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Office of Compliance and Review  
Student Hearing Office

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**Confidential**

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STUDENT HEARING OFFICE  
OSSE

<p>STUDENT<sup>1</sup>, by and through Parent Petitioners,  v.  District of Columbia Public Schools  Respondent.</p>	<p><b>HEARING OFFICER'S DETERMINATION</b></p> <p>Date: July 16, 2009</p> <p><b><u>Hearing Officer: Wanda I. Resto, Esquire</u></b></p>
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<sup>1</sup> Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

## I. PROCEDURAL BACKGROUND

On June 1, 2009, parent's counsel filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent"), pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter "IDEIA"), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to implement Applied Behavior Analysis ("ABA") methodology, as required by the Student's disability and prescribed by the individualized education plan ("IEP") and therefore failing to provide an appropriate educational placement.

The Petitioner requests the Respondent fund the Student's educational placement and transportation to the \_\_\_\_\_ in Rockville, Maryland.

On June 3, 2009, the Respondent filed a Motion pursuant to 34 C.F. R. §300.510 agreeing to waive the resolution session and requesting that the case proceed to a due process hearing on the merits.

On June 11, 2009, the Respondent filed a Notice of Insufficiency and Response to the Complaint and asserted it is insufficient under 20 USC 1415(b)(7)(A)(ii)(I) and § 301.2.C.e of the OSSE Standard Operating Procedures, because the Complaint does not include the parent's nor a guardian's signature as required. The Respondent requested that an amended complaint be filed with the parent's signature; failing that, the Respondent requested that the parent be required to attend the hearing.

The Respondent alleged the Student is in a full-time special education placement and is making progress in his class at \_\_\_\_\_. The Respondent further alleged that ABA methodology is being implemented: the Student's teacher has been trained in ABA and receives support from a Board Certified Behavior Analyst. The Respondent acknowledged that although the Student's IEP references that ABA is a methodology to be used with the Student; the methodology to be used by the teacher is not a required part of the IEP.

A telephonic pre-hearing conference call for the above reference matter was conducted on June 10, 2009 at 3:00 P.M. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session. The Petitioner reiterated the issues as plead and asserted that the Respondent was alleging the Student progressed; however the progress made by the Student was due to independent tutoring services and not any efforts by the Respondent. The parties stipulated the Student attends a DCPS and is a resident of the D.C. The Respondent reasserted its position.

The Hearing Officer determined that the Respondent's claim of insufficiency could not advance. The IDEIA does not require a due process complaint to reach the level of specificity and detail of a complaint in a court of law.<sup>2</sup> The purpose of the sufficiency requirement is to ensure that the other party will have an awareness and understanding of the issues forming the basis for the complaint. Due process complaints should be construed in light of *Schaeffer v. Weast*, 126St.Ct.528, 532 (2005).

The undersigned did not require the Petitioner to be physically present at the hearing, however she was required to sign the Complaint.

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<sup>2</sup> See: 20 U.S.C. 1415(b) (7)(A)(ii)  
HOD

A June 13, 2009, Order required the Petitioner to demonstrate during the hearing that the Student's disability and his IEP required that ABA methodology be included in the Student's program, that the Respondent is obligated to follow a specific methodology, and how the Student's educational placement is inappropriate. The Petitioner had to show why it is important to distinguish whether the Student progressed academically because of independent tutoring services and not from the provision of services from the Respondent. Additionally, the Petitioner had the obligation to show that the alleged failures have caused the Student or Petitioner harm. The Respondent was ordered to demonstrate that the Student is making progress in his placement; that a specific methodology is not required to be used by the teacher as part of the IEP; the Student's teacher has been trained in ABA and receives support from a Board Certified Behavior Analyst; that the procedures and practices used by the Respondent are consistent with required practice; that the educational placement is appropriate; and the Student has not been denied a FAPE.

Hearings were held on June 30, July 1, July 2 and July 6, 2009. The Petitioner presented a disclosure letter dated June 23, 2009 to which thirty-seven documents were attached, labeled P-1 through 37 and which listed seven witnesses, amended June 25, 2009 to include two documents labeled P 38 and 39. During the hearing the Petitioner presented an additional document admitted into evidence and mark as P-40.<sup>3</sup> Seven witnesses testified. The Respondent presented a disclosure letter dated June 23, 2009 identifying twelve witnesses and to which fourteen documents were attached, labeled DCPS 1 through 15, amended June 25, 2009 to include two documents labeled DCPS 15 and 16. Six witnesses testified. All documents submitted were admitted as evidence.

The hearing were conducted in accordance with the rights established under the IDEIA and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

## II. ISSUE(S)

1. Does the Student's IEP require the Respondent to utilize Applied Behavior Analysis ("ABA") methodology?
2. Is the Respondent required to implement a specific ABA methodology?
3. Whether the proposed instructional method meets the Student's needs?
4. Did the Student make educational progress?
5. Has the Respondent failed to provide an appropriate educational placement for the Student during the 2007-2008 and 2008-2009?
6. Has the Respondent denied the Student a FAPE?

