

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
December 05, 2013

Parent,<sup>1</sup> on behalf of,  
Student,\*

Petitioner,

Date Issued: December 5, 2013

v.

Hearing Officer: Melanie Byrd Chisholm

District of Columbia Public Schools,  
Respondent.

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND PROCEDURAL HISTORY**

The student is \_\_\_\_\_ assigned to School A for the 2013-2014 school year. The student's individualized education program (IEP) at issue lists Autism Spectrum Disorder (Autism) as his primary disability and provides for him to receive 24.5 hours per week of specialized instruction outside of the general education environment, thirty (30) minutes per week of adapted physical education (APE), thirty (30) minutes per week of specialized instruction within the general education environment, four (4) hours per month of speech-language therapy outside of the general education environment and one hundred twenty (120) minutes per month of occupational therapy (OT) outside of the general education environment.

On December 21, 2012, Petitioner filed a Due Process Complaint (Complaint) against Respondent District of Columbia Public Schools (DCPS) which was assigned the case #2012-0835. In case #2012-0835, Hearing Officer Frances Raskin addressed the following issues: (A) Whether Respondent denied the student a FAPE during the 2011-2012 and 2012-2013 school years by failing to stop other students and the classroom aide from bullying him, which prevented the student from accessing the curriculum, and resulted in his developing school phobia; (B) Whether Respondent denied the student a FAPE during the 2011-2012 school year by failing to conduct a developmental vision assessment of the student; (C) Whether Respondent denied the student a FAPE from October 25, 2012 through present by failing to provide him with

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<sup>1</sup> Personal identification information is provided in Appendix A.

\*The student is a minor.

home-based instruction while he was unable to attend school due to his school phobia and the injuries he suffered; and (D) Whether Respondent denied the student a FAPE during the 2011-2012 and 2012-2013 school years by failing to provide him a sufficiently restrictive placement, i.e., place him in a separate, special education day school for students with severe autism. In a March 16, 2013 Hearing Officer Determination (HOD), Hearing Officer Raskin determined that the Petitioner prevailed on issues B and C and failed to present sufficient evidence to prevail on issues A and E. As relief, Petitioner was entitled to an independent, developmental vision assessment for the student.

On August 20, 2013, the Petitioner's counsel filed a State Complaint against DCPS alleging that DCPS' definition of visual impairment including blindness conflicts with and wrongfully restricts the definition of visual impairment including blindness in 34 CFR §300.8(a)(13). After an investigation of the DCPS definition of visual impairment including blindness which included a comparison of the DCPS definition of visual impairment including blindness with the definition of visual impairment including blindness from eight other States, the District of Columbia Office of the State Superintendent of Education (OSSE) found that DCPS' definition of definition of visual impairment including blindness is in compliance with 34 CFR §300.8(c)(13).

On September 10, 2013, Petitioner filed the present Complaint against Respondent DCPS, alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to failing to implement the APE on the student's IEP during the 2011-2012 school year; failing to reevaluate the student in all areas of suspected disability within a reasonable period of time; failing to provide home instruction from January 8, 2013 through June 20, 2013; failing to pay for the costs of "medical services" incurred by the parent in her effort to secure an appropriate IEP and placement for the student for the past two years; failing to include IEP Team members able to interpret the instructional implications of evaluation results at the student's June 11, 2013 IEP Team meeting; failing to consider the independent evaluations and other relevant information provided by the parent at the June 11, 2013 IEP Team meeting in order to change the student's eligibility classification and develop an appropriate IEP; failing to permit meaningful participation in the IEP development and placement decision on June 11, 2013; failing to appropriately review and revise the student's IEP on June 11, 2013; failing to add school health services as a related service on the student's June 11, 2013 IEP; failing to add Applied Behavior Analysis (ABA) as a supplementary aid or service on the student's June 11, 2013 IEP; failing to add IEP goals, objectives, accommodations and services to address Traumatic Brain Injury (TBI) on the student's June 11, 2013 IEP; failing to add IEP goals, objectives, accommodations and services to address visual impairment on the student's June 11, 2013 IEP; failing to have an appropriate IEP in effect at the beginning of the 2013-2014 school year; and failing to provide an appropriate placement for the 2013-2014 school year. As relief for the alleged denials of FAPE, the Petitioner requested, *inter alia*, reimbursement for medical expenses incurred by the parent from September 10, 2011 through September 10, 2013; placement in and funding for School C; for the student's eligibility for special education and related services to be extended through age 25; compensatory education; for the student to be classified as a student with Multiple Disabilities (MD); and independent neuropsychological, OT, physical therapy (PT), assistive technology (AT) and speech-language assessments.

On September 12, 2013, Petitioner filed a Motion to Expedite. On September 13, 2013, DCPS filed an Opposition to Petitioner's Motion to Expedite. On September 13, 2013, Petitioner filed a Reply to DCPS' Opposition to Petitioner's Motion to Expedite. On September 25, 2013, the Hearing Officer issued an Order Denying Petitioner's Motion to Expedite however ordered that counsel for the parties make themselves available for a prehearing conference to discuss the provision of services to the student.

On September 19, 2013, Respondent filed a timely Response to the Complaint. In its Response, Respondent asserted that the factual issue regarding implementation of the student's APE during the 2011-2012 school year was litigated in case #2012-0835; in the March 16, 2013 HOD, the Hearing Officer made a finding of fact that the student was hit in the head by a weighted ball during his APE class; any deviations from the student's IEP were *de minimis* and not substantial to constitute a denial of a FAPE; the student was last reevaluated on August 4, 2011; adaptive physical education and functional behavioral assessments were completed for the student on April 25, 2012 and April 12, 2012 respectively; during case #2012-0835, the Petitioner's claim for compensatory education for any claim up to March 16, 2013 was withdrawn with prejudice; no IEP Team has determined that the student requires home instruction or that the home is the least restrictive environment for the student; DCPS was not required to provide home instruction to the student; the only medical expenses reimbursable under the IDEA are those provided for diagnostic or evaluative purposes to determine a child's medically related disability that results in the need for special education and related services; the IDEA does not provide for reimbursement of medical expenses in the manner that the Petitioner contends; the student's June 11, 2013 IEP Team included the parent, an occupational therapist, a speech-language pathologist, a school psychologist, an autism coordinator, a vision expert, an APE teacher, and a special education teacher; during the June 11, 2013 IEP Team meeting, the parent, with counsel, was given the opportunity to express her opinion and provide input; on June 11, 2013, DCPS proposed to conduct audiological, OT, AT and APE assessments of the student and proposed extending the student's June 12, 2012 IEP until the completion of the assessments; during the June 11, 2013 IEP Team meeting, DCPS proposed that the student attend extended school year (ESY) in order for the requested assessments to be completed and to assist the student in transitioning back to school; ESY was included on the student's June 11, 2013 IEP; the prior written notice (PWN) from the student's June 11, 2013 IEP Team meeting stated that ESY was important in order to assess the student and help the student transition back to school; the student did not attend ESY; the June 11, 2013 IEP was reasonably calculated to provide the student with educational benefit; the March 16, 2013 Hearing Officer Determination (HOD) found that the Petitioner did not prove that the student needed to be educated in a segregated nonpublic day school for students with autism; the June 11, 2013 IEP continued the placement in the student's June 12, 2012 IEP which the Hearing Officer in case #2012-0835 deemed appropriate; DCPS is not required to specify teaching methodology on a student's IEP; methodology is left to the district's discretion; to the extent that Petitioner alleges that DCPS did not provide appropriate goals, objectives, accommodations and services to address the student's visual impairment and traumatic brain injury, DCPS attempted to assess the student however the parent has not made the student available for assessments; a vision expert attended the student's June 11, 2013 IEP Team meeting and reviewed the student's optometry assessment; the vision expert determined that there was insufficient evidence to classify the student with a vision impairment but recommended an eye and medical assessment; DCPS provided for an

independent eye and medical assessment; the student does not have a right to a specific disability classification; a neuropsychological assessment does not provide information to address the student's educational needs; a neuropsychological assessment was not requested for the student; and the student's IEP Team did not determine that a neuropsychological assessment was necessary to develop the student's educational program.

On September 30, 2013, the Petitioner filed a Notice of Withdrawal for Issue #1 as presented in the Complaint. On September 30, 2013, DCPS filed an Objection to the Withdrawal of Issue #1 without Prejudice. On October 2, 2013, the Hearing Officer convened a prehearing conference to discuss the immediate provision of services to the student. During the prehearing conference, the Hearing Officer stated that the issues to be determined by the Hearing Officer in the matter would not be finalized until a prehearing conference to outline the issues. Following the prehearing conference on October 2, 2013, the Petitioner filed a Withdrawal of Notice to Withdraw Issue #1.

On October 2, 2013, the Hearing Officer convened a prehearing conference to discuss the immediate provision of services to the student. The Hearing Officer requested that the parties suggest services that could be provided to the student during the pendency of the case. The Hearing Officer expressed the possibility of issuing an Interim Order to provide for some instruction for the student given the parent's refusal to send the child to his assigned location of services based on her belief that his safety would be compromised.

The parties held a Resolution Meeting on October 3, 2013 and failed to reach an agreement during the meeting however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on October 11, 2013, following the conclusion of the 30-day resolution period, and originally ended on November 24, 2013.

On October 9, 2013, DCPS informed the Hearing Officer that DCPS was willing to provide a one-on-one dedicated aide to the student during the pendency of the Complaint at the student's assigned location of services and would conduct OT, PT, APE, orientation and mobility, audiological and AT assessments at the assigned location of services to determine the student's need for further support and services. On October 10, 2013, the Petitioner informed the Hearing Officer that the Petitioner was requesting an Interim Order for the student to be placed at School C and, in the alternative, for the Hearing Officer to order a dedicated aide from an agency of the parent's choice who specializes in ABA; to permit the dedicated aide to be supervised by a BCBA on-site as needed; for the student's full-time home health aide to accompany the student to school; for the student not to attend gym or recess or any activity where athletic equipment is used; and for the dedicated aide, BCBA supervisor and home health aide to accompany the student all day, every day in all school settings without interference. On October 11, 2013, DCPS filed a Motion on Maintenance of Current Educational Placement. On October 13, 2013, the Petitioner filed a Reply to Respondent's Motion to Maintain Placement. On October 14, 2013, the Petitioner filed a Corrected Reply to Respondent's Motion to Maintain Placement.

On October 11, 2013, the Hearing Officer convened a prehearing conference and led the parties through a discussion of the issues, relief sought and related matters. The Hearing Officer

issued the Prehearing Order on October 18, 2013. The Prehearing Order clearly outlined the issues to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the Hearing Officer if the Order overlooked or misstated any item. Neither party disputed the issues as outlined in the Order however on October 11, 2013, the Respondent filed a Motion to Dismiss in Part.

On October 11, 2013, the Respondent filed a Motion to Dismiss in Part alleging that issues in the present matter were fully litigated and decided in case #2012-0835. On October 14, 2013, the Petitioner filed a Reply to Respondent's Motion to Dismiss in Part. On October 15, 2013, the Petitioner filed a Corrected Reply to Respondent's Motion to Dismiss in Part. On October 26, 2013, the Petitioner again filed its Reply to Respondent's Motion to Dismiss in Part. On October 29, 2013, the Hearing Officer issued an Order Granting in Part and Denying in Part Respondent's Motion to Dismiss in Part. The Order dismissed Issues #2 and #4 as outlined in the October 18, 2013 Prehearing Order and dismissed Issue #3 as outlined in the October 18, 2013 Prehearing Order for the period of January 8, 2013 through March 16, 2013 however retained Issue #3 for the period of March 17, 2013 through June 20, 2013.

On October 15, 2013, the Petitioner filed a Motion to Limit Defenses. On October 17, 2013, DCPS filed an Opposition to Motion to Limit Defenses. On October 17, 2013, the Petitioner filed a Reply to DCPS' Opposition to Motion to Limit Defenses.

On October 18, 2013, the Hearing Officer issued the Prehearing Order. On October 22, 2013, the Petitioner provided comments to the Prehearing Order. Specifically, the Petitioner stated that the Prehearing Order should have referenced an "eye medical" assessment rather than an "eye and medical" assessment and clarified the anticipated testimony of a witness. On October 23, 2013, DCPS provided comments regarding the Prehearing Order and filed a Motion to Dismiss in Part arguing that the Hearing Officer did not have subject matter jurisdiction to entertain Issue #4 as outlined in the October 18, 2013 Prehearing Order or to order reimbursement for medical expenses. On October 30, 2013, DCPS withdrew the October 23, 2013 motion. On November 4, 2013, the Hearing Officer responded that revisions to the Prehearing Order to delete the word "and" and the witnesses' testimony were not necessary.

On October 21, 2013, the Petitioner filed a Motion for a Notice to Appear. On October 28, 2013, the Hearing Officer requested that additional information be provided in the Motion for a Notice to Appear. On October 28, 2013, the Petitioner filed a Revised Motion for Notice to Appear. On October 29, 2013, the Chief Hearing Officer signed a Notice to Appear for the requested witness.

On October 30, 2013, the Petitioner requested that the Hearing Officer correct a "typographical error" in Issue #1 as outlined in the Prehearing Order regarding the date of the student's IEP. On October 30, 2013, Petitioner also filed a Motion for Partial Summary Judgment. On November 1, 2013, the Respondent filed an Opposition to Petitioner's Motion for Partial Summary Judgment. On November 5, 2013, Petitioner filed a Reply to Respondent's Opposition to Petitioner's Motion for Partial Summary Judgment.

On October 30, 2013, the Petitioner filed a Prehearing Brief. On October 30, 2013, the Petitioner also filed a Motion for Leave to Observe the Testimony of Respondent's Witnesses.

On October 30, 2013, Petitioner filed Disclosures including thirty-four (34) exhibits and six (6) witnesses.<sup>2</sup> On October 30, 2013, Respondent filed Disclosures including forty (40) exhibits and nine (9) witnesses.

On November 5, 2013, the Petitioner sent a "corrected" Petitioner's Exhibit 8. The Petitioner reasoned that since the document was included in the hearing for case #2012-0835 then it was a "part of the record."

The due process hearing commenced at approximately 9:00 a.m. on November 6, 2013 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2004. The Petitioner elected for the hearing to be closed.

As a preliminary matter, the Hearing Officer dismissed DCPS' October 11, 2013 Motion of Maintenance of Current Education Placement as moot. The Hearing Officer noted that an Interim Order regarding the student's placement during the pendency of the matter was not issued because of the parties' vast differences in suggestions as to where the child would receive temporary education, the Hearing Officer's lack of a record to make a decision beyond the parties' suggestions and the stay-put provision in the Individuals with Disabilities Education Act (IDEA).

Additionally, the Hearing Officer denied Petitioner's October 15, 2013 Motion to Limit Defenses. The Hearing Officer noted that the IDEA states that a Hearing Officer's decision whether a child was denied a FAPE must be based on substantive grounds. The majority of the issues in the present matter stemmed from the student's June 11, 2013 IEP Team meeting and the Hearing Officer was charged with looking at the child's needs on June 11, 2013. The Hearing Officer also clearly noted that the Hearing Officer would not allow any re-litigation of issues determined in case #2012-0835 and to the extent that Findings of Fact and Conclusions of Law in case #2012-0835 were made related to issues in the prior matter, the undersigned Hearing Officer could not and would not overturn Hearing Officer Raskin.

Next, the Hearing Officer addressed the Petitioner's request to change the date in Issue #1 as outlined in the Prehearing Order. The Hearing Officer noted that the date included in Issue #1 was not a "typographical error," in that the date appeared in the Prehearing Order the way it was discussed during the prehearing conference. However the parties agreed that the date discussed during the prehearing conference was the incorrect date of the student's IEP and that the correct date was August 4, 2011 rather than June 13, 2011. Therefore, the Hearing Officer revised Issue #1 to reflect the IEP date of August 4, 2011.

Next, the Hearing Officer denied Petitioner's October 30, 2013 Motion for Partial Summary Judgment. The Hearing Officer concluded that there were genuine issues of material fact yet to be determined and the record did not contain sufficient information to conclude that the Respondent was entitled to judgment as a matter of law.

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<sup>2</sup> A list of exhibits is attached as Appendix B. A list of witnesses who testified is included in Appendix A.

The Hearing Officer noted that Petitioner's October 30, 2013 Prehearing Brief would not be reviewed. First, the Hearing Officer did not request prehearing briefs from the parties and the Prehearing Order did not require prehearing briefs. Additionally, the case included nine prehearing motions and four days scheduled for hearing. Finally, the parties were provided opportunities for Opening and Closing Arguments.

Finally, the Hearing Officer denied Petitioner's Motion for Leave to Observe the Testimony of Respondent's Witnesses. The Petitioner had adequate time to prepare for the hearing, including time to prepare witnesses and examine Respondent's disclosures.

Although a corrected version of Petitioner's Exhibit 8 was disclosed after the Disclosures deadline and the Hearing Office noted that exhibits entered into the record for case #2012-0835 were not a part of the current record, the Respondent did not object to the corrected exhibit being entered into the record. Petitioner's Exhibits 6-10, 12-21, 23-28 and 30-34 were admitted without objection. The Hearing Officer did not admit Petitioner's Exhibits 1-3 because the documents were duplicative of the record. Petitioner's Exhibit 4 was not admitted into the record. The exhibit was a timeline prepared by Petitioner's counsel. The Respondent argued that there was no way to authenticate the documents, that the document was irrelevant and that there was no opportunity to cross-examine the Petitioner's attorney as the author of the document. The Petitioner argued that the document was developed in conjunction with the parent and that the document would be helpful to the Hearing Officer in summarizing the events. The Hearing Officer noted that other documents in the record contained dates of the events and that the Hearing Officer would be able to determine the issues without the aid of a prepared timeline. Petitioner's Exhibit 5 was admitted, over Respondent's objection, for the purpose of clarifying the Petitioner's requested relief not for the truth of the matter asserted. Petitioner's Exhibit 11 was admitted, over Respondent's objection, because the document was found to be relevant. Petitioner's Exhibits 22 and 29 were admitted, over Respondent's objections, because the documents were found to relevant and could be authenticated through the parent's testimony.

