacher's unrebutted testimony, this school year, Student is taking Diploma Track courses and making satisfactory progress. Therefore I will not order DCPS to pay the costs of sending Student to a private school.

Petitioners also seek an award of compensatory education. Compensatory education is designed to place disabled children in the same position they would have occupied but for the school district's violations of IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (*citing Reid v. District of Columbia*, *supra*, 401 F.3d at 518.) Petitioners' compensatory education proposal to provide Student 100 hours of tutoring, a plan advanced by Educational Advocate, would not place Student where she would have been if DCPS had not placed her on the Certificate Track. While Student is not required "to have a perfect case to be entitled to compensatory education," *see Cousins v. District of Columbia*, 880 F.Supp.2d 142, 148 (D.D.C.2012), Petitioners' proposed tutoring remedy does not correlate to any educational need established by the evidence.

Under District law, DCPS is obligated to provide FAPE to every resident child with a disability until he or she has graduated from high school with a regular high school diploma, or through the end of the semester he or she turns twenty-two, whichever comes first. *See* 5E DCMR §§ 3002.1, 3002.2. To vindicate a student's substantive right to receive a FAPE and to compensate the student for past deprivations of educational opportunity, LEAs have been required to provide compensatory relief – even where the student is no longer eligible for IDEA benefits. *See L.R.L. ex rel. Lomax v. District of Columbia*, 896 F.Supp.2d 69, 76 (D.D.C.2012), citing, *e.g.*, *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 55, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) (claim seeking reimbursement for past education expenses is not moot even if the student

has graduated from high school); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 5 n. 3, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) (lawsuit in which plaintiff sought IDEA reimbursement, even though he had already graduated from high school, was not moot); *Ferren C. v. Sch. Dist.*, 612 F.3d 712, 718 (3d Cir.2010) ("[I]ndividual over [age 21] is still eligible for compensatory education for a school district's failure to provide a FAPE prior to the student turning twenty-one. A court may grant compensatory education in such cases through its equitable power . . . ." (citation omitted)); *Garcia v. Bd. of Educ.*, 520 F.3d 1116, 1124 (10th Cir.2008) ("[E]ven if a student is ineligible going forward under IDEA, seeking backward-looking relief to make up for past deprivations also seems entirely appropriate.") Since DCPS' denial of FAPE at issue deprived Student of the opportunity to earn a year's credits toward her goal to pursue a high school diploma, the most apt remedy would be to provide Student an additional school year of FAPE – and an extra year to make up missed Carnegie Units – before she ages out of special education eligibility. Therefore, as a compensatory education remedy, I will order DCPS to continue to provide FAPE to Student through the end of the semester she turns twenty-three, or until she has graduated from high school with a regular high school diploma, whichever occurs first.

Summary

In this case, I have found that DCPS has denied Student a FAPE by failing to provide her a DCPS diploma track schedule for the 2012-2013 school year and by unilaterally implementing an internet-based instructional program for Student in the current school year, which Student's IEP team never considered or determined appropriate. With regard to the remaining issues alleged in this case, I have found that Petitioners have not met their burden of proof to show that Student was denied a FAPE. I will order DCPS to convene Student's IEP team to consider whether internet-based instructional programming is appropriate for Student and, for a

compensatory education remedy, I will order that Student have an additional year of special education eligibility to pursue a DCPS high school diploma.

ORDER

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

1. Within 10 school days of entry of this Order, DCPS shall convene Student's IEP team, including the Parents, to consider whether internet-based instruction is appropriate for Student and to revise, as appropriate, Student's IEP;

2. Student's eligibility to receive a free appropriate public education from DCPS shall be extended by one year through the end of the semester Student turns twenty-three, or until she has graduated from high school with a regular high school diploma, whichever occurs first; and

3. All other relief requested by Petitioners herein is denied.

Date: November 26, 2013

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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