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<sup>3</sup> P#40 DCPS Transition Data Chart.  
HOD

### III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student was registered at a DCPS during school years 2007-2008 and 2008-2009.<sup>4</sup>
2. The Student is a student with disabilities under the IDEIA. The Student's most recent IEP is dated June 8, 2009 and prescribes 24.5 hours of specialized instruction, 90 minutes of occupational therapy, 60 minutes of speech language pathology, 30 minutes of adaptive physical education, and 30 minutes of physical therapy weekly. The Student's disability classification is Autistic. The IEP indicates the Student is entitled to extended school year services outside of general education and requires a dedicated aide.<sup>5</sup>
3. A February 15, 2008, Hearing Officer Determination ("HOD") required "the DCPS to provide compensatory education due to missed services." A May 2008 HOD ordered the Respondent to provide encounter tracking covering all related services beginning December 1, 2007 until May 2008. These two previous complaints resulted in awards of compensatory education to the Student, including 43.5 hours of occupational therapy, 10.5 hours of physical therapy and 8.5 hours of speech therapy. A third complaint resulted in a Settlement Agreement to place the student at the School a non public placement to be paid by the Respondent.<sup>6</sup>
4. The Student's April 8, 2008, provided 28.5 hours of specialized instruction, 1 hour of speech and language, 1.5 hours of occupational therapy, and 30 minutes of physical therapy weekly. The LRE page of his IEP states that the Student requires a "small structured environment using Applied Behavioral Analysis to accommodate disabilities."<sup>7</sup>
5. The Respondent agreed to place and pay for the cost of the Student's educational placement for the remainder of the school year of 2008-2009 at the Trellis School; however the parent returned the Student to his placement at following a dispute about transportation services that could not be resolved. The Petitioner requested the Student be retained during the school year 2008-2009 to keep in with the same special education teacher ("SET") at He had many problems with transitioning and the Mother believed staying with the same teacher would be good for the Student. The Petitioner had daily e-mails, notes and other communications with the SET. The Student was awarded compensatory education. An independent occupational therapist worked on the Student's handwriting skills, muscle tone and used a sensory room. The Student's current school provides sensory stimulation inconsistently. After receiving occupational therapy the Student can hold a pencil in the tripod mode. After the Student received speech and language therapy during the summer camp he was talking more, singing and using small phrases. While at school he was not talking much and had disruptive behavior. The Student receives occupational therapy through a horseback riding program where the horses are used to strengthen the Student's body and improve his muscle tone. After receiving the horseback riding he is more self-confident and is outgoing with peers at the playground. The Student has self-control problems, tantrums at home and is biting again, when he does not get his way. The Student received services from a dedicated aide because his behavior was disruptive to other students and as a result of a Settlement and HOD. The Petitioner

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<sup>4</sup> P# 3 June 1, 2009 Complaint

<sup>5</sup> P#14 IEP June 8, 2009

<sup>6</sup> P# 37-February 15, 2008, May 12, 2008-HOD, January 5, 2009 - Settlement Agreement, and Testimony of the Mother.

<sup>7</sup> P#19 April 8, 2008 - IEP the LRE page

raised concerns about the behavior problems to the school personnel and the Student was provided in June 2009 the services of a Behavior Specialist for 6 hours to assist during the summer break. The Student cannot read a pre-kindergarten book off the shelf at home, although there has been some improvement, and in math he can count to 30. The Petitioner wants to be more involved in the data provision and that an ABA program be provided the entire day for the Student. The Petitioner visited a couple of schools and believes the Ivymount School can provide the appropriate educational program with the proper ABA methodology needed for the Student in a year round program.<sup>8</sup>

6. A developmental neuropsychological evaluation was conducted on the Student it indicates; his profile is consistent with Attention Deficit Disorder (“ADD”) he has communication and behavior disorders, and has problems understanding social cues. The Student has core language difficulties and tantrums. He shows the ability to learn at an age appropriate level when in a safe and comfortable environment. The evaluator suggests Student requires a full year programming where his behavior is able to be monitored and modified throughout the day, and indicates that as an Autistic Student he learns through actions and requires reinforcement. According to the psychologist the standard practice in the field of Autism is to follow an ABA teaching specific skills and most research indicates the method has proven effective with Autistic students who are also struggling with behavior problems. The common practice is that individual assessments are reviewed the parents input is collected and then a program is designed for the individual student. With the ABA method all service providers of the Student are trained in ABA strategies. The Student has a good relationship with his SET however he is not generalizing his skills throughout his day. The Student would not be acting out and would be able to generalize the skills learned across situation if ABA strategies had been used; he acts out because he cannot communicate effectively. The Student’s standard scores place him at the 8 percentile; there is a gap between his actual age and his functional level. It is the Psychologist opinion that the least restrictive environment for the Student is best served without contact to the general education population, in a specialized class with a low student-teacher ratio for children with social communication disorders and developmental delays. If the Student is to have contact with the general education students it must happen with the assistance of a dedicated aide. The lack of generalizing is a common problem with autistic students.<sup>9</sup>
7. The Student is getting therapeutic horseback riding lessons—the lessons helps the Student engage underdeveloped muscles, improves balance, equilibrium, gross motor skills and his stamina. While horse riding the Student is required to process a variety of sensory input, visual/auditory skills and sensory integration is required. There has been an improvement in the Student’s attention span and focus. The Student started taking class in September 2008 once a week and has shown substantial improvement in his confidence, he retains better what he has learned, his motor skills have significantly improved, he now can hold the reins properly and can maneuver the horse better. His language skills have also improved because he talks to the horse, he has to speak with staff and look into their eyes as he speaks. The horseback riding lessons help with the school environment because as his self-esteem has improved he is more willing to learn, he knows how to overcome obstacles, and it has improved his penmanship. The trainer uses the ABA style of transmitting information to the Student by using short direction and providing instruction in a natural manner, neither she nor her assistants have had ABA training.<sup>10</sup>

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<sup>8</sup> Testimony of the Mother, P#23- August 27, 2008 and February 17, 2009 Notes from the SET, P#37- HOD, Settlement Agreement January 2009, May and February 2008.