Respondent's Exhibits 1-9, 11-35 and 38-39 were admitted without objection. The Petitioner objected to Respondent's Exhibit 10 because the copy of the document rendered some words illegible. The Respondent provided a "clean" copy of the exhibit therefore Respondent's Exhibit 10 was admitted into the record. Respondent's Exhibits 36 and 37 were admitted, over Petitioner's objection, because Petitioner questioned the DCPS staff member's ability to interpret assessment results and the person is no longer a DCPS staff member. The exhibits provided assistance to the Hearing Officer in making a substantive determination of the staff member's ability to interpret assessment results. The Hearing Officer reserved ruling on Respondent's Exhibit 40 and was clear that it was Respondent's responsibility to request that the document be entered into the record after authentication. The Respondent did not make another request for the exhibit to be entered into the record therefore Respondent's Exhibit 40 was not admitted.

On November 6, 2013, the hearing recessed at 4:36 p.m. On November 7, 2013, the hearing resumed at 9:00 a.m. and recessed at 4:16 p.m. On November 8, 2013, the hearing resumed at 9:27 a.m. The hearing concluded at approximately 4:07 p.m. on November 8, 2013, following closing statements by both parties.

On November 22, 2013, the Respondent contacted the Hearing Officer to inform the Hearing Officer that the Autism Coordinator misrepresented her educational qualifications during her testimony and on her resume, included in Respondent's Exhibit 38. The Respondent requested a 10-day continuance to allow the Hearing Officer adequate time to determine the amount of weight, if any, to afford the Autism Coordinator's testimony. On November 22, 2013, the Petitioner's attorney indicated that the Petitioner did not oppose the continuance.

On November 22, 2013, the Hearing Officer issued an Interim Order on Continuance Motion, continuing the 45-day timeline by 10 days. Therefore, the HOD is due December 4, 2013.

Although the Petitioner requested sanctions against the Respondent for the DCPS Program Manager's dishonesty, including up to awarding all requested relief, based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. It is inequitable for the Hearing Officer to award relief or issue sanctions based on the dishonesty of one witness when the hearing took place over three days, approximately 70 exhibits were admitted into the record and nine other witnesses testified. The Hearing Officer determined that it is equitable to disregard the testimony of the DCPS Program Manager, in its entirety, and to not consider the DCPS Program Manager's resume.

#### Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

#### ISSUES

The issues to be determined are as follows:

1. Whether DCPS failed to implement the student's August 4, 2011 IEP during the 2011-2012 school year, specifically by failing to implement 30 minutes per week of APE from August 22, 2011 through June 14, 2012, and if so, whether this failure constitutes a denial of a FAPE?
2. Whether DCPS failed to provide the student with home-based instruction services from March 17, 2013 through June 20, 2013, and if so, whether this failure constitutes a denial of a FAPE?
3. Whether DCPS failed to include persons able to interpret evaluation results at the student's June 11, 2013 IEP Team meeting, and if so, whether this failure constitutes a denial of a FAPE?
4. Whether DCPS failed to appropriately identify the student's disability classification on June 11, 2013, specifically by failing to classify the student as a student with MD

- rather than a student with autism, and if so, whether this failure constitutes a denial of a FAPE?
5. Whether DCPS failed to provide the parent the opportunity to participate in the student's June 11, 2013 IEP Team meeting and discussion regarding placement for the student, and if so, whether this failure constitutes a denial of a FAPE?
  6. Whether DCPS denied the student a FAPE by failing to include nursing services for the administration of the student's prescription medication on the student's June 11, 2013 IEP?
  7. Whether DCPS denied the student a FAPE by failing to include ABA as a supplementary aid or service on the student's June 11, 2013 IEP?
  8. Whether DCPS failed to develop an appropriate IEP for the student on June 11, 2013, specifically by failing to develop appropriate goals, with appropriate baseline data, aligned with the student's present levels of performance, appropriate evaluation schedules and linked to AT; goals for vision therapy; a behavioral intervention plan; accommodations of AT devices, sensory diet, climate-controlled environment, low student-teacher ratio, small class size, small school size, increased adult supervision, frequent breaks, hands-on learning, single step directions, posted schedule and a classroom with low spectrum lighting; and 120 minutes per week of OT, PT, orientation and mobility services, AT services, counseling and vision therapy to address the student's unique needs, and if so, whether this failure constitutes a denial of a FAPE?
  9. Whether DCPS denied the student a FAPE by failing to provide placement in a nonpublic special education day school in the student's June 11, 2013 IEP?

### **FINDINGS OF FACT**

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

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Stipulated Fact)
2. The student is a pleasant child. (Petitioner's Exhibit 10; Respondent's Exhibits 2, 3; 4 and 5; ABA Therapist's Testimony; Teacher's Testimony)
3. The student often looks to his mother for approval and reads his mother's social cues.
4. The student is a student with autism. (Petitioner's Exhibits 6, 7, 8, 9, 12, 14, 16, 19, 20 and 21; Respondent's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 17, 18 and 29; OT's Testimony; Pediatrician's Testimony; ABA Therapist's Testimony; Assistant Principal's Testimony; Teacher's Testimony)
5. The student's autistic disorder is exhibited by inappropriate levels of social reciprocity and social interaction, impaired communication skills and repetitive behaviors and interests. (Petitioner's Exhibits 6, 7, 8, 9, 12, 14, 16, 19, 20 and 21; Respondent's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 17, 18 and 29; OT's Testimony; Pediatrician's Testimony; ABA Therapist's Testimony; Assistant Principal's Testimony; Teacher's Testimony)

6. The student exhibits behaviors typical of children with autism, including avoidance of sustained eye contact and scripting. (Petitioner's Exhibits 6, 7, 8, 9, 12, 14, 16, 19, 20 and 21; Respondent's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 17, 18 and 29; OT's Testimony; Pediatrician's Testimony; ABA Therapist's Testimony; Assistant Principal's Testimony; Teacher's Testimony)
7. The student requires a rich sensory diet. (OT's Testimony; ABA Therapist's Testimony)
8. The student does not have low vision, partial vision or blindness. (Petitioner's Exhibits 12 and 13; Respondent's Exhibit 29)
9. The student has an excellent memory. (Petitioner's Exhibit 16; Respondent's Exhibits 3 and 4; ABA Therapist's Testimony)
10. The student has a history of acid reflux. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
11. The student is prescribed Zantac to control his acid reflux. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
12. A 2007 psychiatric evaluation indicated a presence of school phobia. (Petitioner's Exhibit 12)
13. During the 2010-2011 school year, the student was assigned to a self-contained classroom in School D. (Petitioner's Exhibit 10)
14. During the 2010-2011 school year the student made progress toward his academic goals, speech goals and behavioral goals. (Parent's Testimony)
15. During the 2010-2011 school year, the teacher utilized ABA techniques in the student's class. (Respondent's Exhibits 4 and 5; Parent's Testimony)
16. On January 14, 2011, an Augmentative and Alternative Communication assessment was completed for the student. (Petitioner's Exhibit 12; Respondent's Exhibit 1)
17. On January 14, 2011, the student did not have a sufficient way to communicate his daily needs and wants or to participate in structured activities in the classroom; he lacked skills to tell a narrative about his experiences; and an alternative means of communication was needed to support his day-to-day communication. (Petitioner's Exhibit 12; Respondent's Exhibit 1)
18. On January 14, 2011, the evaluator recommended a TechTalk Speech Generating Device, BoardMaker software with Speaking Dynamically Pro, a laptop computer, a picture system and speech therapy for the student. (Petitioner's Exhibit 12; Respondent's Exhibit 1)
19. On February 17, 2011, the student was taken to the hospital for complaints of back pain. The student was in no acute distress and was treated for abdominal pain and eczema. (Petitioner's Exhibit 12)
20. In the student's June 22, 2011 Comprehensive Occupational Therapy Evaluation, the OT recommended that the student receive OT services two times per week for 60 minutes. (Petitioner's Exhibit 12; Respondent's Exhibit 3; OT's Testimony)
21. On August 3, 2011, a triennial reevaluation of the student was conducted. (Respondent's Exhibits 4 and 5)
22. On August 3, 2011, the student was receiving 30 minutes per week of APE. (Respondent's Exhibit 5)
23. The student's August 4, 2011 IEP included 30 minutes per week of APE. (Petitioner's Exhibit 8)

24. The student's August 4, 2011 IEP Team prescribed 240 minutes per month of OT for the student. (Petitioner's Exhibit 8)
25. On October 21, 2011, the student's IEP Team met to conduct a 30-day review of the student's IEP. (Respondent's Exhibit 7)
26. The student's October 21, 2011 IEP Team prescribed 240 minutes per month of OT for the student. (Petitioner's Exhibit 9)
27. By October 21, 2011, the student had significant absences from school. (Respondent's Exhibit 7)
28. By October 21, 2011, the student had missed 50 percent of his scheduled speech-language sessions. (Respondent's Exhibit 7)
29. On November 8, 2011, the student was 168 pounds. (Petitioner's Exhibit 12)
30. In December 2011, the student was hit in the head with a ball during APE. (Petitioner's Exhibits 6 and 12; Respondent's Exhibit 29)
31. On December 7, 2011<sup>3</sup>, the student's eye exam did not show papilledema nor any source for the student's reported pain. (Respondent's Exhibit 29)
32. On December 14, 2011, the student was diagnosed with Bell's Palsy and obesity. The student's treatment plan was a referral to the IDEAL clinic to address the student's obesity. (Petitioner's Exhibit 12)
33. On January 21, 2012, the student had near-complete resolution of his facial weakness. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
34. On January 21, 2012, the parent denied that the student was having headaches. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
35. On January 21, 2012, the parent did not notice a specific narrowing of the student's field of vision but thought that the student was not attending to his full visual environment. (Petitioner's Exhibit 12; Respondent's Exhibit 8)
36. On January 21, 2012, the student had occasional blurring of vision and episodic squinting to improve his sight. (Petitioner's Exhibit 12; Respondent's Exhibit 8)
37. On January 21, 2012, there was not any diurnal variation in the student's visual complaint. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
38. During his January 21, 2012 doctor's appointment, the student was in no apparent distress. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
39. On January 21, 2012, the student had full extraocular movement. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
40. On January 21, 2012, the student was evasive to light that was primarily secondary to fear and behavioral complaint rather than photophobia. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
41. On January 21, 2012, the student was able to demonstrate heel walking, toe walking and tandem gait. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
42. On January 21, 2012, the student showed no evidence of demyelinating process. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
43. On January 21, 2012, the student symptoms were consistent with his diagnosis of autism. (Petitioner's Exhibit 12; Respondent's Exhibit 29)

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<sup>3</sup> The report at Respondent's Exhibit 29 page 16 indicates that the exam occurred on December 7, 2012 however given the date of the Discharge Summary, the Hearing Officer concludes that the year indicated is a typographical error and the exam occurred on December 7, 2011.

44. On January 21, 2012, the student's medications included Zantac. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
45. On February 2, 2012, the student's eye exam was "really quite good." (Respondent's Exhibit 29)
46. On February 2, 2012, the doctor was able to get a portable slit lamp into the student's eyes. (Respondent's Exhibit 29)
47. On February 2, 2012, the student had no photophobia. (Respondent's Exhibit 29)
48. On February 2, 2012, the student's behavior during his medical appointment was consistent with his diagnosis of autism. (Respondent's Exhibit 29)
49. On February 2, 2012, during his medical exam, the student was holding his head up, was not rubbing his head, was not crying and looked fairly comfortable. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
50. On February 2, 2012, the student had no musculoskeletal tenderness. (Petitioner's Exhibit 12)
51. On February 2, 2012, the student was comfortable with the light in the room, was not dizzy and had normal coordination. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
52. On February 2, 2012, the parent reported that headaches were new for the student. (Respondent's Exhibit 29)
53. On February 2, 2012, the doctor did not believe that the student was experiencing a severe debilitating headache as reported by the student's parent. (Respondent's Exhibit 29)
54. On February 2, 2012, the doctor noted that the student's Bell's Palsy was resolved. (Petitioner's Exhibit 12)
55. On February 16, 2012, the student's IEP Team reviewed evaluation data for the student and concluded that the student presented with fine motor, visual motor integration, visual perception and sensory processing skills that were delayed, inadequate and non-supportive. (Respondent's Exhibit 8)
56. On February 16, 2012, the student was receiving 30 minutes per week of APE. (Respondent's Exhibit 8)
57. By February 16, 2012, the student had missed 47 of 103 school days. (Respondent's Exhibit 8)
58. On March 5, 2012, the student's physical examination was normal. (Petitioner's Exhibit 12)
59. On March 5, 2012, the parent was told that the student could go to school when she felt comfortable with the school managing his reported pain. (Petitioner's Exhibit 12)
60. On March 6, 2012, the student was taken to the hospital for eye and ear pain which had reported worsened in the past four days. (Petitioner's Exhibit 12)
61. On March 6, 2012, the parent reported that the student was extremely sensitive to light, necessitating full time sunglasses use. (Petitioner's Exhibit 12)
62. On March 6, 2012, the student was given a slit lamp eye exam. (Petitioner's Exhibit 12)
63. On March 7, 2012, the doctor noted that the parent reported that the student had failed two vision screens at school however had no vision problems on the January 21, 2012 vision exam. (Petitioner's Exhibit 12)
64. On March 7, 2012, the student was in no acute distress. (Petitioner's Exhibit 12)

65. On March 7, 2012, the student was playing video games in a bright room. (Petitioner's Exhibit 12)
66. On March 8, 2012, an MRI showed that the student's brain remained normal. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
67. On March 8, 2012, the student had a bilateral ear infection. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
68. The student's March 8, 2012 MRI showed no change in the student's MRI from December 8, 2011. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
69. In March 2012, the doctor attributed the student's ear pain to the student's ear infection. (Respondent's Exhibit 29)
70. On March 10, 2012, the parent informed the doctors that the student's pain was in his eyes and ears and not his head. (Respondent's Exhibit 29)
71. On March 13, 2012, during a medical exam, the student was not in acute distress. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
72. On March 14, 2012, the student's gait was normal although the parent complained that the student's gait was unstable on March 5, 2012. (Petitioner's Exhibit 12)
73. On March 14, 2012, the doctor noted that there was no definitive diagnosis for the parent's complaint of the student's eye and ear pain and that the student was "pretty much back to his baseline." (Petitioner's Exhibit 12)
74. On March 14, 2012, the student was given ibuprofen for his reported headache. (Petitioner's Exhibit 12)
75. On March 15, 2012, DCPS completed an APE assessment report of the student to determine whether APE services should continue. (Respondent's Exhibit 9)
76. The March 15, 2012 assessment report contains specific examples of the movies the student was scripting during the assessment and specific skills the student was able to perform. (Respondent's Exhibit 9)
77. The March 15, 2012 APE evaluator concluded that the student did not demonstrate any need in the area of APE and recommended that the student's APE be discontinued. (Respondent's Exhibit 9)
78. On March 28, 2012, the student was taken to the hospital for a complaint of pain in both ears however the doctor noted that he student was not in pain. (Petitioner's Exhibit 12)
79. On March 28, 2012, the doctor was concerned that the student may have been exhibiting traits of migraine. (Petitioner's Exhibit 12)
80. On May 2, 2012, the student was taken to the hospital for a complaint of bilateral ear pain however the doctor noted that the student was not in pain. (Petitioner's Exhibit 12)
81. The student's IEP was revised on June 13, 2012. (Petitioner's Exhibit 19; Respondent's Exhibit 17)
82. For the 2011-2012 school year, the student was assigned to School B. (Petitioner's Exhibits 7, 8 and 9; Respondent's Exhibits 4, 5, 6, 7, 8 and 11; Assistant Principal's Testimony)
83. During the 2011-2012 school year, the student made progress. (Assistant Principal's Testimony)
84. During the 2011-2012 school year, ABA was not on the student's IEP. (Petitioner's Exhibits 7, 8 and 9; Respondent's Exhibit 7)

85. During the 2011-2012 school year, the student attended physical education with other students from the self-contained autism classes. (Assistant Principal's Testimony)
86. During the 2011-2012 school year, students attending general education classes did not participate in physical education classes with the student. (Assistant Principal's Testimony)
87. During the 2011-2012 school year, the physical education teacher modified the physical education curriculum for the student. (Assistant Principal's Testimony)
88. During the 2011-2012 school year, the physical education teacher worked on student's IEP goals during physical education. (Assistant Principal's Testimony)
89. During the 2011-2012 school year, the student was not taught the same physical education lessons or participate in the same sports as students in general education classes. (Assistant Principal's Testimony)
90. During the 2011-2012 school year, the improved his ability to follow oral directions for completing tasks. (Petitioner's Exhibit 19; Respondent's Exhibit 17)
91. In September 2012, the student fell and dislocated his thumb while at school. (Petitioner's Exhibit 12; Respondent's Exhibit 29)
92. On September 12, 2012, the student's medications included ranitidine (Zantac) and hydroxide/simethicone (Maalox). (Respondent's Exhibit 29)
93. On September 12, 2012, the student showed no signs of distress or pain. (Respondent's Exhibit 29)
94. On September 12, 2012, the student's doctor indicated that the student should return to school the following day. The doctor indicated no limitations to the student returning to school. (Respondent's Exhibit 29)
95. Following the student's injury in September 2012, the student was found to have no lasting trauma and had full range of motion in his joint. (Respondent's Exhibit 29)
96. The student was taken to the hospital on October 24, 2012 and the parent noted that the student's eye and ear pain had improved significantly. (Petitioner's Exhibit 12)
97. On October 24, 2012, the parent reported that the student complained of photophobia. (Petitioner's Exhibit 12)
98. On October 24, 2012, the student's eye exam was normal with the exception of the doctor noting that the student needed glasses to correct his vision. (Petitioner's Exhibit 12)
99. On October 24, 2012, the doctor noted that the student's eye and ear pain was resolved. (Petitioner's Exhibit 12)
100. On October 25, 2012, during the student's medical appointment, the student was not in distress. (Respondent's Exhibit 29)
101. On November 24, 2012, Hearing Officer Massey concluded that the DCPS Program Manager was qualified to interpret the results of a developmental vision assessment. (Respondent's Exhibit 36)
102. On November 28, 2012, the student's physician completed a Physician Verification Form and stated that the student diagnosis was "autism spectrum disorder/school phobia" and that the student's "advocate is working to get him placed in a right school." (Petitioner's Exhibit 10)
103. On November 28, 2012, the physician indicated that the student could return to school in eight weeks. (Petitioner's Exhibit 10)

104. On January 30, 2013, the student had little to no fall risk. (Respondent's Exhibit 29)
105. On January 30, 2013, the student had a complete resolution of Bell's palsy and resolution of the enhancement of the left facial nerve. (Respondent's Exhibit 29)
106. On January 30, 2013, the student's medications included Zantac and ibuprofen. (Respondent's Exhibit 29)
107. On January 30, 2013, the parent reported that the student had begun to have back pain. (Respondent's Exhibit 29)
108. On January 30, 2013, the doctor found that there was some evidence of trigger point tenderness in the student's lower back. (Respondent's Exhibit 29)
109. On January 30, 2013, the doctor noted that the student's back pain was compromised by his increasing weight. (Respondent's Exhibit 29)
110. On February 2, 2013, during the student's medical appointment, the student was not in distress. (Respondent's Exhibit 29)
111. In February 2013, the parent complained that the student had back pain. The doctor ordered x-rays and there were no signs of traumatic injury, fractures or other bone abnormalities or alignment or malalignment. (Respondent's Exhibit 29)
112. Throughout the student's medical appointments in 2012-2013, the parent consistently told medical personnel that she was trying to get the student into a school program in Maryland because she did not feel the program at DCPS was meeting his needs. (Respondent's Exhibit 29)
113. On March 16, 2013, Hearing Officer Raskin found that the Petitioner did not prove that the student was denied a FAPE by failing to provide him with a sufficiently restrictive placement, i.e., a separate, special education day school for students with autism. (Petitioner's Exhibit 6)
114. On May 2, 2013, the student's physician completed a Physician Verification Form stating that the student needed to "visit appropriate school setting to determine best placement [illegible] due to negative events at previous school." The treatment plan for the student was for DCPS "to have teams in place to work with family and student to determine alternate and appropriate educational setting." (Petitioner's Exhibit 10)
115. On May 2, 2013, the physician stated that the student could return to school, "upon identification of appropriate school setting for student and family." (Petitioner's Exhibit 10)
116. On May 13, 2013, the student appeared very sensitive to the lights of instruments used for assessments. The student's color vision and confrontation visual fields were within normal limits. (Petitioner's Exhibit 13)
117. On May 13, 2013, with corrective lenses, the student's visual acuity was between 20/25 and 20/20 in each eye. The student was found to have significant hyperopia (farsightedness) and astigmatism (blurry vision). (Petitioner's Exhibit 13)
118. On May 13, 2013, the evaluator observed fixation losses, jerky eye movements and excessive head movement. (Petitioner's Exhibit 13)
119. On May 13, 2013, the evaluator was unable to access the student's accommodative ability, binocular vision. (Petitioner's Exhibit 13)
120. On May 29, 2013, the physician wrote a letter stating that the student required home instruction "until he is placed in an appropriate school program." (Petitioner's Exhibit 10)

121. On June 5, 2013, the evaluator noted that the student's visual-perceptual skills were "unscorable" because the student was only able to answer the sample questions. (Petitioner's Exhibit 13)
122. On June 5, 2013, the student's scores on the visual thinking assessment and visual motor integration were at the first and second grade levels. (Petitioner's Exhibit 13)
123. The history in the student's May-June 2013 Developmental Vision Evaluation Report does not fully comport with the student's medical history. (Petitioner's Exhibits 10, 12 and 13; Respondent's Exhibit 29)
124. In June 2013, the evaluator who conducted the March 2012 APE assessment of the student conducted another APE assessment of the student at the student's home. (Parent's Testimony)
125. Present at the student's June 11, 2013 IEP Team meeting were the Assistant Principal (as the special education coordinator), the Teacher, an occupational therapist, a speech-language therapist, the parent's attorney, the Parent, a school psychologist, the ABA Therapist, the Autism Coordinator, a DCPS Program Manager, the Home Program Manager, an APE teacher, a health & physical education teacher, the Teacher and a compliance case manager. (Petitioner's Exhibits 20 and 21; Respondent's Exhibits 17 and 18)
126. On June 11, 2013, the ABA Therapist had only known the student for approximately three weeks and had not worked directly with the student. (Petitioner's Exhibit 16; ABA Therapist's Testimony)
127. The DCPS Program Manager was the person designated to interpret the results of the student's May-June 2013 Developmental Vision Evaluation Report. (Petitioner's Exhibits 20 and 21; Respondent's Exhibits 17 and 18)
128. The vision therapy recommended by the Optometrist in the May-June 2013 Developmental Vision Evaluation Report could not be provided in a school environment. (Optometrist's Testimony)
129. The student's June 11, 2013 IEP Team determined that the student required 24.5 hours per week of specialized instruction outside of the general education environment, 30 minutes per week of APE, 30 minutes per week of specialized instruction within the general education environment, four hours per month of speech-language therapy outside of the general education environment and 120 minutes per month of OT outside of the general education environment. (Petitioner's Exhibit 19; Respondent's Exhibit 17)
130. The student's June 11, 2013 IEP also provides for the student to receive instruction in small groups with at least a 2:1 student-teacher ratio and provides accommodations and modifications including structured, scheduled breaks throughout the day; a visual schedule; graphic organizers; simplification of directions; extended time; lessons broken down into small, achievable objectives; verbal instructions; a token economy system; and models and visual aids for writing. (Petitioner's Exhibit 19; Respondent's Exhibit 17)
131. The student's June 11, 2013 IEP contains five math goals, with 19 objectives; four reading goals, with ten objectives; two written expression goals, with three objectives; four adaptive/daily living skills goals, with five objectives; two speech-language goals, with 11 objectives; one social/emotional/behavior goal, with two

- objectives; and two motor skills goals, with six objectives. (Petitioner's Exhibit 19; Respondent's Exhibit 17)
132. The goals on the student's June 11, 2013 IEP are measurable and contain the anticipated date of achievement. (Petitioner's Exhibit 19; Respondent's Exhibit 17)
133. The baseline data and present levels of performance in the student's IEP align with the data provided by the student's ABA Therapist. (Petitioner's Exhibits 16 and 19; Respondent's Exhibit 17)
134. The student's June 11, 2013 IEP states the student's requirement for a highly structured classroom environment with predictable routines. (Petitioner's Exhibit 19; Respondent's Exhibit 17)
135. The student's June 11, 2013 IEP includes goals for the student to utilize a static communication output device. (Petitioner's Exhibit 19; Respondent's Exhibit 17)
136. The student June 11, 2013 IEP indicates that a TechTalk augmentative communication device has been identified and procured for the student. (Petitioner's Exhibit 19; Respondent's Exhibit 17)
137. The student's June 11, 2013 IEP contains the provision of picture communication symbols and speech therapy. (Petitioner's Exhibit 19; Respondent's Exhibit 17)
138. The student's June 11, 2013 IEP Team agreed that the student needed an updated AT assessment. (Petitioner's Exhibit 20; Respondent's Exhibit 16)
139. The student's June 11, 2013 IEP team discussed the May-June 2013 Developmental Vision Evaluation Report. (Petitioner's Exhibit 20; Respondent's Exhibit 16; ABA Therapist's Testimony; Assistant Principal's Testimony; Teacher's Testimony)
140. On June 11, 2013, the DCPS Program Manager recommended that a developmental ophthalmologist assess the student to determine if a functional vision or visual media assessments needed to be completed, that an orientation and mobility assessment be completed and that a DCPS specialist informally assess the student's sensitivity to light. (Petitioner's Exhibit 20; Respondent's Exhibit 16; Assistant Principal's Testimony)
141. On June 11, 2013, the student's IEP Team determined to provide the student with home instruction until the end of the school year in order to help the student transition back to school. (Petitioner's Exhibits 20 and 21; Respondent's Exhibits 17 and 18; Assistant Principal's Testimony; Teacher's Testimony)
142. On June 11, 2013, the IEP Team agreed that there was no medical basis for a home/hospital placement for the student. (Petitioner's Exhibits 20 and 21; Respondent's Exhibits 17 and 18)
143. On June 11, 2013, the student's IEP Team discussed the student's transition into School C for extended school year (ESY) in order to complete assessments and determine how the student functioned in an academic environment. (Petitioner's Exhibits 20 and 21; Respondent's Exhibits 17 and 18; Teacher's Testimony; Assistant Principal's Testimony)
144. On June 11, 2013, the student's IEP Team determined that, given an appropriate transition plan, the student could successfully reenter a public school. (Petitioner's Exhibits 20 and 21; Respondent's Exhibits 17 and 18; Teacher's Testimony; Assistant Principal's Testimony)

145. The transition plan developed for the student on June 11, 2013 included the student remaining with the same teacher and classmates from School B for ESY in School C; for assessments to be conducted during ESY at School C to determine if the student needed any additional services or supports; and for the student to be supported during this transition by the medical supports at School C. (Petitioner's Exhibits 20 and 21; Respondent's Exhibits 17 and 18; Teacher's Testimony; Assistant Principal's Testimony)
146. To complete the transition, the student would transition with the same teacher and the same classmates to the school to which the classroom was assigned for the 2013-2014 school year. (Teacher's Testimony)
147. On June 11, 2013, the ABA Therapist was prohibited by the parent's attorney from answering DCPS' questions. (Petitioner's Exhibit 20; Respondent's Exhibit 16; ABA Therapist's Testimony)
148. The tone of the June 11, 2013 meeting was neutral and productive. (Teacher's Testimony)
149. During the June 11, 2013 IEP Team meeting, the parent's attorney advocated for what she felt the student needed, what the parent wanted, the student's placement and present levels of performance on the student's IEP. (Petitioner's Exhibit 20; Respondent's Exhibit 16; Teacher's Testimony; Assistant's Principal's Testimony)
150. For the period of time that student attended school during the 2012-2013 school year, the student made progress. (Teacher's Testimony)
151. For the 2012-2013 school year, ABA was not on the student's IEP. (Petitioner's Exhibits 9 and 20; Respondent's Exhibit 16)
152. During the 2012-2013 school year, there were seven students in the student's classroom. (Teacher's Testimony)
153. On June 10, 12 and 17, 2013, a home instructor provided instruction to the student. (Respondent's Exhibit 32)
154. In June 2013, when the student visited School A, the student was able to follow directions to navigate an unfamiliar environment. (Teacher's Testimony)
155. In June 2013, when the student visited the School A campus and his proposed classroom, the student exclaimed, "I love this school!" (Teacher's Testimony)
156. During the student's medical visit on July 25, 2013, the student did not appear to be in any distress or in any pain. (Respondent's Exhibit 29)
157. On July 25, 2013, the student had a normal fluent gait. (Respondent's Exhibit 29)
158. On July 25, 2013, the student did not exhibit any pain upon palpation. (Respondent's Exhibit 29)
159. On August 20, 2013, the student was prescribed a brace for low back pain. (Petitioner's Exhibit 14)
160. On August 20, 2013, the parent reported that the student did not "seem to be in as much pain" as before. (Respondent's Exhibit 29)
161. On August 20, 2013, the student was taking a topical Lidoderm every 12 hours, ibuprofen as needed and Zantac. (Respondent's Exhibit 29)
162. On August 20, 2013, the student was prescribed a pain patch. (Respondent's Exhibit 29)
163. On August 20, 2013, the Petitioner filed a State Complaint with respect to DCPS' definition of visual impairment including blindness. (Respondent's Exhibit 34)

164. DCPS' definitional criteria for visual impairment and blindness are not inconsistent with the Federal definition of visual impairment including blindness. (Respondent's Exhibit 34)
165. DCPS' eligibility criteria for visual impairment including blindness were more inclusive than some other State's policies. (Respondent's Exhibit 34)
166. On August 22, 2013, the student had an orthopedic consultation. During the visit, the parent reported that the student was in pain however the doctor noted that there was no acute distress. (Respondent's Exhibit 29)
167. On August 22, 2013, the student did not voice any discomfort. (Respondent's Exhibit 29)
168. On August 22, 2013, the student had a smooth, reciprocal, non-antalgic gait. (Respondent's Exhibit 29)
169. On August 22, 2013, the student was 213 pounds. (Respondent's Exhibit 29)
170. For the 2013-2014 school year, the student was assigned to the same teacher and program from the 2012-2013 school year. (Teacher's Testimony)
171. The only changes to the student's assigned program for the 2013-2014 school year included a new physical space with three computer labs, a space for "specials" and activities; a larger autism program; more support and resources; and additional specialized instructional programs for reading and math intervention. (Teacher's Testimony)
172. In late October or early November 2013, the student presented similarly as in his June 2011 OT assessment and had slightly improved. (Occupational Therapist's Testimony)
173. The student's weight is a contributing factor to his reported back pain. (Respondent's Exhibit 29)
174. The student is able to go up and down stairs and is able to use an elliptical machine. (Respondent's Exhibit 29)
175. There are no barriers to the student's mobility at home. (Respondent's Exhibit 29)
176. The student is making progress with no more than two hours per session of ABA therapy in the home. (Petitioner's Exhibit 16; ABA Therapist's Testimony)
177. The student's back pain may be associated with lumbar lordosis which is secondary to his the association with his weight. (Respondent's Exhibit 29)
178. The Pediatrician has not observed the student in pain, other than while pressing on his back, or observed the student dizzy. (Pediatrician's Testimony)
179. When the student appears to be in physical discomfort, methods such as increasing the rate of reinforcement, non-contingent breaks, mixed hard and easy activities, preferred activities and increased visual support to address the student's appearance of discomfort are successful strategies to use with the student. (ABA Therapist's Testimony)
180. The student does not like the taste of medication. (Pediatrician's Testimony)
181. Environmental remedies such as warm, moist heat appear to help alleviate the student's reported pain. (Pediatrician's Testimony)
182. The student's medical team is taking a "trial and error" approach to medication for the student. (Pediatrician's Testimony)

183. The student exhibits attention seeking, avoidance and escaping behaviors. (ABA Therapist's Testimony)
184. The student exhibits approximately one challenging behavior per two hour ABA session. (Petitioner's Exhibit 16; ABA Therapist's Testimony)
185. The student occasionally whimpers or whines when he wants an object or an action performed. (Petitioner's Exhibit 19; Respondent's Exhibit 17)
186. The student's behaviors can inadvertently be reinforced. (ABA Therapist's Testimony)
187. Attention is a major reinforcer for the student and that the only reinforcer stronger than attention for the student is escape. (ABA Therapist's Testimony)
188. A student's OT needs change when a student suffers a TBI. (Occupational Therapist's Testimony)
189. The DCPS Home/Hospital Instruction Program is for any student who must miss school for health reasons. (Home Program Manager's Testimony)
190. School A has a sensory room. (Teacher's Testimony)
191. At School A students in the student's assigned classroom can take items from sensory boxes to go into the sensory room. (Teacher's Testimony)
192. The student's assigned classroom at School A has three computers and three ipads. (Teacher's Testimony)
193. The student's assigned classroom has a SmartBoard. (Teacher's Testimony)
194. School A has a new computer lab. (Teacher's Testimony)
195. School A has a full-time nurse on staff who is able to administer medication. (Teacher's Testimony)
196. The student assigned program at School A has a total of six adults and eight students. (Teacher's Testimony)
197. The DCPS autism program at School A utilizes ABA and other methodologies. (Petitioner's Exhibits 4 and 5; Teacher's Testimony)
198. School C is a public separate school that serves students with severe behavioral and medical needs and employs two full-time nurses. (Teacher's Testimony)
199. School E is a private special education day school. (School E Program Director's Testimony)
200. School E utilizes a multi-disciplinary approach including direct instruction, community-based instruction, play-based instruction, natural language and positive behavior supports. (School E Program Director's Testimony)
201. School E utilizes praise and reinforcement to encourage positive behaviors and ignoring maladaptive behaviors unless the maladaptive behaviors are unsafe. (School E Program Director's Testimony)
202. School E observes a student for two months before conducting an FBA and creating a "data sheet" to focus on targeted behaviors. (School E Program Director's Testimony)
203. The average class size in School E is five to six students. (School E Program Director's Testimony)
204. The average student-teacher ratio at School E is 2:1:1. (School E Program Director's Testimony)
205. Sensory integration is embedded in the School E program. (School E Program Director's Testimony)