<sup>9</sup> P#5 Developmental neuropsychological evaluation and testimony of the Developmental Neuropsychologist-Dr. Atmore.

<sup>10</sup> Testimony of the Therapeutic Riding Instructor- Ms. Beveridge.

8. Applied Behavior Analysis (“ABA”) is a set of principles, philosophies and procedures based on scientific research which has proven to work with special education students, with empirical data of success. The process to follow with Autistic students is to use a “discreet trial teaching” method-which looks at what happen before a triggering behavior and consequences. A skill is introduced to the Student and the data is recorded for each response through the day. The SET should receive no less than 2 weeks of training on ABA methodology to adequately decide the targets, how to provide reinforcement and assess. An instructional aide does not require the same level of training as the SET. During a classroom observation of the Student on May 8, 2009, there was not a clean identified working area or instructional area and there was no schedule for the Student. There are safety concerns in the classroom because there are sharp objects like pencils left out in the open and the Student can be aggressive sometimes. While at the playground the Student was physically aggressive towards other students. When the other students were in naptime; the Student was with the SET and she was using the discreet trial teaching method. The Student was inconsistent counting the number six, required prompting and had difficulty demonstrating the skill. She observed the teacher try to establish 8 minutes interval between activities and the Student received a treat after the completion of the task. The class had a token system in place and when the teacher could not find the Student’s token board she use another student’s. When the Student was incorrect he received full prompting, but there was no activity to allow the Student to demonstrate the action. A Student who has been receiving instruction with an ABA methodology would not be exhibiting the problems with transition from activity or person as this Student. The only data registering the Student’s responses available is from May, there should be data for every day in each class, where behavior program was followed and shows all the goals worked on and consultations notes should be available for every contact with the Student and include what was discussed, what requires attention and when to follow-up. While the Student appears to be stable, there is no data to demonstrate that the criteria was met and to determine accuracy. During March 2009 the Student was having difficulties with transitions and he should have been getting reinforcement, however, there is no data available, no ABC data sheet. There should have been strategies put in place sooner. The Student requires ABA practice put in place throughout the day and staff trained in ABA, and a placement that has a carryover that trains the parent so she can help control the behavior across settings. It is common for students with autism to have difficulties in transition. Having a behavior analyst once every two weeks may be enough. <sup>11</sup>
9. The Speech pathologist indicates the Student is behind his chronological age, he has significant delays and testing the Student was difficult because when a toy was removed he had a tantrum and the testing could not be continued. The Student does not need the picture exchange method but does require visual aids. The Student has difficulty generalizing skills and transferring knowledge from one place to another. The Student has a low level of abilities and requires in-home and in the classroom setting attention. The Student’s daily routine should be in a highly structured and not in a pullout setting. She did not review any of the DC evaluations to reach her to conclusions. <sup>12</sup>
10. The Student did not receive occupational therapy services for a while and when he returned he was having more tantrums in between tasks. The Student could not wait his turn and would use his body to shove others and required more assistance using his writing tools. The Student has improved his ability to transition, requires fewer cues to sustain attention and there is improvement in his grasp. The Student can self regulate, tolerates transition and he can wait for his turn when interacting with

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<sup>11</sup> P#4 Notes and testimony of Ms. Cox - Board Certified Behavior Analyst, DCPS 12 -Consultation notes and P-23 SET notes.

<sup>12</sup> P#6-Speech and Language Evaluation and testimony of the speech and language pathologist-Ms. Bateman.  
HOD

other students, his motor planning is better he can navigate his body and space more accurately. His core strengths and balance improve and his sensory processing has improved. Sensory processing disorder is usually present in students within the autism spectrum. The occupational therapy goals in the Student's current IEP are sufficient, she recommended many of them.<sup>13</sup>

11. An MDT reviewed the Student's occupational therapy evaluations; upon request from the Petitioner; the occupational therapy goals, developed by an independent occupational therapist were included in the Student's IEP. The Student is receiving extended school year services and will be receiving services for 4 weeks during 4 hours of the day. The Student will receive six additional hours of services from a behavior specialist for services to be provided in collaboration with the Petitioner. The SEC did various observations of the Student; he is now engaging in activities with others, before the Student was more self-centered and could not focus. When two new students were placed in same classroom as the Student, his behavior became a problem and a dedicated aide was assigned to the Student. The Student is now able to identify emotions and activities; he can read words and speak two words phrases without prompting. The Student gets in line, walks properly in the halls and during transitions he does not throw tantrums when his SET is not available. Some of the parent's recommendations have been put into the Student's IEP and programming. The paraprofessionals are trained in ABA by the teachers. During school year 2009-2010 there will be a fulltime speech and language therapist at the school and there will be BCBA approximately once a week and one in each class. The Student's next teacher will be \_\_\_\_\_ in the primary grades and her classroom has approximately seven students with two aides assigned and the dedicated aide for the Student. The SEC stated that the Respondent can provide additional support to work with the Student including in-house training on ABA and protocols.<sup>14</sup>
12. The physical therapist has been working with the Student since September 2008, the goals she has addressed centered on strength and coordination. She used different strategies to achieve a response from the Student, at times it was a token board, some days he was cooperative and no specific strategy was required. She has had no training in ABA. At the beginning the SET provided a lot of assistance working with Student; however as time advance it became less necessary, because his transition improved. The Student has progressed toward his goals he can throw the ball higher, when he throws a kick his direction is good, he has better strengthen in his legs and can maneuver more obstacles in his path. The Student has demonstrated the ability to walk; he can go up stairs independently and uses the handrails. The Student has mastered his organization, he can move his chair, pickup objects from floor, and the Student's gross motor skills also improved, he has mastered most of his physical therapy goals.<sup>15</sup>
13. The Student fits the diagnostic criteria for autism under DSM-IV.<sup>16</sup> Upon review of the Student's assessments and observations of the Student, and without formally evaluating the Student the

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<sup>13</sup>P#4 June 8, 2009 IEP , P#29 occupational therapist notes and testimony - Ms. Shiraz

<sup>14</sup> DCPS # 11- Student observation notes and testimony of the special education coordinator-Ms. Teel.