206. In School E, some classes have florescent lights. Some classes the lights can be controlled by dimming. (School E Program Director's Testimony)
207. School E has a sensory room. (School E Program Director's Testimony)
208. The School E schedule has 30 minute blocks. (School E Program Director's Testimony)
209. For one of the 30 minute blocks, students are pulled for one-on-one ABA to work on individual goals. (School E Program Director's Testimony)
210. School E is located in Maryland. (School E Program Director's Testimony)
211. The School E classrooms have a "sensory box" and students can take items to go into the sensory room. (School E Program Director's Testimony)
212. School E has a computer lab and an ipad in the classroom. (School E Program Director's Testimony)
213. School E has SmartBoards in the classrooms. (School E Program Director's Testimony)
214. At School E, the behavior specialist is BCBA certified. (School E Program Director's Testimony)
215. School E has a nurse present five days per week. (School E Program Director's Testimony)
216. School E utilizes ABA and other methodologies. (School E Program Director's Testimony)
217. School E has a Certificate of Approval (COA) from OSSE. (School E Program Director's Testimony)
218. School E's COA does not include students with MD, TBI or vision impairments. (School E Program Director's Testimony)
219. The teachers at School E are not BCBA certified. (School E Program Director's Testimony)
220. The DCPS Program Manager was a program manager for student with low incidence disabilities including autism spectrum disorders, TBI, ID, blindness/visual impairment and deafness/hearing impairments. As a part of her role, the DCPS Program Manager was responsible for preparing an annual census of all blind and visually impaired students throughout the district's public schools and public charter schools; serving as the Ex-Officio Trustee for the District of Columbia, managing Federal quota funds for blind and visually impaired students through the American Printing House for the Blind; assigning case loads and schedules to itinerant teachers of the blind and visually impaired; and attending conferences related to supports, services and accommodations for students with sensory impairments. (Respondent's Exhibits 36 and 37)
221. Within the position, the DCPS Program Manager ensured current eye medical, functional vision and learning media assessments for blind or visually impaired students; formed an after-school social group for blind/visually impaired youth in transition; implemented an initiative with Bookshare and use of AT to ensure blind/visually impaired students received textbooks and other core instructional materials in accessible formats at the same time as their sighted peers; and testified before the District of Columbia City Council, along with two blind students, about how services to blind/visually impaired students would be negatively impacted by budget cuts. (Respondent's Exhibits 36 and 37)

222. The Hearing Officer does not find credible the Parent's testimony. Throughout the record, the parent's complaints of the student's pain, sensitivity to light and mobility is unsupported by medical documentation. The parent described a student screaming in constant pain however rarely, if ever, is the reported pain confirmed by a physician. The parent continued to report to evaluators and service providers that the student suffered from various medical ailments that were found to be resolved or not confirmed by physicians. The Parent also testified that she "has always kept an open mind" regarding the placement/location of services for the student however for two years expressed to medical personnel that she was attempting to get the student in School E. The Parent claimed that she did not send the student to ESY because she did not believe that the student should be "thrown" back into school and that the student would not be provided with appropriate medical care however when questioned regarding the health-centered school to which the student was assigned for ESY, the Parent stated that she was "against ESY." The Parent's testimony contains numerous inconsistencies and contradictions as does the medical documentation of the mother's report of the student's health.
223. The OT gave credible testimony regarding the student's OT functioning in 2011 and the week prior to the hearing. The Hearing Officer does not find credible the OT's testimony regarding the student's safety in the school environment as it is based on the parent's report of the student's functioning.
224. The School E Program Director gave credible testimony.
225. The Pediatrician gave credible testimony regarding what she believed to be true. While she testified that the student was in frequent pain, she acknowledged that this assessment was based on the parent's report and that she had not observed the student in pain with the exception of the student's reaction when she pressed on his back.
226. The ABA Therapist gave generally credible testimony. The ABA Therapist's description of ABA was credible as was her description of her work with the student. However the ABA Therapist spoke only in "ABA language," that being her experience and training, of what was required for the student and what she believed to be best for the student rather than from a perspective of educational benefit.
227. The Optometrist gave credible testimony regarding what she believed to be true. However the Optometrist's testimony and assessment of the student was largely based on the parent's report of the student's functioning which was unsupported by the record.
228. The Assistant Principal gave credible testimony.
229. The Teacher gave credible testimony.
230. The Home Program Manager gave credible testimony.
231. The Hearing Officer does not find credible the Autism Coordinator's testimony. On November 22, 2013, Respondent's counsel disclosed that the Autism Coordinator misrepresented her academic credentials during testimony and in her resume. Therefore, the Hearing Officer did not consider any testimony provided by the Autism Coordinator that was not supported by the testimony of another witness.
232. The Hearing Officer gave little or no weight to Respondent's Exhibit 9 because the assessment was reported to have occurred on a day that the student was likely not in school and the skills reported performed by the student during the assessment are not skills able to be performed by the student given the totality of the record.

233. The Hearing Officer gave little weight to Petitioner’s Exhibit 13 because the recommendations in the report were largely based on reports by the parent, which are unsupported by the medical documentation in the record.
234. The Hearing Officer gave reduced weight to Undated Letter To Whom It May Concern from the Pediatrician contained within Petitioner’s Exhibit 14. While the record contains more than 100 pages of medical documents, the diagnoses listed in the letter are largely extracted from Petitioner’s Exhibit 13, which the Hearing Officer is attributing little weight. Further, the doctor reasoned that the student needed a particular school environment, in part, because of the parent’s report that she “witnessed [the student] in a large general education class where he had problems with dizziness and balance and hit his head in the classroom and almost lost balance several times.” The record is clear that the student has not been in a large general education class for many years. Further, there is no evidence that the student ever displayed signs of dizziness while in school. Additionally, the Pediatrician testified that she has never observed the student being dizzy and that, with the exception of her pressing on the student’s back, she has not observed the student in pain.
235. The Hearing Officer gave no weight to Respondent’s Exhibit 38, the resume of the Autism Coordinator.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

#### **Burden of Proof**

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term “free appropriate public education” means “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped.” The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C.C. April 26, 1991).

#### **Issue #1**

The IDEA at 34 CFR §300.323(c)(2) requires each public agency to ensure that as soon as possible following the development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. A material failure to implement a student's IEP constitutes a denial of a free appropriate public education. *Banks ex rel. D.B. v. District of Columbia*, 720 F. Supp. 2d 83, 88 (D.D.C. 2010).

In failure-to-implement claims, the consensus among federal courts has been to adopt the standard articulated by the Fifth Circuit. *E.g., S.S. v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 67 (D.D.C. 2008). In *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), the Fifth Circuit held that "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the ... authorities failed to implement substantial or significant provisions of the IEP." *Id.* at 349; *see also 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."). "[C]ourts applying [this] standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld." *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). What provisions are significant in an IEP should be determined in part based on "whether the IEP services that were provided actually conferred an educational benefit." *Bobby R.*, 200 F.3d at 349, n. 2. Failure to provide the services must deprive the student of educational benefit. *See Savoy v. District of Columbia*, 2012 WL 548173, 112 LRP 8777 (D.D.C. 2012).

In the present matter, the Petitioner alleged that DCPS failed to implement the student's August 4, 2011 IEP during the 2011-2012 school year, specifically by failing to implement 30 minutes per week of APE from August 22, 2011 through June 14, 2012.

On August 3, 2011, the student's IEP Team, during a triennial evaluation, noted that the student was receiving 30 minutes per week of APE. The student's IEP Team determined that 30 minutes per week of APE continued to be appropriate for the student and included 30 minutes per week of APE on the student's August 4, 2011 IEP.

On February 16, 2012, the student's IEP Team reviewed existing data regarding the student and noted that the student was receiving 30 minutes per week of APE. By February 16, 2012, the student had missed 47 of 103 school days.

On March 15, 2012, DCPS completed an APE assessment report of the student. The purpose of the assessment was to determine "whether APE services should continue." The assessment report contains specific examples of the movies the student was scripting during the assessment and specific skills the student was able to perform. The evaluator concluded that the student did not demonstrate any need in the area of APE and recommended that the student's APE be discontinued. The Petitioner argued that DCPS could not have conducted an APE assessment of the student on March 15, 2012 because the student was not present in school on that particular day. During the 2011-2012 school year, the student was absent from school for 103 days. The Hearing Officer notes that while the date on the report could be a typographical

error, the skills the student was able to perform during the assessment may not be consistent with the student's physical/motor abilities throughout the record.

In June 2013, the same evaluator who conducted the March 2012 assessment conducted an APE assessment of the student at his home. The Parent testified that during the visit, the evaluator commented that it was her opinion that the student did not require APE, so she "took him out of APE." The parent acknowledged that she had not observed the student in a physical education class. The parent concluded that the student had to have been "pulled out [of APE] in the Fall."

The student's Teacher during the 2011-2012 school year testified that the students in his self-contained autism classroom attended physical education together and that no general education students attended physical education with the students with autism. The classroom aides from the self-contained autism class and related service providers accompanied the students to physical education. While the physical education teacher was a general education teacher, the physical education teacher modified the physical education curriculum and worked on the goals from the student's IEP during physical education. The physical education teacher did not conduct the same lessons and teach the same sports to the children with autism as with general education classes.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *affd*, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. The record does not contain persuasive evidence that the student did not receive APE from August 22, 2011 through June 14, 2012. The student's August 4, 2011 IEP prescribed 30 minutes per week of APE. On February 16, 2012, the student's IEP Team noted that the student was receiving 30 minutes per week of APE. Although a DCPS evaluator recommended in a report that the student no longer receive APE, there is no evidence that DCPS discontinued the student's APE. The Teacher testified that the student's in his self-contained autism classroom attended physical education without general education peers during the 2011-2012 school year and that the physical education teacher modified the physical education curriculum for the students with autism and worked on IEP goals during physical education. While the physical education teacher was not a special education teacher, there is no requirement that APE be delivered by a special education

teacher. Additionally, in case #2012-0835, based on the Parent's testimony, Hearing Officer Raskin made the finding of fact that in December 2011, the student was hit in the head several times by weighted basketballs during his APE class.

While the March 2012 APE assessment results may not be valid, the purpose of the assessment was to determine if the student should continue to receive APE. It stands to reason that APE was a service being provided to the student in March 2012 if the assessment was questioning whether the service was a necessary service and should continue. While the evaluator recommended that APE discontinue for the student, there is no evidence that APE was discontinued for the student or that the student's IEP Team agreed with the March 2012 assessment. In June 2013, the student's IEP Team determined that the student would continue to receive 30 minutes per week of APE.

The Hearing Officer concludes that the record does not contain persuasive evidence that DCPS failed to implement the student's August 4, 2011 IEP during the 2011-2012 school year by failing to implement 30 minutes per week of APE from August 22, 2011 through June 14, 2012.

The Petitioner failed to meet its burden with respect to Issue #1.

#### Issue #2

The IDEA regulations at 34 CFR §300.115 mandate that each public agency ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. The continuum must include instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions. Placements are to be made by a group of persons, in conformity with the least restrictive environment provisions of the IDEA and based on the student's IEP. See 34 CFR §300.116.

A homebound placement may be necessary for a student with a disability who is unable to attend school for medical or psychological reasons. A home instruction placement is appropriate when nature and severity of a student's disability are such that he cannot be educated in a public school setting. See *Tindell v. Evansville-Venderburgh Sch. Corp.*, 805 F. Supp. 2d 630 (S.D. Ind. 2011); *Georgetown Indep. Sch. Dist.* 45 IDELR 116 (SEA TX 2005). The Hearing Officer notes that DCPS' Home/Hospital Instruction Program is different than a home instruction placement pursuant to the IDEA. The DCPS Home/Hospital Instruction Program is for any student who must miss school for health reasons while a homebound placement is a special education placement determined by an IEP Team. The student was referred to the DCPS Home/Hospital Instruction Program in November 2010 and May 2013. For March 17, 2013 through June 11, 2013, the student's IEP Team did not determine, nor was it alleged, that the student needed a homebound placement.

On November 28, 2012, the student's physician completed a Physician Verification Form and stated that the student diagnosis was "autism spectrum disorder/school phobia" and that the student's "advocate is working to get him placed in a right school." The physician indicated that the student could return to school in eight weeks. Eight weeks ended on January 23, 2013.

Between January 23, 2013 and May 2, 2013, there was no medical documentation or IEP Team decision determining that the student needed to receive home instruction.

On May 2, 2013, the student's physician completed another Physician Verification Form stating that the student needed to "visit appropriate school setting to determine best placement [illegible] due to negative events at previous school." The treatment plan for the student was for DCPS "to have teams in place to work with family and student to determine alternate and appropriate educational setting." The physician stated that the student could return to school, "upon identification of appropriate school setting for student and family." The physician followed-up with Letter on May 29, 2013 stating that the student required home instruction "until he is placed in an appropriate school program."

On March 16, 2013, Hearing Officer Raskin found that the Petitioner did not prove that the student was denied a FAPE by failing to provide him with a sufficiently restrictive placement, i.e., a separate, special education day school for students with autism. Given such, it was inappropriate for the student's physician to make an independent determination that the student could not return to school because he was not assigned to an appropriate educational setting. Even had Hearing Officer Raskin not made this determination, it still was inappropriate for the physician, on May 2, 2013 and May 29, 2013, to make a placement determination for the student absent the consensus of the student's IEP Team or a decision by a "group of persons." The May 2, 2013 Physician Verification Form and May 29, 2013 letter contained no medically valid reason for why the student could not attend school.

Under the Individuals with Disabilities Education Act (IDEA), a state must provide a "free appropriate public education" to children with disabilities. *See* 20 U.S.C. §1412(a)(1)(A). Where a student does not avail himself of the benefits of his IEP because he is frequently absent from classes, a local education agency cannot be found to deny FAPE to the student. *Nguyen v. District of Columbia* 681 F.Supp.2d 49, 54 IDELR 18 (D.D.C. February 1, 2010). The Hearing Officer concludes that from March 17, 2013 through June 11, 2013 DCPS made a FAPE available to the student and the parent chose not to allow the student to avail himself of the benefits of his IEP.

For any medical reason that may have existed on November 28, 2012, the student was to return to school on January 23, 2013. From January 23, 2013 through May 2, 2013 there was no medical documentation asserting that the student was unable to attend school for medical or psychological reasons. In fact, on March 5, 2012, the parent was told that the student could go to school when she felt comfortable with the school managing his reported pain. On May 2, 2013, the documentation provided by the physician did not contain a medically valid reason for the student to receive home instruction and instead made an inappropriate placement decision based on what was desired by the "student and family." It stands to reason that if the student indeed suffered from "school phobia," the school phobia would be generalized to all schools not the one school that the parent did not desire for the student to attend. Therefore, the Hearing Officer concludes that DCPS did not deny the student a FAPE by failing to provide the student with home-based instruction services from March 17, 2013 through June 11, 2013. The Hearing Officer also notes that a 2007 psychiatric evaluation noted the presence of school phobia however the record indicates that the student was able to attend and progress in school following this diagnosis.

On June 11, 2013, the student's IEP Team determined to provide the student with home instruction until the end of the school year in order to help the student transition back to school. At that time, the IEP Team agreed that there was no medical basis for a home/hospital placement for the student. The record does not contain evidence regarding how much home instruction was to be provided to the student. On June 10, 12 and 17, 2013, a home instructor provided instruction to the student. The school year ended on June 20, 2013.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. Since there is no evidence regarding the amount of home instruction that the student's June 11, 2013 IEP Team agreed would be provided to the student and the student was provided with three sessions of home instruction prior to the end of the school year, the Hearing Officer is not persuaded that DCPS denied the student a FAPE by failing to provide the student with home-based instruction services from June 11, 2013 through June 20, 2013.

The Petitioner failed to meet its burden with respect to Issue #2.

### Issue #3

Pursuant to the IDEA regulations at 34 CFR §300.321(a), a public agency must ensure that the IEP Team for each child includes (1) the parents of the child; (2) not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); (3) not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child; (4) a representative of the public agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities and is knowledgeable about the availability of resources of the public agency; (5) an individual who can interpret the instructional implications of evaluation results; (6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) whenever appropriate, the child with a disability. The IEP Team member present to interpret evaluation results does not have to be an individual who is qualified to conduct a particular assessment, because such an individual "does not necessarily have the skills or knowledge to assist the IEP Team in determining the special education, related services and other supports that are necessary in order of the child to receive a FAPE." *Analysis and Comments to the Regulations*, 71 Federal Register 46540:46670 (August 14, 2006).

The Petitioner alleged that DCPS failed to include persons able to interpret evaluation results at the student's June 11, 2013 IEP Team meeting. Specifically, the Petitioner alleged that the student's June 11, 2013 IEP Team did not include a person able to interpret the student's May-June 2013 Developmental Vision Evaluation Report.

Present at the June 11, 2013 IEP Team meeting were the Assistant Principal (as the special education coordinator), the Teacher, an occupational therapist, a speech-language therapist, the parent's attorney, the Parent, a school psychologist, the ABA Therapist, the Autism Coordinator, a DCPS Program Manager, the Home Program Manager, an APE teacher, a health & physical education teacher, the Teacher and a compliance case manager. The DCPS Program Manager was the person designated to interpret the results of the student's May-June 2013 Developmental Vision Evaluation Report. The Petitioner argued that the DCPS Program Manager was not qualified to interpret the results of the assessment because she did not classify the assessment as a "comprehensive eye medical exam" and because she did not agree with the Petitioner's definition of visual impairment including blindness.

The DCPS Program Manager was a program manager for student with low incidence disabilities including autism spectrum disorders, TBI, ID, blindness/visual impairment and deafness/hearing impairments. As a part of her role, the DCPS Program Manager was responsible for preparing an annual census of all blind and visually impaired students throughout the district's public schools and public charter schools; serving as the Ex-Officio Trustee for the District of Columbia, managing Federal quota funds for blind and visually impaired students through the American Printing House for the Blind; assigning case loads and schedules to itinerant teachers of the blind and visually impaired; and attending conferences related to supports, services and accommodations for students with sensory impairments. Within the position, the DCPS Program Manager ensured current eye medical, functional vision and learning media assessments for blind or visually impaired students; formed an after-school social group for blind/visually impaired youth in transition; implemented an initiative with Bookshare and use of AT to ensure blind/visually impaired students received textbooks and other core instructional materials in accessible formats at the same time as their sighted peers; and testified before the District of Columbia City Council, along with two blind students, about how services to blind/visually impaired students would be negatively impacted by budget cuts.