<sup>15</sup> DCPS# 8- Physical Therapist notes and testimony -Ms. Zanardi.

<sup>16</sup> Testimony of the Developmental Pediatrician-Dr. Shapiro- DSM-IV Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition- Diagnostic criteria for 299.00 Autistic Disorder A. A total of six (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3): (1) qualitative impairment in social interaction, as manifested by at least two of the following:

(a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction

Developmental Pediatrician identifies the Student as having the classic Autism. He states that ABA is considered an important component of treatment of children with autism. He has observed the SET implementing discrete trials and other practices used in ABA. There are also other methods such as pivotal response training that while ABA can be artificial; these other techniques are more child-centered and natural. He opined that the standard of treatment was moving toward a more comprehensive approach and not all students respond to treatment even to ABA. The Student has a difficult profile to manage he is one of the most challenging in the DCPS. Transition is a problem for students with Autism; they tend to have an obsessive tendency. The Student has problems with transition, in particular with his SET, a set of strategies were designed for the Student and he has improved substantially. The standard of care for children with autism requires 25 hours per week. The Doctor disagrees that the Student requires a more structured environment as recommended by two independent evaluators. It is his contention that the evaluators never observed the setting or the program, could not provide an informed decision. He has observed the SET on more than ten occasions, and she provides intensive attention to the Student and uses a variety of techniques to get him to respond. The Ivymouth School is known to provide better than average care including ABA and you pay extra for home based services, there is no program in the Country with a home based component as an integral component. The Student is getting good individualized care, he may require more and after review of the Student's file, the Doctor is offering to provide the Petitioner his training services and additional assistance free of cost.<sup>17</sup>

14. The SET has worked with the Student since November 2006, has received training on autism for three weeks prior to starting the semester and then on the job training. She has received several 2 days training on ABA and ongoing training from the BCBA. The behavior analyst observes her class, provides reinforcement, is available for consultation and advises on the Assessment of Basic Language and Learning Skills ("ABLLS") a test that comprehensively assesses basic learner skills and helps design appropriate objectives, focusing on developing behavioral skills. The BCBA was available every week for half a day. She uses ABA in a variety of ways to look at what is especially rewarding to the child, to encourage him to use language, it maybe verbal, pictures, drills with focus on the child's interests. There is collaboration between the different service providers of the Student and the SET; they discuss skills, materials, and often formulate goals together. The sensory room is used daily, group activities and literacy. The Student attends special classes by moving to another classroom for physical education, science, arts class with the same students that are in his special education class. The Student is gradually writing better, his speech has improved; he also calls people by their name now. The Student's aggression has decreased, while his cooperation and his social interaction have increased. To keep track of the Student she uses antecedent -behavior-consequence("ABC") charts and communicates almost daily with the Petitioner, via e-mails, text messages or calls. The Student has improved substantially on all the goals in his IEP. The Student now has a dedicated aide who accompanies him throughout the school day.<sup>18</sup>

15. The Speech Pathologist who has worked with the Student from the beginning of school year 2pp8-2009 uses ABA as needed by modeling, prompting, and reinforcements. She has used the sensory

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(b) failure to develop peer relationships appropriate to developmental level

(c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)

(d) lack of social or emotional reciprocity and

<sup>17</sup> Testimony of the Developmental Pediatrician-Dr. Shapiro.

<sup>18</sup> Testimony of the SET-Ms. Ewing, DCPS#1 DCPS #13 ABLLS

room with the Student, coordinates with the SET and talked about the Student every time when she provides services. The Student has shown progress he does not require as much prompting, he is more spontaneous, and his play skills are better. She uses some aspects of level 3, 4, and 5 of PEC keeps track of the progress in notes. At the beginning the Student was having difficulty with transitions from activities, now his meltdowns have decreased and he has started using verbal cues. <sup>19</sup>

16. The ABA is a set of principles focused on behavior and the function of behavior, and includes strategies like prompting, reinforcement contingent on positive behavior, task analysis training, and fluency training. The discreet trail technique is a learning strategy and along with the pivotal response approach is part of ABA. The progress a student has with ABA depends on the student. ABA takes away the subjectivity of whether the student is learning and provides information on whether the student can or cannot do the task. The Student's SET has been coached on ABA the last three years once a week for half a day. She has provided the SET strategies and has seen the SET use these with students. The BCBA take notes, not all the notes are in the response and do not reflect everything that was discuss with the SET. The SET is fantastic using ABA, she keeps up to date she goes to workshops outside of school system and she stays current. The Student has had transition problems since entering the school and various techniques used with the Student; an example is that the Student likes to read and to distract the behavior he is allowed a book to diffuse the behavior. The Student has a problem with transition which is common for students with autism and instructional approaches will need to be individualized and varied. The Student has a schedule that is broken down, it explains activities and simple terms, so as to allow the student an opportunity to know what to expect and have a clear understanding of the day and he uses it very well. The Student was using the picture exchange system last school year and it was faded out this school year because his language skills have increased. Another strategy use with the Student was to provide him general who, why, when questions. By the end of the school year the student was transitioning well within the class. The lack of generalization skills is a manifestation of autism, and that concern is being addressed through the Student's IEP. The Student has learned to appropriately ask for help, and his reading has improved greatly, he is now using and responding to verbal and written prompts, he is using language to get attention. There is not a written behavior intervention plan for the Student; because the strategies are incorporated in the approaches used. The Student started having a difficult time when two new students were placed in his classroom and his SET attention was divided, as a result the Student was assigned a dedicated aide. While the Student was still having behavior problems at the end of the school year the intensity diminish. The Student's language skills have improved significantly, he is now using carrier phrases like it "can you give me:" The Student social skills have improved significantly he is now taking turns, sharing there was constant positive reinforcement and now all he can actually share with other students. The Student's language and social skills component will benefit from interaction with the general education. <sup>20</sup>
17. According to evaluations and witnesses the Student requires "a more specialized program for children with autism in order to make adequate progress" and "intensive instruction in order to learn social appropriate interaction and communication." It is recommended that he be placed in a class with a low student-teacher ratio, intensive speech and language intervention, a reward system that is consistent at home and in school, and "full year" programming. The Petitioner's witnesses specifically recommended Ivymount School, which has an eleven month program. The independent

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<sup>19</sup> DCPS#10 and testimony of the DCPS Speech and Language Pathologist-Ms. Townsend

<sup>20</sup> Testimony of the BCBA -DCPS Consultant -Ms- Keegan

psychiatric evaluation conducted March 3, 2009 referred the Petitioner Dr. Shapiro's workshops for support on working with the Student.<sup>21</sup>

18. The Program in Maryland serves students with disabilities including Autism developmental delays, speech/language and other health impairments. The program serves students ages 4-21 in a non-graded program and Grades 2-9 in an Elementary/Secondary graded program. The Autism Program provides highly structured teaching environments using the Applied Behavior Analysis methodology. The program provides students one-to-one, two-to-one and small group instruction. Research-based instruction methods and treatments form the core of the Autism Program. Speech and language, occupational therapy, and related services are delivered in a consultative classroom model. Students ages 4-13 work on academic, applied academic and functional living skills in the classroom setting and throughout the school. The Autism program is located in one hall with 6 classroom spaces each class has 6-7 students. There is also a token system in place to assist with behavior management. The Autism Program is an eleven month program with a focus on increasing the Student's ability to function independently at school, at home and in the community. Every student has an individual program that includes reading and math, life skills, motivation, behavior, communication and career development. Data is recorded daily and reviewed weekly to see how the strategies are impacting the Student. The SETs do not collect data from the parent. Currently, there is not a space available for the Student, although there should be 1-3 openings during the summer period and the Student is next on the waiting list. All the teachers are certified in Special Education. Ivymount can provide the Student with the educational benefit. There are no general education students at the school and the cost is approximately per year.<sup>22</sup>

#### IV. CONCLUSIONS OF LAW

##### **FAPE Determination**

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."

##### **Burden of Proof**

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a FAPE.

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<sup>21</sup> P#5, March 10, 2009-Neuropsychological and P # 7, March 3, 2009 Psychiatric Evaluations and testimony of the Autism Program Director at the Private School

<sup>22</sup> Testimony of the Autism Program Director at the Private School.

## Individualized Education Program

The Petitioner claims the Student's IEP requires the Respondent to implement ABA methodology supervised by a Board Certified Behavior Analyst ("BCBA"), with a year-round program and that the Respondent's proposed instructional method did and will not meet the Student's educational needs.

The term "autism spectrum disorders (ASDs)" refers to a wide range of developmental disorders and includes five classifications. According to the National Institute of Mental Health, these disorders are usually first diagnosed in early childhood and range from a severe form, called autistic disorder, through pervasive development disorder not otherwise specified (PDD-NOS), to a much milder form, Asperger's syndrome. Each of these disorders has a specific set of characteristics used as criteria for diagnosis in the Diagnostic and Statistical Manual (DSM IV) of the American Psychiatric Association. It is important to understand that individuals can share common characteristics on the spectrum, yet ASD is unique to the individual and will be different for every person.<sup>23</sup>

Autism is a brain development disorder whose characteristic signs are impairments in social interaction and communication, as well as restricted and repetitive behavior, all exhibited before a child is three years old.<sup>24</sup>

A Board Certified Behavior Analyst ("BCBA") is a professional who has passed a standardized curriculum and tests indicating he or she has certain competencies in the field of Applied Behavior Analysis and is certified by the Behavior Analyst Certification Board. A BCBA must meet minimum education, training and coursework requirements and pass a national exam. A BCBA is the professional that oversees an ABA based program, including conducting a functional behavior assessment to determine the antecedents to the students behaviors, developing behavior intervention strategies for the student, and reviewing the discrete trial data to determine the student's progress and make changes to the programming as needed.<sup>25</sup>

In accordance with 20 U.S.C. § 1414 (d)(1)(A)(i)(II)(aa), (bb), Individualized Education Programs or IEP "means a written statement for each child with a disability that includes a statement of measurable annual goals, including academic and functional goals, designed to—

- aa. 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
- bb. Meet each of the child's other educational needs that results from the child's disability."

The purposes of the IDEIA is to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and to ensure that the rights of children with disabilities and parents of such children are protected..

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<sup>23</sup> See: Autism Center at [www.autismcenter.org/](http://www.autismcenter.org/)

<sup>24</sup> American Psychiatric Association. "Diagnostic criteria for 299.00 Autistic Disorder", *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (2000) and testimony of Dr. Shapiro.