Since the DCPS Program Manager was unavailable to testify, the Respondent included in the record a November 24, 2012 HOD where Hearing Officer Kimm Massey was charged with determining whether the DCPS Program Manager was qualified to interpret the results of a student's Developmental Optometry Evaluation. In the November 24, 2012 HOD, Hearing Officer Massey concluded that:

A review of the evidence in this case confirms that DCPS' Program Director for Vision Services has a Master's degree in special education and approximately 20 years of experience in the field as well. The Program Director has extensive experience programming for and implementing vision services. She also has experience distinguishing between visual perception and visual acuity problems, she understands the educational implications of

Student's developmental vision evaluation, and she was able to interpret the evaluation report at Student's July 24, 2012 IEP team meeting so that the team could understand the report. Although the Program Director mistakenly believes that vision therapy services must be provided by a medical doctor and she has not been trained to provide vision therapy, these factors do not prevent her from serving as an individual who can interpret the instructional implications of Student's developmental vision evaluation results pursuant to 34 CFR §300.321(a)(5), because such an individual does not have to be qualified to administer the assessment at issue or to provide the related service recommended in the assessment. As a result, the hearing officer concludes that Petitioner failed to meet its burden of proof on this claim.

Additionally, the Petitioner filed a State Complaint with respect to DCPS' definition of visual impairment including blindness. OSSE found no evidence that OSEP or any court has found any of the definitional criteria to be inconsistent with the Federal definition of visual impairment including blindness. In fact, OSSE found that DCPS' eligibility criteria were more inclusive than some other State's policies.

While the undersigned Hearing Officer is not bound by a Hearing Officer's determination in another case or by an OSSE State Complaint decision, upon independent review of both of these documents, the Hearing Officer agrees with the analysis and conclusions of both Hearing Officer Massey regarding the qualifications of the DCPS Program Manager and the DCPS definition of visual impairment including blindness. While the Optometrist testified that the DCPS Program Manager's training was "completely different" and that the DCPS Program Manager's work with children with low vision did not align with this student's vision problems because the student does not have low vision, the Hearing Officer was not persuaded that the DCPS Program Manager was not qualified to interpret the results of the student's May-June 2013 Developmental Vision Evaluation Report. As described in Issues #4 and #8, the Hearing Officer questions certain conclusions in the May-June 2013 Developmental Vision Evaluation Report, as did the DCPS Program Manager, and the DCPS' understanding of the DCPS definition of visual impairment including blindness aligned with OSSE's understanding of the definition as well as OSSE's conclusion that the DCPS definition of visual impairment including blindness was consistent with the Federal definition of visual impairment including blindness.

The Petitioner failed to meet its burden with respect to Issue #3.

#### Issue #4

The Petitioner alleged that DCPS failed to appropriately identify the student's disability classification on June 11, 2013, specifically by failing to classify the student as a student with MD rather than a student with autism. The Petitioner argued that the student's autism, TBI and vision impairments would necessitate an MD classification.

Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evidence before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental

change or change in daily routines, and unusual responses to sensory experiences. 34 CFR §300.8(c)(1)(i).

Traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma. 34 CFR §300.8(c)(12).

Visual impairment including blindness means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness. 34 CFR §300.8(c)(13).

Other Health Impairment means having limited strength, vitality, or alertness, including heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and adversely affects a child's educational performance. 34 CFR §300.8(c)(9).

Orthopedic impairment means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis), and impairments from other causes (e.g. cerebral palsy, amputations, and fractures or burns that cause contractures). 34 CFR §300.8(c)(8).

Multiple disabilities means concomitant impairments (such as mental retardation-blindness or mental retardation-orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. Multiple disabilities does not include deaf-blindness. 34 CFR §300.8(c)(7).

It is uncontested that the student is a student with autism. The student's autistic disorder is exhibited by inappropriate levels of social reciprocity and social interaction, impaired communication skills and repetitive behaviors and interests. The student exhibits behaviors typical of children with autism, including avoidance of sustained eye contact and scripting.

The record does not support the contention that the student is a student with TBI. The student was hit in the head with a ball in December 2011. On December 7, 2011, the student's eye exam did not show papilledema nor any source for the student's reported pain. On December 14, 2011, the student was diagnosed with Bell's Palsy and obesity. The student's treatment plan was a referral to the IDEAL clinic to address the student's obesity. On January 21,

2012, the student had near-complete resolution of his facial weakness, the parent denied that the student was having headaches, the student had occasional blurring of vision and episodic squinting to improve his sight however there was not any diurnal variation in the student's visual complaint. During his January 21, 2012 doctor's appointment, the student was in no apparent distress, the student had full extraocular movement, the student was able to demonstrate heel walking, toe walking and tandem gait and the student showed no evidence of demyelinating process. On January 21, 2012, the student's physician concluded that the student symptoms were consistent with his diagnosis of autism.

On February 2, 2012, the doctor did not believe that the student was experiencing a severe debilitating headache as reported by the student's parent and noted that the student's Bell's Palsy was resolved. On February 2, 2012, the student's behavior during his medical appointment was consistent with his diagnosis of autism. On March 8, 2012, an MRI showed that the student's brain remained normal which was no change from the student's December 8, 2011 MRI.

In March 2012, the doctor attributed the student's ear pain to the student's ear infection. On March 14, 2012, the doctor noted that there was no definitive diagnosis for the parent's complaint of the student's eye and ear pain and that the student was "pretty much back to his baseline." On March 6, 2012, the parent reported that the student was extremely sensitive to light, necessitating full time sunglasses use however was able to comply with a slit lamp eye exam and was playing video games in a bright room. On March 28, 2012, the doctor was concerned that the student may have been exhibiting traits of migraine. While the student was taken to the hospital on March 28, 2012 for a complaint of pain in both ears, the doctor noted that he student was not in pain. Likewise, on May 2, 2012, the student was taken to the hospital for a complaint of bilateral ear pain however the doctor noted that the student was not in pain.

On September 12, 2012, the student showed no signs of distress or pain and the student's doctor indicated that the student should return to school the following day. The doctor indicated no limitations to the student returning to school. The student was again taken to the hospital on October 24, 2012 and the parent noted that the student's eye and ear pain had improved significantly. On that date, the student's eye exam was normal with the exception of the doctor noting that the student needed glasses. Further, on October 24, 2012, the doctor noted that the student's eye and ear pain was resolved. The student was not in distress and had little to no fall risk. On January 30, 2013, the student had a complete resolution of Bell's palsy and resolution of the enhancement of the left facial nerve.

While the parent reported to medical personnel and evaluators following the December 2011 incident that the student had TBI, there is no medical documentation to support this claim. The medical documentation does not suggest a total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Further, there is no evidence that the student's cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem-solving, motor abilities, psychosocial behavior, information processing and speech were different following the December 2011 incident. While the student has delays in some of these areas, the delays were present before the student was hit with a ball in December 2011. There is some evidence which suggests that the student's sensory

and physical functions may have worsened after December 2011, however the student's extreme sensitivity to light was not reported until March 2012 on the same day the student was playing video games in a bright room; the student's ear pain was attributed to a bilateral ear infection; and the complaints regarding the student's physical functions were largely attributed to the student's obesity.

The Pediatrician acknowledged that the student has back pain however denied any personal observation of the student in pain, other than while pressing on his back, or of reported dizziness. The Occupational Therapist testified that if the student had suffered a TBI then his OT needs would change however one week before the hearing the student presented similarly as in his June 2011 assessment and had slightly improved. Therefore, the Hearing Officer concludes that the student does not meet the criteria for TBI.

The Petitioner also argued that the student has a visual impairment because the student is unable to focus on a page and an "extensive vision problem which impairs his ability to navigate the school environment and learn," the Hearing Officer is not persuaded by this argument. On December 7, 2011, the student's eye exam did not show papilledema nor any source for the student's reported pain. On January 21, 2012, the parent did not notice a specific narrowing of the student's field of vision but thought that the student was not attending to his full visual environment. Although the student had occasional blurring of vision and episodic squinting to improve his sight, there was not any diurnal variation in the student's visual complaint and the student had full extraocular movement. On January 21, 2012, the doctor noted that the student was evasive to light that was primarily secondary to fear and behavioral complaint rather than photophobia.

On February 2, 2012, the student's eye exam was "really quite good," and the doctor was able to get a portable slit lamp into the student's eyes and the student was comfortable with the light in the room. On February 2, 2012, the student had no photophobia.

One month later, on March 6, 2012, the student was taken to the hospital for eye and ear pain which had reportedly worsened in the past four days. The parent reported that the student was extremely sensitive to light, necessitating full time sunglasses use. On March 6, 2012, the student was given a slit lamp eye exam. The doctor noted that the parent had reported that the student failed two vision screens at school however the claim was not supported by the student's January 21, 2012 vision exam. During the visit, the student was playing video games in a bright room.

On October 24, 2012, the parent again reported that the student complained of photophobia however the student's eye exam was normal with the exception of the doctor noting that the student needed glasses. On October 24, 2012, the doctor noted that the student's eye pain was resolved.

The student's May-June 2013 Developmental Vision Evaluation Report began with a "history" of the student's visual functioning, as reported by the parent, which does not fully comport with the student's medical history contained within the record or the student's behavior as observed by testifying witnesses. Additionally, the student's tutoring reports contain no

evidence of the student having headaches associated with near work, head close to paper when reading or writing, avoiding reading, writing or printing poorly, dizziness or nausea associated with near work, skipping or repeating lines when reading, avoidance of reading and near work or holding reading material too close as reported in the student's "history."

On May 13, 2013, the student appeared very sensitive to the lights of instruments used for assessments. The student's color vision and confrontation visual fields were within normal limits. With corrective lenses, the student's visual acuity is between 20/25 and 20/20 in each eye. The student was found to have significant hyperopia (farsightedness) and astigmatism (blurry vision). The evaluator observed fixation losses, jerky eye movements and excessive head movement. The evaluator was unable to access the student's accommodative ability, binocular vision. On June 5, 2013, the evaluator noted that the student's visual-perceptual skills were "unscorable" because the student was only able to answer the sample questions. The student's scores on the visual thinking assessment and visual motor integration were at the first and second grade levels. The Hearing Officer notes that two of the subtests on the visual-perceptual skills assessment related to memory which is a documented extreme strength for the student and the student's scores on the visual thinking assessment and visual motor integration were consistent with the student's current academic functioning and cognitive levels.

The Hearing Officer concludes that the student does not meet the criteria for visual impairment or blindness. With correction, the student has between 20/25 and 20/20 in each eye. The Optometrist testified that the student does not have low vision. There is no evidence that the student has partial sight or blindness. DCPS' definition of visual impairment or blindness requires that a child's impairment must meet one or more of the criteria: central acuity with corrective lenses 20/70 in the better eye with correction; or reduced visual field to 50 degrees or less in the better eye; or a diagnosis of cortical visual impairment; or a diagnosis of a degenerative condition that is likely to result in a significant loss of vision in the future. Although the Petitioner does not agree with DCPS' definition of visual impairment or blindness, the Hearing Officer agrees with OSSE's October 16, 2013 determination that there is no evidence that OSEP or any court has found any of the definitional criteria to be inconsistent with the Federal definition of visual impairment including blindness.

While not argued prior to closing arguments, the Petitioner also argued that the student's pain would be OHI or an orthopedic impairment. The Hearing Officer is likewise not persuaded by this argument. The student's medical records are consistent in their display of the parent reporting that the student is in extreme pain and the student showing no signs of distress or pain. With the exception of the student's back pain, which is largely attributed to his obesity, the remaining complaints of pain are not supported by the record. While the student's obesity is a concerning health issue and may be the primary source of the student's back pain, obesity does not meet the definition of OHI or orthopedic impairment because the condition is not chronic or acute, was not caused by a congenital anomaly, disease or other cause within the definition of orthopedic impairment. The Occupational Therapist did not report that the student was in pain during the November 2013 visit or that the student had OT needs that would justify a classification of OHI or orthopedic impairment. The ABA Therapist testified that when it appears that the student is in physical discomfort, the therapist uses methods such as increasing the rate of reinforcement, non-contingent breaks, mixed hard and easy activities, preferred

activities and increased visual support to address the student's appearance of discomfort. With the exception of occasional appearance of physical discomfort, the ABA Therapist did not note any characteristics of OHI or orthopedic impairment by the student. The ABA Therapist testified that the student is a "pleasant, smiley" boy who often looks to his mother for approval and reads his mother's social cues. To the extent that the student has heightened alertness to environmental stimuli, this condition is consistent with his diagnosis of autism. The Petitioner's claim that the student suffers from post-traumatic vision syndrome because of the TBI, is not supported by the record in that the evidence does not support that the student had a TBI.

The IDEA does not give a substantive right to a particular disability classification. Nothing in the IDEA requires that children be classified by their disability so long as each child who has a disability that is listed in 34 CFR §300.8 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability. 34 CFR §300.111(d). The student does have a right to an IEP which addresses his unique needs, regardless of her disability classification. *See* 20 U.S.C. §1414(d); 34 CFR §§300.320-300.324.

To the extent that the student's June 11, 2013 IEP did not address his unique needs, the Hearing Officer has addressed that claim in Issues #6-#9. However the record contains extensive evidence that the student's primary area of concern is his academic, behavioral and academic functioning as it relates to autism. The record does not support a classification of TBI, visual impairment, OHI or MD. The Hearing Officer concludes that Autism is an appropriate primary disability classification for the student. DCPS did not deny the student a FAPE by failing to classify the student as MD on June 11, 2013.

The Petitioner failed to meet its burden with respect to Issue #4.

#### Issue #5

Pursuant to the IDEA regulations at 34 CFR §§300.327 and 300.501(c), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child. In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 CFR §300.116(a)(1). The procedural inquiry should focus on whether there has been "full participation" of the parties throughout the IEP development process. *Rowley*, 458 U.S. at 206; *see also Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001).

A district is required to allow "meaningful" participation by the parent in the decision making process. *See, e.g. Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 208 (1982) ("Congress sought to protect individual children by providing for parental involvement... in the formulation of the child's individual educational program.") (citation omitted); *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir. 2004) (citation omitted) ("Participation [of parents] must be more than a mere form; it must be meaningful."). The Petitioner alleged that DCPS failed to provide the parent the opportunity to participate in the student's June 11, 2013 IEP Team meeting and discussion regarding placement for the student.

Present at the June 11, 2013 IEP Team meeting were the Assistant Principal (as the special education coordinator), the Teacher, an occupational therapist, a speech-language therapist, the parent's attorney, the Parent, a school psychologist, the ABA Therapist, the Autism Coordinator, a DCPS Program Manager, the Home Program Manager, an APE teacher, a health & physical education teacher, the Teacher and a compliance case manager. The Parent testified that at the June 11, 2013 meeting, "placement was not discussed." However the Parent also stated that "one woman was yelling at me that the school was appropriate" and DCPS "just wanted a DCPS school." The Parent questioned how School B could be appropriate if the school was closing at the end of the 2012-2013 school year. The Parent testified that the discussion regarding the student's related services was "like a team vote." On direct examination the Parent stated that the IEP Team discussed only having the student transition into School B. On cross examination the Parent acknowledged that the IEP Team discussed the student's transition plan during ESY to School C.

On direct examination the ABA Therapist testified that she was "not permitted to assist the team in making decisions." On cross examination, the ABA Therapist acknowledged that DCPS requested information from her regarding her work with the student and strategies to address the student's reported school phobia however it was the parent's attorney who prohibited her from answering DCPS' questions.

The Teacher testified that the tone of the June 11, 2013 meeting was neutral and productive. She stated that the parent provided her thoughts on the student's participation however the parent's attorney communicated the parent's position throughout the meeting. The Teacher specifically noted that the parent's attorney advocated for what she felt the parent needed, the student's placement and present levels of performance on the student's IEP. Regarding placement, the parent's attorney responded to what was offered by DCPS and advocated for "complete understanding" of the placement requested by the parent – that being a building that was safe and had access to all academic and related services. The Teacher testified that there was "a lot of conversation" between the parent's attorney and the DCPS Program Manager and that the parent's attorney and the parent's attorney "brainstormed" in the meeting.

The Assistant Principal testified that the parent and the parent's attorney expressed concerns during the meeting. The Assistant Principal stated that the "main" concerns discussed by the parent and the parent's attorney were related to the student's vision, the student's potential head trauma and the student's eligibility classification. The Assistant Principal's testimony aligned with the Teacher's testimony that the June 11, 2013 IEP Team discussed the student's transition into School C for ESY in order to complete assessments and determine how the student functioned in an academic environment given the student's reported "issues."

Ultimately the student's June 11, 2013 IEP Team determined that, given an appropriate transition plan, the student could successfully reenter a public school. The transition plan included the student remaining with the same teacher and classmates from School B for ESY in School C. For assessments to be conducted during ESY at School C to determine if the student needed any additional services or supports and for the student to be supported during this transition by the medical supports at School C. School C is a public separate school that serves

students with severe behavioral and medical needs and employs two full-time nurses. Finally, the student would transition with the same teacher and the same classmates to the school to which the classroom was assigned for the 2013-2014 school year. The Parent testified that she felt “like based on [the student’s] medical needs he could not be in a general education public school, he needed a private placement.” The June 11, 2013 IEP Team determined that the student would not transition directly into a general education public school but would rather transition into a public separate school which was specifically tailored to students with medical needs. Additionally, the student would remain with a familiar teacher and familiar classmates.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers’ Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *affd*, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. The record does not contain persuasive evidence that the parent was not provided the opportunity to participate in the student’s June 11, 2013 IEP Team meeting and discussion regarding placement for the student. The parent’s attorney attended the meeting, advocated for the parent’s position throughout the meeting and “brainstormed” with the DCPS Program Manager. The fact that the parent did not agree with the proposed placement did not invalidate the placement decision. *See K.A. v. Fulton County Sch. Dist.*, 59 IDELR 248 (N.D. Ga. 2012) (while parents have a right to actively participate in the development of their child’s IEP, school districts are not bound to bend to the wishes of the parent in the final IEP determination. School districts comply with the IDEA by providing parents notice of upcoming IEP meetings and their procedural safeguards, and by ensuring that parents have an opportunity for meaningful participation in the IEP development process).

The Hearing Officer concludes that the parent, primarily through her attorney, was provided the opportunity to meaningfully participate in the June 11, 2013 IEP Team meeting. Therefore, DCPS did not deny the student a FAPE by failing to provide the parent the opportunity to participate in the student’s June 11, 2013 IEP Team meeting and discussion regarding placement for the student.

The Petitioner failed to meet its burden with respect to Issue #5.

#### Issue #6

The Petitioner alleged that DCPS denied the student a FAPE by failing to include nursing services for the administration of the student's prescription medication on the student's June 11, 2013 IEP.

Related services include "speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training." 34 CFR §300.34(a). The district need only provide those related services that are necessary for the student to receive the "basic floor of opportunity." *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769 (D.C.C. 2012).

Each student's need for related services, like the need for special education, is determined on an individual basis as part of the IEP process. The student's IEP must contain "a statement of the specific education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to or on behalf of the child." 34 CFR §300.320(a)(4). Additionally, each IEP requires a statement of the "anticipated frequency, location, and duration" of related services that will be provided. 34 CFR §300.320(a)(7).

If a student must take medication during the school day to effectively participate in his educational program, then administration of that medication may be a related service. *See Collier County Sch. Dist.*, 110 LRP 7471 (SEA FL September 15, 2009); *see also Birmingham City Bd. of Educ.*, 33 IDELR 236 (SEA AL 2000) (ordering a district to devise a strategy to ensure that a student with ADD received his medication at the proper intervals and dosages). However, if the state law does not require administration by a nurse, then the district may utilize other school personnel capable of safely administering the medicine. *Collier County Sch. Dist.*, 110 LRP 7471 (SEA FL September 15, 2009) (by showing that the administration of a particular medication did not require medical expertise, a Florida district justified its decision not to hire a full-time nurse for a child with a seizure disorder. An ALJ found no fault with a health plan that required the principal or assistant principal to administer the medication as needed.).

In the present matter, the Pediatrician testified that the student does not like the taste of medication and environmental "things," such as warm, moist heat appear to "help his pain more." The Pediatrician further testified that the student's medical team is taking a "trial and error" approach to medication for the student. The Pediatrician did not provide any testimony regarding current medications prescribed to the student or any information regarding the administration of medication to the student. Throughout the student's medical documentation, the only medications that have been consistent for the student are Zantac, to control the student's acid reflux, and ibuprofen as needed. On August 20, 2013, the student was taking a topical Lidoderm every 12 hours, ibuprofen as needed and Zantac. That day, the student was prescribed a pain patch.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail.

5 DCMR §E-3030.3. Here, the Hearing Officer concludes that the Petitioner did not present sufficient evidence to prove that the student's June 11, 2013 IEP should have included nursing services on the student's IEP. While the Pediatrician testified that she "believe(s) that the student "could benefit" from a school nurse because it would be better to treat the student at school rather than send him home," the Pediatrician offered no testimony of treatment necessary for the student on a daily basis to participate effectively in his educational program. Further, there was no evidence of the "anticipated frequency, location, and duration" needed of the related service that was requested, as a required element of the student's IEP. Finally, there was no evidence that the student's medications need to be administered by a nurse, ibuprofen and Zantac are medications that do not require medical expertise, or even that the student's medications need to be administered during the school day. School A has a full-time nurse on staff who is able to administer medication, as needed, to the student.

The Petitioner failed to meet its burden with respect to Issue #6.

#### Issue #7

Pursuant to the IDEA, any state receiving federal funds must provide a FAPE to disabled children. 20 U.S.C. § 1412(a)(1)(A); *Rowley*, 458 U.S. at 179. To satisfy its obligation, the FAPE provided by the state must include "special education and related services" tailored to meet the unique needs of the particular child, 20 U.S.C. § 1401(9), and be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207.

A public school ensures that a student with disabilities receives a FAPE by providing the student with an IEP. *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 482 (2d Cir. 2002). An IEP is a written statement, collaboratively developed by the parents, educators, and specialists, that "sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988), *superseded by statute*, *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036 (9th Cir. 2009).

The IEP must be "likely to produce progress, not regression," and afford the student with an opportunity greater than mere "trivial advancement." *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 195 (2d Cir. 2005) (*quoting Walczak*, 142 F.3d at 130) (internal quotation marks omitted). However, a school district is not required to provide "every special service necessary to maximize each handicapped child's potential," *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 379 (2d Cir. 2003) (*quoting Rowley*, 458 U.S. at 199) or "everything that might be thought desirable by loving parents." *Walczak*, 142 F.3d at 132 (citation and internal quotation marks omitted).

During the 2010-2011 school year, the student was assigned to a self-contained classroom in School D. There is no evidence that ABA was on the student's IEP during the 2010-2011 school year. It is uncontested that during the 2010-2011 school year the student made progress toward his academic goals, speech goals and behavioral goals. There is no evidence that the student's teacher was BCBA certified however the teacher utilized ABA techniques in the student's class. For the 2011-2012 school year, the student was assigned to School B. It was

also uncontested that the student progressed, when he attended school, during the 2011-2012 school year. During the 2011-2012 school year, the student's teacher was not BCBA certified and ABA was not on the student's IEP. Likewise, for the short period of time that student attended school during the 2012-2013 school year, it was uncontested that the student made progress. The student's teacher during the 2012-2013 school year is not BCBA certified and ABA was not on the student's IEP.

The student's June 11, 2013 IEP Team determined that the student required 24.5 hours per week of specialized instruction outside of the general education environment, 30 minutes per week of APE, 30 minutes per week of specialized instruction within the general education environment, four hours per month of speech-language therapy outside of the general education environment and 120 minutes per month of OT outside of the general education environment. With the exception of the amount of OT and a request for additional services, there was no challenge to the service hours on the student's IEP. The provision of specialized instruction within the general education environment for the student's preferred activity of computer lab, was not challenged.

The student's June 11, 2013 IEP also provides for the student to receive instruction in small groups with at least a 2:1 student-teacher ratio and provides accommodations and modifications including structured, scheduled breaks throughout the day; a visual schedule; graphic organizers; simplification of directions; extended time; lessons broken down into small, achievable objectives; verbal instructions; a token economy system; and models and visual aids for writing. The June 11, 2013 IEP states the student's requirement for a highly structured classroom environment with predictable routines.

The student's June 11, 2013 IEP contains five math goals, with 19 objectives; four reading goals, with ten objectives; two written expression goals, with three objectives; four adaptive/daily living skills goals, with five objectives; two speech-language goals, with 11 objectives; one social/emotional/behavior goal, with two objectives; and two motor skills goals, with six objectives. With the exception of one of the speech-language objectives, there was no evidence presented which suggested that the goals were inappropriate for the student.

Although the ABA Therapist attended the June 11, 2013 IEP Team meeting, at that point, she had not worked directly with the student and had only been involved with the student for about three weeks. Additionally, although the IEP Team members attempted to solicit information from the ABA Therapist, the parent's attorney would not allow the ABA Therapist to answer questions posed to her.

Precise teaching methodologies are generally a matter for districts to decide. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (U.S. 1982). In *P.C. and S.C. v. Harding Twn. Bd. of Ed.*, 61 IDELR 223 (D. NJ) (July 31, 2013), the parents of a 3-year-old with autism preferred that their son receive full-time one-to-one ABA instruction, however the court found that the district's eclectic program for children with autism would have addressed the student's needs while offering opportunities to develop social skills. Similar to *P.C.*, the Petitioner argued that the student needs ABA, as a methodology on his IEP, and that the student will not make progress with other methodologies. However, the Hearing Officer is not

persuaded by this argument. First, the Petitioner has requested that the student be placed in School E, as an appropriate program, however School E only provides individual ABA for, at most, two hours per day and directly for only 30 minutes per day. School E actually utilizes a multi-disciplinary approach including direct instruction, community-based instruction, play-based instruction, natural language and positive behavior supports. Next, the student is making progress with ABA therapy in the home for no more than two hours per session. Most importantly, even the parent acknowledged that the student made progress during the 2010-2011 school year with the approach of the DCPS autism program and it was uncontested that the student also made progress during the 2011-2012 and 2012-2013 school years, when the student was present in school, without ABA included on the student's IEP.

In *A.D. and M.D. v. NY Cty. Dept. of Ed.*, 60 IDELR 287 (S.D.N.Y) (March 19, 2013), the student's improved behavior and the offer of a structured, supportive learning environment at public school demonstrated the appropriateness of the district's proposal. The classroom provided a structured and supportive environment that included a relaxation center, and supports aimed at helping students to communicate their emotional states and transition smoothly between activities. Likewise, in the present matter, the student displayed no behavior problems during the last year he attended school on a consistent basis, without having ABA included on his IEP, and the student's June 11, 2013 IEP provides for a highly structured classroom environment with predictable routines, instruction in small groups with at least a 2:1 student-teacher ratio and provides accommodations and modifications including structured, scheduled breaks throughout the day; a visual schedule; graphic organizers; simplification of directions; extended time; lessons broken down into small, achievable objectives; verbal instructions; a token economy system; and models and visual aids for writing.

To determine whether a student is likely to make progress, the Hearing Officer "must examine the record for any 'objective evidence' indicating whether the child is likely to make progress or regress under the proposed plan," *Walczak*, 142 F.3d at 130 (citation omitted). Here, the evidence is objective that the student is likely to make progress under DCPS' proposed plan as he did in the past.

While the recommended placement may not provide an 'optimal' education to the student, the IDEA only requires a "basic floor of opportunity." *Rowley*, 458 U.S. at 200 (internal quotation marks omitted). "School districts are not required to furnish 'every special service necessary to maximize each handicapped child's potential.'" *A.C. ex rel. M.C.*, 553 F.3d at 173 (quoting *Rowley*, 458 U.S. at 199). "The education provided need only be 'appropriate' ... and 'not one that provides everything that might be thought desirable by loving parents.'" *D.D-S v. Southold Union Free Sch. Dist.*, No. 09 Civ. 5026 (JS), 2011 WL 3919040 (E.D.N.Y. Sept. 2, 2011) (quoting *Walczak*, 142 F.3d at 132).

The student's IEP is equipped to provide the student with a structured and supportive learning environment and provides eighteen goals, with 56 objectives for the student. There was no evidence presented which indicated that the student's goals cannot be mastered without ABA. While there was evidence presented which suggested that ABA would be the best method for the student, DCPS is only required to offer the student services that would provide significant learning and confer meaningful benefit. See *G.A. v. River Vale Bd. of Educ.*, 62 IDELR 37 (D.

NJ) (September 18, 2013) (although a preschooler with mild to moderate hearing loss in his left ear might have been better served by a hearing aid rather than an FM system, a desktop speaker, in conjunction with the student's right ear, would have allowed the child to receive FAPE.)

Accordingly, the Hearing Officer concludes that the student's June 11, 2013 IEP, with the adjustments indicated in Issue #8, and without ABA as a prescribed methodology, met the "basic floor of opportunity" that is required by the IDEA, *Rowley*, 458 U.S. at 200 (internal quotation marks omitted), was reasonably calculated to enable the student to receive educational benefits and would allow the student to make educational progress, and not regress. The last time the student attended school, the student demonstrated progress with IEPs that did not include the ABA methodology.

Further, with the exception of the size of the school building, the program at School A is substantially similar to the program at School E. The Petitioner seeks to have ABA included on the student's IEP and, at the same time, argues that the only appropriate placement for the student is a school only specifically uses ABA for 30 minutes per day.

The Hearing Officer concludes that while ABA is an appropriate method to teach the student, ABA is not required to provide the student with educational benefit. While the student may be better served in an ABA program, the record indicates that the student is able to receive a FAPE without the ABA methodology being included on the student's IEP. DCPS did not deny the student a FAPE by failing to include ABA on the student June 11, 2013 IEP.

The Petitioner failed to meet its burden with respect to Issue #7.

#### Issue #8

The Petitioner alleged that DCPS failed to develop an appropriate IEP for the student on June 11, 2013, specifically by failing to develop appropriate goals, with appropriate baseline data, aligned with the student's present levels of performance, appropriate evaluation schedules and linked to AT; goals for vision therapy; a behavioral intervention plan; accommodations of AT devices, sensory diet, climate-controlled environment, low student-teacher ratio, small class size, small school size, increased adult supervision, frequent breaks, hands-on learning, single step directions, posted schedule and a classroom with low spectrum lighting; and 120 minutes per week of OT, PT, orientation and mobility services, AT services, counseling and vision therapy to address the student's unique needs.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

The student's June 11, 2013 IEP Team determined that the student required 24.5 hours per week of specialized instruction outside of the general education environment, 30 minutes per week of APE, 30 minutes per week of specialized instruction within the general education

environment, four hours per month of speech-language therapy outside of the general education environment and 120 minutes per month of OT outside of the general education environment. With the exception of the amount of OT and a request for additional services, there was no challenge to the service hours on the student's IEP. The provision of specialized instruction within the general education environment for the student's preferred activity of computer lab, was not challenged.

The student's June 11, 2013 IEP also provides for the student to receive instruction in small groups with at least a 2:1 student-teacher ratio and provides accommodations and modifications including structured, scheduled breaks throughout the day; a visual schedule; graphic organizers; simplification of directions; extended time; lessons broken down into small, achievable objectives; verbal instructions; a token economy system; and models and visual aids for writing. The June 11, 2013 IEP states the student's requirement for a highly structured classroom environment with predictable routines.

#### *Appropriate Goals*

An IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability. 34 CFR 300.320(a)(2)(i).

The student's June 11, 2013 IEP includes academic goals for reading, math and written language and goals for adaptive/daily living skills, communication/speech and language and social/emotional/behavioral development. With the exception of two of the three objectives for the student's speech Annual Goal #2, all of the goals and objectives are measurable. While the Petitioner argued that he goals needed "appropriate evaluation schedules," specifically data for discrete trials, the IDEA does not require this level of detail. The goals are measurable and contain the anticipated date of achievement as required.

The Petitioner also argued that the goals on the student's June 11, 2013 IEP did not have appropriate baseline data and were not linked to the student's present levels of performance. With the possible exception of the student's speech baseline of not being able to verbally request his wants and needs, there is no evidence in the record that the baseline data or present levels of performance included in the student's June 11, 2013 IEP is inaccurate. In fact, with the possible exception of the student's speech baseline data and present level of performance, the baseline data and present levels of performance in the student's IEP align with the data provided by the student's ABA Therapist. The student has only one speech-language objective in his June 11, 2013 that the student may have mastered. The annual goal attached to the objective and the other eight objectives align with the student's needs as indicated in the record.

The Hearing Officer concludes that the goals on the student's IEP are measurable, related to the student's needs, align with the student present levels of performance, include appropriate baseline data and an anticipated date of achievement. Therefore, DCPS did not deny the student a FAPE by failing to include appropriate goals on the student's June 11, 2013 IEP. To the extent that the one speech objective may have been mastered, the student's June 11, 2013 IEP contains

other objectives related to the appropriate goal and other goals and objectives which are appropriate for the student. Therefore, having one possibly mastered objective does not rise to the level of a substantive violation.

#### *Goals for Vision Therapy/Vision Therapy*

Related services include “speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.” 34 CFR §300.34(a). The district need only provide those related services that are necessary for the student to receive the “basic floor of opportunity.” *Petit v. U.S. Dep’t of Educ.*, 675 F.3d 769 (D.C.C. 2012). Although vision therapy is not included in the IDEA definition of related service, the list is not meant to be exhaustive. *Analysis and Comments to the Regulations*, 71 Federal Register 46540:46569 (August 14, 2006); *See also, C. v. Missouri State Bd. of Educ.*, 53 IDELR 81 (E.D. Mo. 2009).

In May-June 2013, the student’s color vision, confrontation visual fields, visual acuity, refractive status, ocular motility – eye movement control, accommodation – focusing ability, binocular status – eye teaming ability, visual form perception, visual thinking assessment and visual motor integration was assessed. The student May-June 2013 Developmental Vision Evaluation Report began with a “history” of the student’s visual functioning, as reported by the parent, which does not fully comport with the student’s medical history contained within the record or the student’s behavior as observed by testifying witnesses. Contrary to the information in the May-June 2013 report, the student’s tutoring reports contain no evidence of the student having headaches associated with near work, head close to paper when reading or writing, avoiding reading, writing or printing poorly, dizziness or nausea associated with near work, skipping or repeating lines when reading, avoidance of reading and near work or holding reading material too close as reported in the student’s “history.”

The report indicated that the student appeared very sensitive to the lights of instruments used for assessments. The student’s color vision and confrontation visual fields were within normal limits. With corrective lenses, the student’s visual acuity is between 20/25 and 20/20 in each eye. The student was found to have significant hyperopia (farsightedness) and astigmatism (blurry vision). The evaluator observed fixation losses, jerky eye movements and excessive head movement. The evaluator was unable to access the student’s accommodative ability, binocular vision. On June 5, 2013, the evaluator noted that the student’s visual-perceptual skills were “unscorable” because the student was only able to answer the sample questions. The student’s scores on the visual thinking assessment and visual motor integration were at the first and second grade levels. The Hearing Officer notes that two of the subtests on the visual-perceptual skills assessment related to memory which is a documented extreme strength for the student and the student’s scores on the visual thinking assessment and visual motor integration were consistent with the student’s current academic functioning and cognitive levels.

The Optometrist testified that the student is in need of visual therapy because the student “cannot understand visual materials” and “doesn’t understand what he sees.” The Optometrist stated that glasses would correct the student hyperopia and astigmatism but would not address the student’s dizziness, photophobia, eye pain, headaches, convergence or visual perceptual problems and that a program needed to be developed to remediate skills not developed or lost after the student’s TBI. The Optometrist stated that it typically takes two to three visits per week for one year for a student to reenter a typical school environment and another six to nine months “to get back to where they were before the injury.” The Optometrist acknowledged that a vision teacher could not provide the services she was recommending and that she did not necessarily agree that the student’s symptoms could be addressed at school and that she was recommending vision therapy in an office. The Optometrist testified that a vision teacher can assist a teacher with providing visual accommodations such a preferred seating, adapted lighting, large print, reading bars, isolated text, highlighting or isolation of important information. The Optometrist did not testify regarding which of these accommodations would be appropriate for this student.