<sup>25</sup> See Behavior Analyst Certification Board, available at [http://www.bacb.com/pages/bcba\\_stand.html](http://www.bacb.com/pages/bcba_stand.html)). Testimony of BCBA, and Dr. Shapiro.

The Petitioner argues that the term “ABA” or “Applied Behavior Analysis” do not appear in the Student IEPs, however, that they do make repeated references to ABLLS, which is an ABA based assessment tool. There is evidence that the DCPS is considered an “ABA jurisdiction”.<sup>26</sup>

The Petitioner further argues that Studies show that ABA, provided intensively and consistently in the early years and not the eclectic approach, produces the best outcomes for children with autism. The Commission on Behavioral and Social Sciences and Education (CBASSE) in (2001), recommended, “educational services should include a minimum of 25 hours a week, 12 months a year, in which the child is engaged in systematically planned, developmentally appropriate educational activity aimed toward identified objectives.” The Petitioner affirms the report states that, “Appropriate educational objectives for children with autistic spectrum disorders should be observable, measurable behaviors and skills. These objectives should be able to be accomplished within 1 year and expected to affect a child’s participation in education, the community, and family life.”<sup>27</sup>

In accordance with CBASSE the appropriate goals for educational services for children with autistic spectrum disorders are: personal independence, social and communication skills. These objectives entail progress in social and cognitive abilities, verbal and nonverbal communication skills, and adaptive skills; reduction of behavioral difficulties; and generalization of abilities across multiple environments. Each child must receive sufficient individualized attention on a daily basis so that adequate implementation of objectives, annual goals can be carried out effectively. The priorities of focus include functional spontaneous communication, social instruction delivered throughout the day in various settings, cognitive development and play skills, and proactive approaches to behavior problems.<sup>28</sup>

The Student’s previous IEP dated April 8, 2008, provided 28.5 hours of specialized instruction, 1 hour of speech and language, 1.5 hours of occupational therapy, and 30 minutes of physical therapy weekly. The LRE page of his IEP indicates the Student requires a “small structured environment using Applied Behavioral Analysis to accommodate disabilities. During the existence of that IEP the SET and other credibly witnesses testified that some ABA methods were used. Furthermore, the Respondent agreed to place and pay for the cost of the Student’s educational placement for the remainder of the school year of 2008-2009 at the Trellis School. The Student attended one day and the Petitioner chose to return him to his placement at Burroughs following a dispute about transportation services that could not be resolved. Moreover in June 2009 another IEP is drafted and there is no specific methodology included, or evidence that the methodology must absolutely be included in an IEP.<sup>29</sup>

Consistent with §§ 1412(a)(4), 1414(d) of the IDEA, once children are identified, a “team” including the child’s parents and select teachers, as well as a representative of the local educational agency with knowledge about the school’s resources and curriculum, develops an individualized education program for the child. The parent has an obligation to participate in the process that will form a plan and program designed to meet the unique needs for her child. However, because the development of the IEP is a multi-person responsibility, the parent does not have the last word. When the parent believes the IEP is inappropriate she must demonstrate what the insufficiencies are.

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<sup>26</sup> Reinforcement Unlimited. What is ABLLS-R?, available at <http://www.behavior-consultant.com/whatablls.htm> Petitioner’s Closing Argument filed July 2009 page 2, Hearing Officer Exhibit 1- Teach DC Autism Teacher Advertisement.

<sup>27</sup> Commission on Behavioral and Social Sciences and Education (CBASSE) -Educating Children with Autism (2001) available at [http://www.nap.edu/record\\_id=10017](http://www.nap.edu/record_id=10017), Id. at 220 and at 218.

<sup>28</sup> Id. page 220

<sup>29</sup> P#19 April 8, 2008 - IEP the LRE page and testimony of the Petitioner.

It is the contention of the Petitioner that only ABA is the appropriate methodology to use with the Student. The testimony of multiple expert witnesses provided more than sufficient evidence about the ABA methodology and its effectiveness. There is no dispute that ABA is a research-based approach that can be effective for students with autism.

The Hanover case cited by the Petitioner as supporting the right to an ABA program, is distinguishable from the current Complaint in the Hanover case the Court accepted that "the accommodations section of JP's IEP includes "direct one-on-one instruction to include opportunities for the discrete trials where appropriate." It goes on to state that JP will have a "[t]rained instructional assistant to support J[P]' programs. Training will entail methods such as repetition, data collection, step by step methods that is [sic] proven to work with children with autism. HCPS will arrange for the aide to receive training from a Certified Behavior Analyst from a program such as the Faison School or a comparable program. . . ." (*Id.*) Clarifications attached to the IEP and were part of the settlement agreement that became part of the 2004 IEP. In the present case the Petitioner acknowledged that the Student's IEP does not require ABA and there is not an agreement for specific ABA practices to be put in place.<sup>30</sup> In the present case the settlement agreement and HOD between the same parties here, provided the Student with services and a private placement, but none required a specific methodology to be the only strategies used with this Student.

The *Rowley* decision established that, as long as a school district provides an appropriate education, methodology is left to the district's discretion. (*Rowley*, 458 U.S. at p. 208.)