As discussed throughout this Order, the Hearing Officer is not persuaded that the student’s reported TBI, dizziness, photophobia, eye pain and headaches are supported by medical documentation. For example, on January 21, 2012, the doctor noted that the student’s evasiveness to light was primarily secondary to fear and behavioral complaint rather than photophobia. On March 6, 2012, the parent reported that the student was extremely sensitive to light, necessitating full time sunglasses use however the student was able to withstand a slit lamp eye exam and was playing video games in a bright room. On March 7, 2012, the doctor noted that the parent reported that the student had failed two vision screens at school however demonstrated no vision problems on his January 21, 2012 vision exam.

The student’s June 11, 2013 IEP team discussed the May-June 2013 Developmental Vision Evaluation Report. The DCPS Program Manager recommended that a developmental ophthalmologist assess the student to determine if a functional vision or visual media assessments needed to be completed, that an orientation and mobility assessment be completed and that a DCPS specialist informally assess the student’s sensitivity to light.

The Hearing Officer is not persuaded that the student’s June 11, 2013 IEP Team should have included goals for vision therapy and vision therapy on the student’s IEP. First, the Hearing Officer has questions regarding the validity of the May-June 2013 Developmental Vision Report. Next, the recommendations of the Optometrist appear to be seeking medical services beyond what is required for an LEA to provide as a related service. Finally, the June 11, 2013 IEP Team had legitimate concerns regarding the May-June 2013 recommendations and sought to provide for additional assessments to gather more data to make an appropriate determination regarding the student’s need for related services related to his vision. The Petitioner did not meet its burden in proving that the student’s June 11, 2013 IEP Team should have included goals related to vision therapy and vision therapy on the student’s June 11, 2013 IEP.

#### *Behavioral Intervention Plan/Counseling*

The ABA Therapist testified that student exhibits attention seeking, avoidance and escaping behaviors, is “hard to calm down” and on one occasion pushed the therapist. The

student's July 31, 2013 Academic Tutoring Report indicates that the student exhibits approximately one challenging behavior per two hour session. The ABA Therapist's observations of the student's behavior were not shared with the June 11, 2013 IEP Team and the July 31, 2013 report was not available on June 11, 2013. Nonetheless, the student's June 11, 2013 IEP Team determined that the student would participate in a token economy to promote positive behavior and decrease behaviors such as scripting and noncompliance. The student's June 11, 2013 IEP also indicates that the student occasionally whimpers or whines when he wants an object or an action performed. The team also noted that in the past the student would display physical aggression when upset.

Pursuant to 34 CFR §300.324(a)(2)(i), in the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider the use of positive behavioral interventions and supports, and other behavioral strategies, to address that behavior. The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005) (quoting *Bd. Of Educ. Of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203 (1982)).

The student's June 11, 2013 IEP contains one social/emotional/behavioral goal, one speech goal related to requesting attention/assistance appropriately and the provision of a token economy. The record does not contain enough evidence to assist the Hearing Officer in determining if this strategy is adequate to address the student's behaviors. Given the IDEA's affirmative mandate to address a student's behaviors, the Hearing Officer concludes that the student's June 11, 2013 should have included a BIP to address the student's behaviors. Conversely, there is no evidence that the student requires counseling to address his behaviors or that the student possesses the necessary communication and/or functioning skills to benefit from counseling at this time. Therefore, DCPS denied the student a FAPE by failing to include a BIP in the student's June 11, 2013 IEP however did not deny the student a FAPE by failing to include counseling in the student's June 11, 2013 IEP.

#### *AT Devices/AT Services*

An assistive technology device means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such a device. 34 CFR §300.5. Assistive technology service means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. 34 CFR §300.6.

On January 14, 2011, an Augmentative and Alternative Communication assessment was completed for the student. The evaluator concluded that the student did not have a sufficient way to communicate his daily needs and wants or to participate in structured activities in the classroom; he lacked skills to tell a narrative about his experiences; and an alternative means of communication was needed to support his day-to-day communication. The evaluator recommended a TechTalk Speech Generating Device, BoardMaker software with Speaking Dynamically Pro, a laptop computer, a picture system and speech therapy.

The student's June 11, 2013 IEP includes goals for the student to utilize a static communication output device. The IEP indicates that a TechTalk augmentative communication device has been identified and procured. The student's June 11, 2013 IEP contains the provision of picture communication symbols and speech therapy. The student's June 11, 2013 IEP Team agreed that the student needed an updated AT assessment. The student's assigned classroom contains computers and ipads for student use.

The Hearing Officer concludes that the student's June 11, 2013 IEP contains AT devices and goals which require DCPS to provide services for the student to assist the student in the use of the AT device. In fact, the June 11, 2013 IEP includes the AT device recommended for the student. While the June 11, 2013 IEP does not contain the software recommended, the LEA is not required to adopt all of the recommendations of the evaluator. The record contains no evidence that the student would be denied a FAPE without the software or without any other AT device or services. Additionally, the ABA Therapist testified that the student is now able to communicate some of his wants and needs, especially as it related to food, drink, pain or preferred activities.

#### *Sensory Diet*

The OT testified that the student requires a rich sensory diet including movement throughout the day and chewing gum. The OT stated that in order to determine an appropriate sensory diet for the student, data needs to be reviewed and a plan developed. Based on the data, the IEP Team would determine if the sensory diet should be included as IEP goals, accommodations or as a part of the student's program. The ABA Therapist also testified that the student's sensory needs need to be met to address the student's tendency to become overstimulated.

While the ABA Therapist was prohibited by the parent's attorney from speaking during the June 11, 2013 IEP Team meeting, the IEP Team did have access to the student's June 22, 2011 Comprehensive Occupational Therapy Evaluation and the appropriate team members to understand that a sensory diet is necessary for students with autism. The student's assigned program has a sensory room with a swing and mats and students are able to carry other sensory items into the sensory room. Students are also able to access sensory items while in the classroom.

Although sensory items are available in the student's assigned program, it is not clear what sensory items are appropriate or effective for this student. The Hearing Officer concludes that the student's June 11, 2013 IEP Team should have discussed an appropriate sensory diet for the student and included that sensory diet on the student's June 11, 2013 IEP. The Petitioner met its burden in proving that DCPS denied the student a FAPE by failing to include a sensory diet on the student's June 11, 2013 IEP.

#### *Climate-Controlled Environment*

The Parent testified that temperature triggers the students headaches and eye pain however in the more than 100 pages of medical documents, including numerous visits to the hospital and pain clinic regarding the student's reported headaches and eye pain, there is no documentation, suggestion, allegation, implication or conclusion that the student's reported

headaches or eye pain are triggered by temperature. The record contains no creditable evidence that a climate-controlled environment is a unique need of the student or that a climate-controlled environment is necessary for the student to receive educational benefit. The Hearing Officer concludes that DCPS did not deny the student a FAPE by failing to include a climate-controlled environment on the student's June 11, 2013 IEP.

#### *Low Student-Teacher Ratio*

The student's June 11, 2013 IEP also provides for the student to receive instruction in small groups with at least a 2:1 student-teacher ratio. The Hearing Officer concludes that the student's IEP contains the provision as requested by the Petitioner.

#### *Small Class Size*

The ABA Therapist testified that the student becomes distracted when in the presence of "a lot of people" and that "having a lot of people talking in the background" creates inadvertent stimuli for the student. The ABA Therapist testified that the student is "best served" in a one-on-one setting in the home. During the 2012-2013 school year, there were seven students in the student's classroom. The Teacher testified that, when present, the student made progress.

The student's June 11, 2013 IEP Team indicated that the student needed a highly structured classroom environment with predictable routines and a low student to staff ratio. DCPS is not required to provide what may be "best" for the student, only that the student be provided with educational benefit, likely to produce progress, not regression. The Hearing Officer concludes that this provision in the student's IEP was sufficient to meet the student's needs. Although the student becomes distracted when in the presence of "a lot of people," the student's IEP prescribes a highly structured classroom which is likely to minimize distractions. Further, the student's assigned classroom has eight students, not unlike the last classroom where the student was making progress.

#### *Increased Adult Supervision*

As discussed throughout this Order, the parent made continual complaints regarding the student's safety in the public school environment. On June 11, 2013, the parent stated to the IEP Team that "fear is running very high" for [the student] and parent "right now." Despite the Hearing Officer's conclusion that the parent's testimony regarding the student's medical ailments is not supported by medical documentation, it is uncontested that the student was hit in the head by a ball during APE in December 2011 and that the student fell and dislocated his thumb in September 2012 while at school. While the student's medical documentation indicates that the student has a normal gait and is able to climb up and down stairs, the OT, ABA Therapist and Pediatrician have concerns regarding the student's ability to navigate the hallways of a general education school.

The student's June 11, 2013 IEP Team indicated that the student needed a highly structured classroom environment with predictable routines and a low student to staff ratio. While this environment is appropriate for the student's learning environment, it does not address the student's need for assistance when not in the classroom. Given the student's injuries in December 2011 and September 2012, the student's June 11, 2013 IEP Team should have provided for increased adult supervision for the student in the hallways, during physical

education and during recess. The Hearing Officer concludes that DCPS denied the student a FAPE by failing to include increased adult supervision on the student's June 11, 2013 IEP.

#### *Frequent Breaks*

The student's June 11, 2013 IEP provides for the accommodation of structured, scheduled breaks throughout the day. While the ABA Therapist testified that the student needs "frequent breaks or movement activities," the Petitioner presented no compelling evidence of the frequency of breaks needed by the student. The ABA Therapist testified that the student is given a break every five to ten minutes however this is dependent on the student's mood and feelings. Absent any evidence to the contrary, the Hearing Officer concludes that the student's IEP contains an appropriate provision to address the student's need for breaks.

#### *Hands-on Learning*

The record does not contain evidence that the student requires hand-on learning to receive educational benefit. The record indicates that the student made progress during the 2011-2012 and 2012-2013 school years, when present and does not indicate that hand-on learning is currently being used by the student's ABA therapist.

#### *Single Step Directions*

The Teacher testified that the student was able to follow directions to navigate an unfamiliar environment while visiting School A. The student June 11, 2013 IEP Team noted that the last time the student was in school, the student had improved his ability to follow oral directions for completing tasks.

The student's June 11, 2013 IEP contains the modification of simplification of directions and a goal for responding to group instructions. The Hearing Officer concludes that the goals and modification related to directions in the student's June 11, 2013 IEP are appropriate to address the student's need for modified directions.

#### *Posted Schedule*

The student's June 11, 2013 IEP also provides for the student to receive the accommodation of a visual schedule. While the student's IEP does not specifically state that the schedule is to be posted, there is no evidence that the schedule needs to be "posted" rather than provided to the student. Further, there is no evidence that the visual schedule is not intended to be posted. Absent any evidence to the contrary, the Hearing Officer concludes that the student's IEP contains the provision as requested by the Petitioner.

#### *Classroom with Low Spectrum Lighting*

The ABA Therapist testified that the student's behaviors can inadvertently be reinforced. The ABA Therapist also testified that attention is a major reinforcer for the student and that the only reinforcer stronger than attention for the student is escape. Additionally, the ABA Therapist testified that the student "looks to his mother for approval," and "reads his mother's social cues."

On January 21, 2012, the doctor noted that the student's evasiveness to light was primarily secondary to fear and behavioral complaint rather than photophobia. On March 6, 2012, the parent reported that the student was extremely sensitive to light, necessitating full time

sunglasses use however the student was able to withstand a slit lamp eye exam and was playing video games in a bright room. On September 12, 2012, the student's doctor indicated that the student should return to school the following day. The doctor indicated no limitations to the student returning to school. On October 24, 2012, the parent reported that the student complained of photophobia however the student's eye exam was normal with the exception of the doctor noting that the student needed glasses to correct his vision and the doctor noted that the student's eye pain was resolved.

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *affd*, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. The Hearing Officer is not persuaded that the student requires low spectrum lighting. While the Optometrist testified that she had to "turn off all lights, close the blinds and turn away the one incandescent light," and the student ran out of the room; and ABA Therapist testified that the student "likes dimmer, darker rooms," there is no valid medical documentation supporting the student's reported light sensitivity. The Petitioner did not meet its burden in proving that the student's June 11, 2013 IEP should have included a classroom with low spectrum lighting. The Hearing Officer notes that all classrooms in School E, as requested by the parent, do not have low spectrum lighting.

#### *Increased OT/PT and Orientation and Mobility Services*

In the student's June 22, 2011 Comprehensive Occupational Therapy Evaluation, the OT recommended that the student receive OT services two times per week for 60 minutes. Following this recommendation, the student's August 4, 2011 IEP Team prescribed 240 minutes per month of OT for the student. Likewise, the student's October 21, 2011 IEP Team prescribed 240 minutes per month of OT for the student. On February 16, 2012, the student's IEP Team reviewed evaluation data for the student and concluded that the student presented with fine motor, visual motor integration, visual perception and sensory processing skills that were delayed, inadequate and non-supportive. While the record indicates that the student's IEP was revised on June 13, 2012, the record does not include a copy of the student's June 13, 2012 IEP. On week before the hearing the OT met with the student for the first time since the June 22, 2011 assessment. The OT testified that the student's functioning had improved from June 2011.

The student's June 11, 2013 IEP prescribed 120 minutes per month of OT for the student. It is not clear whether the reduction in OT services from 240 minutes per month occurred on June 13, 2012 or June 11, 2013. The Hearing Officer believes that it is likely that the student's IEP Team agreed to the reduction on June 13, 2012 because neither the notes from the June 11, 2013 IEP Team meeting nor the testimony of the witnesses who attended the June 11, 2013 IEP Team meeting indicated the June 11, 2013 IEP Team discussed a reduction in the student's OT services. Given that the student stopped attending school in September 2012 and has not received any school-based OT services since that time, it can be concluded that the student's progress from June 22, 2011 to October/November 2013 was based on 240 minutes per month of OT services. The record does indicate that the student has a home healthcare worker but does not contain any evidence of the role and responsibility of the home healthcare worker.

The Hearing Officer concludes that it is more likely than not that the student's IEP Team should have prescribed 240 minutes per month of OT on the student's June 11, 2013 IEP. Following the June 22, 2011 OT assessment, the student's August 4, 2011 IEP Team determined that 240 minutes per month of OT was appropriate and the student made progress with this level of service. The Petitioner met its burden in proving that DCPS denied the student a FAPE by failing to include 240 minutes per month of OT on the student June 11, 2013 IEP.

The student's June 11, 2013 IEP Team discussed an orientation and mobility assessment for the student however did not determine that one was necessary. The June 11, 2013 IEP did not discuss a PT assessment. The record contains numerous parental complaints regarding the student's mobility and physical functioning but little evidence to support the claim that the student required IEP services to address the reported areas of need. The Hearing Officer concludes that the Petitioner did not meet its burden in proving that the student required PT and orientation and mobility related services on his June 11, 2013 IEP. The Hearing Officer does strongly suggest that DCPS conduct PT and orientation and mobility assessments to address the concerns of the parent and other service providers related to the student's needs in these areas.

#### Issue #9

The Petitioner alleged that DCPS denied the student a FAPE by failing to provide placement in a nonpublic special education day school in the student's June 11, 2013 IEP.

The IDEA mandates that an LEA maintain procedures allowing "an opportunity for any party to present a complaint with respect to any matter related to the identification, evaluation or education placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). District of Columbia Municipal Regulations provide that, "A parent of a LEA child or the LEA has the right to initiate a hearing, when there is a dispute about the eligibility, identification, evaluation, educational placement, or the provision of FAPE to a child with a disability, in accordance with 20 U.S.C. § 1415(f)." DCMR 5, § 3029.1.

Under the doctrine of res judicata "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Taylor v. Blakey*, 490 F.3d 965 (D.C. Cir. 2007) *rev'd on other grounds*, 553 U.S. 880 (2008) (*citing Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979)); *see also Jackson v. District of Columbia*, 826 F. Supp. 2d 109, (D.D.C. November 29, 2011). Although courts were initially

hesitant to use *res judicata* in the administrative setting, the doctrine has consistently been applied to administrative hearings that reach a final judgment on the merits. *See Hobby v. Hodges*, 215 F.2d 754, 759 (10th Cir. 1954); *Robinson v. Heckler*, 593 F. Supp. 737, 741 (D.D.C. 1984); *Mannerfrid v. Brownell*, 145 F. Supp. 55, 56 (D.D.C. 1956); *Rhema Christian Center v. Dist. of Columbia Bd. of Zoning Adjustment*, 515 A.2d 189, 192 (D.C. 1986) (finding that final administrative decisions that operate as a judicial proceeding generally will be accorded preclusive effect by courts).

Claim preclusion focuses on whether the same cause of action is implicated in both the initial and subsequent lawsuits, meaning that the two lawsuits “share the same nucleus of facts.” *Theodore v. Dist. of Columbia*, 772 F. Supp. 2d 287, (D.D.C. March 28, 2011); *Serpas v. Dist. of Columbia*, 2005 U.S. Dist. LEXIS 44536 (D.D.C. 2005) (citing *Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002)). Ultimately, the successful application of the claim preclusion doctrine requires three things: “(1) the presence of the same parties or privies in the two suits; (2) claims arising from the same cause of action in both suits; and (3) a final judgment on the merits in the previous suit.” *Theodore v. Dist. of Columbia*, 772 F. Supp. 2d 287, (D.D.C. March 28, 2011) (citing *Friendship Edison Public Chartered School v. Suggs*, 562 F. Supp. 2d 141, 148 (D.D.C. 2008) (citing *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004)).