While the Fourth Circuit has noted that although a school district is not required to provide the best possible education to a child with a disability, a FAPE requires more than mere minimal or trivial educational benefit. It also has stated that a hearing officer cannot reject a methodology adopted by a school district because he believes that a different methodology would be better for the child. Once it has been determined that the FAPE requirement of the Act has been met, questions of methodology are left to the discretion of professional educators.<sup>31</sup>

The Ninth Circuit recently considered the argument that the intensive ABA is the best or the only way to treat an autistic student, and that without it a school district has denied the student a FAPE. The Ninth Circuit affirmed a decision in which the ALJ heard extensive evidence on the relative merits of ABA and eclectic programs, rejected the argument that intensive ABA training was necessary to provide the student in that case a FAPE, and ruled that the school district's eclectic program was reasonably calculated to allow the child to obtain meaningful educational benefit. <sup>32</sup>

Furthermore the IDEIA does not mandate that a district use a particular methodology, especially for autistic students. Courts have consistently rejected the proposition that an ABA-only program is the only effective method of instruction for autistic students. Courts have determined that most important issues are whether the proposed instructional method meets the student's needs and whether the student may make adequate educational progress. In *Deal, supra*, the court noted that the scientific evidence does not support the contention that there is only one correct way to educate an autistic child.<sup>33</sup>

The Respondent's educational program incorporates ABA, DTT, Pivotal Response Training (PRT), and Picture Exchange Communication System (PECS). All of these programs except PECS were among

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<sup>30</sup> In *J.P. v County School Bd. of Hanover County, Virginia*, 447, F. Supp 2d 553 (2006)

<sup>31</sup> *County Sch Bd v. Z.P.*, 399 F.3d 298, 42 IDELR 229 (Fourth Cir 2005).

<sup>32</sup> *Joshua A. v. Rocklin Unified School District*, 2009 LEXIS 5795, \*4-5 (9<sup>th</sup> Cir. March 19, 2009)

<sup>33</sup> See: *Deal v. Hamilton Count)/Dept. of Educ.* (E.D.Tenn. 2006) 2006 U.S. Dist. LEXIS 27570, pp. 51-57 [summary of recent cases concerning purported superiority of an ABA-only program for autistic children].)

the 10 comprehensive model programs selected by the NRC in its book, "Educating Children with Autism." "The Committee recommends that the federal agencies involved in autism initiatives—should establish a joint task force to look longitudinal and other intervention studies that assess the relative effectiveness of treatments and that investigate the effectiveness of different educational and treatment models for children, with individual differences."<sup>34</sup>

The evidence was that the Respondent utilizes the strengths of the Student, including visual learning, visual cues and scheduling, to develop other related skills that are generally more challenging. The program emphasizes a variety of communication skill and socialization all aimed at helping the Student "generalize" skills that are encourage in his educational environment. The Student's program has ABA elements. The SET, testified that she uses the discrete trial method and applies ABA principles to her instruction and general interactions with the Student. Other witnesses testified that they had observed the SET implement ABA in the classroom as a central component in her classroom.

The Respondent is providing ABA-based instruction and the Student is progressing. There is a speculation by the Petitioner that the Student would have made more progress with more intensive ABA services, however, the obligation of the Respondent is to provide educational benefit, which it has.<sup>35</sup> Currently, in addition to 24.5 hours of specialized instruction, 90 minutes of occupational therapy, 60 minutes of speech language pathology, 30 minutes of adaptive physical education, and 30 minutes of physical therapy weekly, which surpasses the 25 hours of services suggested by the Petitioner. The Student also receives extended school year services outside of the general education setting. Additional services from a behavioral specialist and from a dedicated aide have been added.

The evidence was that when the Student started at \_\_\_\_\_ he was minimally verbal did not interact with others during play, had tantrums during transitions, had poor motor planning, and was not successful with toilet training,. The facts are that the Student can now follow two-step commands without cues, understand pronouns, identify colors, make inferences, make spontaneous comments, use 3-4 word combinations, initiate eye contact, share, and engage in imaginative play. The credible testimony also was that the Student now reads more than 100 sight words and is starting to blend sounds, has improved his rote and meaningful counting abilities, calls people by name, uses 2-4 word phrases, can follow simple directions, can identify shapes and body parts, can put on his coat, can cut with a knife, can use the toilet, and can take turns with classmates. The Student has been able to show his abilities and skills, in an unfamiliar setting with an unfamiliar person, interacting with the examiner and initiating eye contact.<sup>36</sup>

The Respondent's program was tailored to this Student's needs and based upon the Respondent's belief that the Student would make meaningful benefit from the program. The Student annual goals proposed for the 2007-2008 and 2008-2009 school years were appropriate, as they were designed to meet his core areas of deficit and educational need. Furthermore, the Student now has a dedicated aide to assist him. The annual goals were designed to meet all of the Student's areas of need that resulted from his disability, as they were designed to address speech, conversational skills, expressive language, receptive language, social skills, social interaction, safety skills, attending skills, school readiness, and academics. Furthermore, the evidence was also that different ABA strategies were used with the Student, albeit not the amount desired by the Petitioner.

The Rowley Court has determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEIA does require school districts to provide special education students with the best education available or to provide instruction or services that maximize a

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<sup>34</sup> (CBASSE) - *Id.* at 220 and at 218.

<sup>35</sup> Testimony of the various witnesses and the evaluations.

<sup>36</sup> P#12 Student's 2009 educational evaluation, P# 25, P# 26 and Testimony of the SET and Evaluators

student's abilities. Indeed, the *Rowley* opinion sets forth the well-established principle that, as long as a district offers an appropriate educational program, the choice regarding the methodology used to implement the IEP is left to the district's discretion.<sup>37</sup>

The Hearing Officer determines the Student's IEPs were "reasonably calculated to enable the Student to receive educational benefits. The Petitioner had the burden to prove that the challenged IEPs did not provide the Student with a FAPE, she did not.

## Placement

The Petitioner claims the Respondent failed to provide an appropriate educational placement for the Student during the 2007-2008 and 2008-2009.

The IDEIA regulations require the determination of the educational placement of a child with a disability must be based on a child's IEP.<sup>38</sup>

Pursuant to 5 D.C.M.R. § 3013.1(e), Placement, "[t]he LEA shall ensure that the educational placement decision for a child with a disability is ...based on the child's IEP."

While pursuant to 34 C.F.R. § 300.327, Educational Placements, "[e]ach public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the education placement of their child."

Once developed, the IEP is then implemented through appropriate placement in an educational setting suited to the student's needs. See *Roark ex rel. Roark v. District of Columbia*, 460 F Supp. 2d 32, 35 (D.D.C. 2006).

The Respondent did exactly what the IDEIA required it to do. The Respondent convened MDT meetings in March and June 2009, and the parent participated in the development of an appropriate IEP focused on assisting the Student function independently at school, at home and in the community. There is no indication on the Student's 2009 IEP that the Student requires a specific ABA or any other strategy to be followed. The Student was properly placed in a specialized class with a low student-teacher ratio for children with social communication disorders and developmental delays. The evidence is the Respondent is providing the services prescribed in the Student's IEP and supplemental services.

Furthermore, placement for the 2008-2009 was an issue raised and settled, resulting in the Student getting a private educational placement for school year 2008-2009, which was later rebuffed by the Petitioner. The evidence including the testimony of the Petitioner was that the Student was benefiting from services received through his SET. The benefit was sufficient enough for the Petitioner to request the Student be reassigned to the same SET during the 2008-2009 school year; chose to disregard a private placement at the Trellis school and return the Student to Ivymount School, which has been requested by the Petitioner only provides an eleven month program, there is not a space available for the Student and no interaction with general education students.<sup>39</sup>

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<sup>37</sup>*Rowley*, 458 U.S. at 198-200, 208.

<sup>38</sup> U.S.C 1412(a)(5). 34 C.F.R. § 300.116. Testimony of the Mother.

<sup>39</sup> P# 37 Settlement Agreement between the here Petitioner and the Respondent signed January 5, 2009, and testimony from the Petitioner and the private school representative.

## Least Restrictive Environment

The IDEIA seeks to educate disabled children with non-disabled children "to the maximum extent possible." § 1412(a)(5)(A). "Special classes, separate schooling, or other removal . . . occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."<sup>40</sup>

At the Student has the opportunity to interact with nondisabled classmates in a supervised and controlled environment. The testimony was that the Student interaction with peers and behaviors has improved, the interaction is beneficial to the Student because his nondisabled peers model age-appropriate social, language, and academic skills.

The District of Columbia Code imposes a strict order of priority for special-education placement: "(1) DCPS schools or District of Columbia public charter schools; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia."<sup>41</sup>

The evidence is that a DCPS school, can provide a FAPE to the Student and it is the first priority placement. A local government meets its federal and local statutory obligations to implement a student's IEP -- and thus provide a FAPE -- where public placement is "reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 207.

## FAPE determination

The United States Supreme Court has established a two-part test to determine whether a school has fulfilled its duty to provide a FAPE was established: (1) has the school district complied with the procedures provided by the IDEA; and (2) is the student's IEP reasonably calculated to provide educational benefits. If these requirements are met, the Court explained, then defendants have "complied with the obligations imposed by Congress and the courts can require no more."<sup>42</sup>

There was no evidence that the Respondent violated its procedural obligation under the IDEIA. The IEP's created in the school years 2007-2009 for the Student were calculated to provide an educational benefit to the Student.

While the may be the best program working with Autistic students, the IDEIA calls for a program that is focused on allowing the Student to attain educational benefit, the Respondent has met its obligation to provide a FAPE.

## V. SUMMARY OF DECISION

The Petitioner parent of the Student with autism spectrum disorder believes that the Student requires an in-home ABA program to obtain an educational benefit, but did not prove that the Respondent's placement of the child in an eclectic program with some ABA practices did not provide educational benefit. The Petitioner failed to demonstrate that the Student's disability and his IEP required

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<sup>40</sup> See: 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i) & (ii).

<sup>41</sup> See: D.C. Code 38-2561.02(c) (2007).

<sup>42</sup> *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982)

that ABA methodology be included in the Student's program in exclusion of other strategies. The Petitioner did not prove that the Respondent is obligated to follow a specific methodology, nor that the Student's educational placement is inappropriate. The Petitioner did not demonstrate the Student progress was due solely to the independent tutoring services. The testimony indicated that the Student made educational progress in the classroom in spite of his behavior and was benefiting from the interventions in place for him. The Petitioner failed to show that the Student had a unique need for an ABA program and that no other program could meet his needs.

The Student is in a full-time special education placement and is making progress in his class at The methodology to be used by the teacher is not a required part of the IEP. The Petitioner failed to show the Student or Petitioner were harmed. The Student is making progress; the educational placement is appropriate; and the Student has not been denied a FAPE.

The Respondent agreed during the hearing to provide in-home services to supplement the services the Student receives at school. There is an assistive technology assessment pending and it will determine what types of technology can assist him; at which time the MDT will discuss the assessment and the Respondent will provide the agreed upon technology.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the DCPS has not denied the Student a FAPE and issues the following:

#### **VI. ORDER**

**ORDERED**, the Complaint is **Dismissed**.

This order resolves all issues raised in the Petitioner's June 1, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

#### **NOTICE OF RIGHT TO APPEAL**

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)



**Wanda Iris Resto - Hearing Officer**

**Date: July 16, 2009**