Under claim preclusion, “it is the factual nucleus that gives rise to a plaintiff’s claims, not a legal theory on which the claim rests that determines whether the claim may proceed.” *Lindsey v. Dist. of Columbia*, 609 F. Supp. 2d 71, 77 (D.D.C. 2009) (referencing *Page v. U.S.*, 729 F.2d 818, 820 (D.C. Cir. 1984)). In the present matter, there is a presence of the same parties in the two suits. Both cases involve the same student and the same local educational agency (LEA) and there was a final judgment on the merits in the previous case related to the student’s placement for the 2011-2012 and 2012-2013 school years. In determining whether the claims arise from the same cause of action, the Hearing Officer must conclude that the two lawsuits share the same nucleus of facts. In general, the exhibits and testimony related to the student’s placement in the present matter are the same and involve many overlapping facts as the prior matter. On June 11, 2013, the student IEP remained substantially similar to the student’s previous IEP however the June 11, 2013 IEP Team had information regarding the student’s May-June 2013 developmental vision assessment which was not previously available. Additionally, the ABA Therapist was an IEP Team member on June 11, 2013 IEP but had not been in the student’s previous IEP meetings.

In case #2012-0835, the Petitioner alleged that DCPS denied the student a FAPE during the 2011-2012 and 2012-2013 school years by failing to provide him a sufficiently restrictive placement, i.e., a separate, special education day school for students with autism. Claim preclusion seeks to bar the situation where the Petitioner attempts to file a second action based on the same nucleus of facts. Here, the nucleus of facts is substantially similar in both cases.

The Hearing Officer made clear to both parties during the prehearing conference and at the beginning of the hearing, that the parties were not permitted to re-litigate issues previously decided in case #2012-0835. On March 16, 2013, Hearing Officer Raskin determined that the Petitioner did not meet its burden in proving that DCPS denied the student a FAPE during the 2011-2012 and 2012-2013 school years by failing to provide him a sufficiently restrictive

placement, i.e., a separate, special education day school for students with autism. Therefore, the undersigned Hearing Officer will consider all of the evidence in the record in determining if DCPS denied the student a FAPE by failing to provide placement in a nonpublic special education day school in the student's June 11, 2013 IEP however will not allow the Petitioner a "second bite at the apple." Absent a disagreement with Hearing Officer Raskin's Findings of Fact or Conclusions of Law, after a thorough and independent review of the record, the undersigned Hearing Officer will afford substantially more weight to any potential changes in the student's needs between March 16, 2013 and June 11, 2013 and information provided in the student's June 11, 2013 IEP Team meeting in determining whether DCPS denied the student a FAPE by failing to provide placement in a nonpublic special education day school on June 11, 2013.

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. *See* 34 CFR 300.320(a). For an IEP to be "reasonably calculated to enable the child to receive educational benefits," it must be "likely to produce progress, not regression." *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (internal quotation marks and citation omitted).

Pursuant to 34 CFR §300.116(b)(2), the child's placement must be based on the child's IEP. Placement decisions can only be made after the development of the IEP. *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 441 IDELR 178 (4<sup>th</sup> Cir. 1988). Only after the IEP has been developed does the IEP Team have a basis for determining where the student's needs can be served. The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 Supp. 2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. §1412(a)(5)); 5 DCMR §3011 (2006). Handicapped children are to be educated with non-handicapped children to the maximum extent possible. *LaGrange*, 184 F.3d at 915. The IDEA's implementing regulations provide that "children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled." 34 CFR §300.114(a)(2)(i). Furthermore, children with disabilities are only to be removed from regular education classes "if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR § 300.114(a)(2)(ii).

It is uncontested that the nature and severity of the student's academic disability are such that the student's primary education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The student's June 11, 2013 IEP Team determined that the student required 24.5 hours per week of specialized instruction outside of the general education environment, 30 minutes per week of APE, 30 minutes per week of specialized instruction within the general education environment, four hours per month of speech-language therapy outside of the general education environment and 120 minutes per month of OT outside of the general education environment. With the exception of the amount of OT and a request for additional services, there was no challenge to the service hours on the student's IEP. The provision of specialized instruction within the general education environment for the student's preferred activity of computer lab, was not challenged.

The student's June 11, 2013 IEP also provides for the student to receive instruction in small groups with at least a 2:1 student-teacher ratio and provides accommodations and modifications including structured, scheduled breaks throughout the day; a visual schedule; graphic organizers; simplification of directions; extended time; lessons broken down into small, achievable objectives; verbal instructions; a token economy system; and models and visual aids for writing. The June 11, 2013 IEP states the student's requirement for a highly structured classroom environment with predictable routines.

The only new data provided during the student's June 11, 2013 IEP Team meeting was the May-June Developmental Vision Report. As discussed in Issue #4, the Hearing Officer questions the validity of the report. Notwithstanding the Hearing Officer's reservations, the report recommended optometric vision therapy, for the student to wear his glasses and additional testing to address visual information processing and binocular vision function. While the ABA Therapist was present at the June 11, 2013 IEP Team meeting, when the IEP Team members attempted to gather information from the therapist, the parent's attorney would not allow her to answer.

The Teacher and the Assistant Principal testified that during the 2011-2012 and 2012-2013 school years, the student was progressing toward his IEP goals as would be expected of a student who attended school at the rate of the student. While the Petitioner argued that the student did not make progress toward his IEP goals prior to December 2011, the record indicates that the student was frequently absent from school prior to December 2011. For the 2013-2014 school year, while the student was assigned to School A, the student was assigned to the same teacher and program from the 2012-2013 school year. The Teacher testified that the changes to the program for the 2013-2014 school year included a new physical space with three computer labs, a space for "specials" and activities; a larger autism program; more support and resources; and additional specialized instructional programs for reading and math intervention. The class has a total of six adults and eight students.

The Pediatrician recommended a "smaller more controlled school environment" with no general education physical education. The student's June 11, 2013 IEP does not provide for the student to participate in general education physical education.

In *S.D. v. Starr*, 60 IDELR 70, 112 LRP 57584 (D. Md. 2012), the parent's medical expert witness testified that the student could suffer serious health risks if he returned to public school. However, the court credited the testimony of teachers and related services providers who had previously worked with the boy, and who testified that they were able to respond to the child's health needs within the school setting. The medical expert had never observed the child at school and was not familiar with the school's ability to provide accommodations for the child. Likewise, in *Sebastian M. v. King Phillip Reg'l Sch. Dist.*, 685 F.3d 79 (1st Cir. 2012), the court rejected the testimony of the parent's expert witnesses, who had never spoken with the student's teachers, reviewed his schoolwork, evaluated the student or observed him at school. The court was persuaded by the testimony of the student's teachers who worked directly with him on a daily basis. "All of these educators testified that the proposed IEPs offered an appropriate combination of services designed to permit [the student] to achieve meaningful educational progress, including counseling services, occupational therapy, social skills training, and

vocational training,” U.S. Circuit Judge Kermit V. Lipez wrote for the three judge panel. The school district’s witnesses were therefore due more deference than the expert witness on behalf of the parents.

Therefore, as in *S.D. v. Starr* and *Sebastian M.*, the Hearing Officer affords more deference to the testimony of the Teacher and Assistant Principal regarding the student’s ability to function in a school setting. While the Teacher and the Assistant Principal have not taught the student in the past year, the Pediatrician has not seen the student in an educational environment. Additionally, throughout the student’s medical appointments in 2012-2013, the parent consistently told medical personnel that she was trying to get the student into a school program in Maryland because she did not feel the program at DCPS was meeting his needs.

The Petitioner’s primary argument related to the student’s need for placement in a private special education day school was that the student’s health and safety needs could not be met if the student interacted at all with general education peers. As discussed in Issues #4, #6 and #8, the Hearing Officer is not persuaded that the reports of the student’s pain and physical ailments are supported by the medical documentation in the record. The parent’s report of the student suffering from dizziness has never been observed by the student’s Pediatrician and was not reported by the ABA Therapist. The Petitioner vehemently argued that the student was unable to walk down a hallway without falling however the student’s medical records consistently documented that the student had a smooth and steady gait. While the Parent testified that the student had to be caught by four adults during his visit to School A, the Teacher testified that the student had to stop to catch his breath after climbing the stairs. To the extent that the Hearing Officer believes that the student’s safety should have been considered by the student’s June 11, 2013 IEP Team, the Hearing Officer has addressed this in Issue #8.

On September 12, 2012, the student’s doctor indicated that the student should return to school the following day. The doctor indicated no limitations to the student returning to school. On January 30, 2013, the student posed little to no fall risk. On July 25, 2013, the student had a normal fluent gait. On August 20, 2013, the doctor noted that the student was able to go up and down stairs and that there were no barriers to the student’s mobility at home.

An appropriate educational placement must be provided for each child with a disability, so that the child’s needs for special education and related services can be met. *See* 34 CFR §300.17; 34 CFR §§300.114-300.120. However, “educational placement,” as used in IDEA means the educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted); *see also, A.K. v. Alexandria City School Board*, 484 F.3d 672, 680 (4th Cir. 2007) (*citing AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004)). Hence, school districts are afforded much discretion in determining which school a student is to attend. *See White, supra*. The Comments to the Federal Regulations note that “placement” refers to points along the continuum of placement options available for a child with a disability and “location” refers to the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. 71 Federal Register 46540:46588 (14 August 2006).

The preponderance of evidence standard simply requires the trier of fact to find that the existence of a fact is more probable than its nonexistence. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted). In other words, preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it. *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *affd*, 512 U.S. 246 (1994). Unlike other standards of proof, the preponderance of evidence standard allows both parties to share the risk of error in roughly equal fashion, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted). Except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion.

In this proceeding, the Petitioner carries the burden of persuasion. The Hearing Officer is not persuaded that the student requires education in a private special education day school. It is uncontested that the nature and severity of the student's academic disability are such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. However, there was no evidence presented which supports the contention that the nature or severity of the student's disability is such that interaction with nondisabled peers in the school environment for 100% of the day is necessary. The argument by the Petitioner that a general education school, in and of itself, is poses a health and safety risk to the student is not supported by the record. Additionally, there was no evidence presented which suggested that the student's placement/program, or even location of services, is unable to implement the student's June 11, 2013 IEP even given the Hearing Officer's conclusions in Issue #8. Although the ABA Therapist testified that "without the executive functioning skills to navigate social situation" the student has a "risk of overload and aggression that could possibly happen," the Hearing Officer is not persuaded that the possible risk of overload or aggression justifies a more restrictive environment. Nonetheless, the Hearing Officer has addressed this concern in Issue #8.

Although the Parent did not desire for the student to be educated in a DCPS school, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. *See Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (stating that the IDEA does not provide for an "education ... designed according to the parent's desires") (citation omitted). In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. *See Gregory K v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.

The Petitioner presented evidence that School E is better than DCPS' proposed placement. The Hearing Officer agrees that the services and environment at School E are likely the best for the student however DCPS is not obligated to provide the student with the best education. Additionally, School E is unable to implement the 30 minutes of specialized instruction within the general education environment as agreed upon by the student's IEP Team. The Hearing Officer concludes that the student's June 11, 2013 placement in a self-contained classroom with a low student-teacher ratio, autism support, access to a sensory room and an

opportunity for the student to interact with nondisabled peers during a preferred activity was appropriate for the student. The student's June 11, 2013 placement is likely to produce progress, not regression, as it had in the past, should the student avail himself of the FAPE offered.

The Petitioner failed to meet its burden with respect to Issue #9.

### Requested Relief

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* “. . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005) citing *G.ex. RG v Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003). In this case, the Hearing Officer concludes that DCPS denied the student a FAPE by failing to include a BIP in the student's June 11, 2013 IEP, failing to include a sensory diet on the student's June 11, 2013 IEP, failing to include increased adult supervision on the student's June 11, 2013 IEP and failing to include 240 minutes per month of OT on the student June 11, 2013 IEP.

For the denial of FAPE related to a BIP for the student, the IDEA regulations at 34 CFR §300.304(c)(6) require the public agency to ensure that evaluation of a child is sufficiently comprehensive to identify all the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. An FBA is an educational evaluation. See *Harris v. District of Columbia*, 561 F. Supp. 2d 63 (D.D.C. 2008). Although the Hearing Officer concluded that DCPS denied the student a FAPE by failing to include a BIP on the student's June 11, 2013 IEP, the record does not contain evidence to support ordering DCPS to develop a BIP without an FBA. The student has not attended school since September 2012. While there is some evidence regarding the student's current behavior in the home environment and the student's past behavior in the school environment, neither of these is adequate to support an appropriate BIP for the school environment at this time. Therefore, the Hearing Officer concludes that it is equitable to Order DCPS to conduct an FBA, to assess the student's behaviors and functions thereof, before developing a BIP. Since the student will likely have some behaviors related to transitioning back to school after such a long period of time, or alternative a “honeymoon” period, it is proper for the FBA to be conducted after the student has been reintroduced to the school environment.

For the denial of a FAPE related to a sensory diet on the student's June 11, 2013 IEP, the Hearing Officer also concludes that an assessment is necessary prior to including a sensory diet on the student's IEP. The student's last OT assessment was completed on June 22, 2011. Since that time, the student has been out of school for more than one year. While the OT noted some improvements in the student, the OT did not suggest sensory strategies that are appropriate or successful for the student at the current time.

For failing to include increased adult supervision on the student's June 11, 2013 IEP and failing to include 240 minutes per month of OT on the student June 11, 2013 IEP, it is appropriate to Order DCPS to convene a meeting to include these services on the student's IEP.

When an LEA deprives a child with a disability of a FAPE in violation of the IDEA, a court and/or Hearing Officer fashioning appropriate relief may order compensatory education. *Reid* at 522-523. *See also Peak v. District of Columbia*, 526 F. Supp. 2d 32, 36, 49 IDELR 38 (D.D.C. 2007). If a parent presents evidence that her child has been denied a FAPE, she has met her burden of proving that the child may be entitled to compensatory education. *Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland*, 534 F. Supp. 2d 109, 49 IDELR 183 (D.D.C. 2008); *Henry v. District of Columbia*, 55 IDELR 187 (D.D.C. 2010). However, even if a denial of a FAPE is shown, “[i]t may be conceivable that no compensatory education is required for the denial of a [FAPE]...either because it would not help or because [the student] has flourished in his current placement. *Phillips v. District of Columbia*, 55 IDELR 101 (D.D.C. 2010) *citing Thomas v. District of Columbia*, 407 F. Supp. 2d 102, 44 IDELR 246 (D.D.C. 2005). *See also Gill v. District of Columbia*, 55 IDELR 191 (D.D.C. 2010) (“The court agrees that there may be situations where a student who was denied a FAPE may not be entitled to an award of compensatory education, especially if the services requested, for whatever reason, would not compensate the student for the denial of a FAPE.”)

Since June 11, 2013, the parent has chosen to keep the student from attending school. While the parent argued that the student was medically prohibited from attending school, the physician’s documentation indicates that the student was to remain out of school until the student was placed in a school that was appropriate for the “student and family.” It is difficult to discern whether or not the parent would have allowed the student to avail himself of the FAPE offered had the student’s June 11, 2013 IEP included a BIP, a sensory diet, increased adult supervision and 240 minutes per month of OT however the Hearing Officer believes that it is likely that the parent still would not have sent the student to School A since the parent was adamant that the student needed to be placed at School E. Therefore, to a large extent, compensatory education would not compensate the student for the denial of a FAPE. However, the Hearing Officer believes that it is nonetheless equitable, weighing all of the considerations, to provide the student with some compensatory education. In particular, the Hearing Officer believes that it is appropriate to Order DCPS to provide additional one-on-one ABA services for the student and independent OT services for the student to compensate for the services missed from August 26, 2013 through present.

The Hearing Officer does not believe that it is equitable to provide compensatory education for the student during the ESY period because the student was assigned to School C for the ESY period. School C is a public separate school that serves students with severe behavioral and medical needs and employs two full-time nurses and would have likely provided the increased adult supervision, access to a sensory diet and behavioral interventions lacking in the student’s IEP.

## ORDER

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

1. Issues #1, #2, #3, #4, #5, #6, #7 and #9 are **dismissed** with prejudice.

2. Within 10 school days of the date of this Order, or on a date mutually agreed upon by the parties, DCPS to convene the student's IEP Team to add increased adult supervision for transitions, physical education and recess to student's IEP; and revise the student IEP to include 240 minutes per month of OT services. The increased adult supervision can be accomplished by a dedicated aide or by a staff member assigned to the student for transitions, physical education and recess.
3. Within 10 school days after the student has attended school for 10 school days, DCPS to conduct a FBA of the student. As a part of the FBA, DCPS must gather data from the student's ABA therapy providers.
4. Within 5 school days of the completed FBA, or on a date mutually agreed upon by the parties, DCPS convene an IEP Team meeting to develop a BIP for the student. The BIP must incorporate strategies used by ABA therapists which are appropriate in a school environment.
5. Within 30 days of the date of this Order, DCPS conduct an OT assessment for the student. The deadline to complete the assessments is increased by one day for each day that the parent fails to make the student available for the assessment. As a part of the OT assessment, DCPS must gather data from the student's ABA therapy providers regarding sensory strategies used for the student.
6. Within 15 calendar days of the completed assessment, or on a date mutually agreed upon by the parties, DCPS convene an IEP Team meeting to include an appropriate sensory diet on the student's IEP.
7. If the parties mutually agree, DCPS may convene one or two IEP Team meetings for the student to complete the required actions rather than convening three separate meetings.
8. DCPS provide the student with 10 hours of one-on-one ABA therapy to be completed by March 28, 2014.
9. DCPS provide the student with 10 hours of independent OT services to be completed by March 28, 2014.
10. All other relief sought by Petitioner herein is **denied**.

#### NOTICE OF RIGHT TO APPEAL

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

Date: December 5, 2013

  
Hearing Officer