

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

OSSE
Student Hearing Office
March 18, 2013

Parent, on behalf of)	Case Number: 2012-0835
STUDENT,¹)	
)	
Petitioner,)	
)	
v.)	
)	
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS,)	
)	
Respondent.)	Hearing Officer: Frances Raskin

HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals With Disabilities Education Act (“IDEA”), as amended in 2004, codified at 20 U.S.C. §§ 1400, *et seq.*; the District of Columbia Code, §§ 38-2561.01, *et seq.*; the federal regulations implementing IDEA, 34 C.F.R. §§ 300.1, *et seq.*; and the District of Columbia regulations at D.C. Mun. Reg. tit. 5-E §§ 3000, *et seq.*

II. BACKGROUND

Petitioner is the parent of an [REDACTED], young man (“Student”) with a disability. On December 21, 2012, Petitioner filed a due process complaint (“Complaint”) against Respondent, the District of Columbia Public Schools (“DCPS”), alleging violations of the Individuals with Disabilities Education Act (“IDEA”).

On December 21, 2012, the Student Hearing Office assigned this Hearing Officer to preside over this case. The same day, this Hearing Officer issued an order requiring the parties to inform her of the scheduling of the resolution meeting and the results of the meeting.

¹ Personal identification information is provided in Attachment A.

On January 9, 2013, Respondent filed a response (“Response”) to the Complaint.² Respondent filed its Response nine days after the deadline established by IDEA.³

The parties did not participate in a resolution meeting. Nor did the parties agree to start the forty-five day, due process hearing period prior to the end of the thirty-day resolution session. Thus, the resolution period ended on January 20, 2012.

On January 23, 2013, this Hearing Officer held a prehearing conference in which counsel for Petitioner and counsel for Respondent participated. During the prehearing conference, both counsel agreed that the forty-five day, due process hearing timeline began on January 20, 2013. This Hearing Officer informed counsel that the end of the forty-five-day timeline, i.e., the deadline for the hearing officer determination (“HOD”), was March 6, 2013.

During the prehearing conference, the parties agreed to schedule the due process hearing for February 27-28 and March 4-5, 2013. Counsel for Petitioner agreed to file a motion for a ten-day continuance of the due process hearing timeline to extend to March 16, 2013, the deadline for the issuance this Hearing Officer Determination (“HOD”).

During the prehearing conference, counsel for the respective parties informed this Hearing Officer that, with the exception of the continuance motion, neither party planned to file any motions. In response to this Hearing Officer’s suggestion, counsel agreed that the deadline for filing motions in this case would be February 7, 2013. This Hearing Officer informed counsel that motions filed after this date, with the exception of unanticipated continuance motions, would not be considered.

On January 23, 2013, this Hearing Officer issued a prehearing conference summary and order (“Prehearing Order”) memorializing the prehearing conference. In the Prehearing Order, this Hearing Officer reiterated that the parties were required to file all motions, including requests for continuances, on or before February 7, 2013. The Prehearing Order stated that this Hearing Officer would not consider any motions, other than unforeseen continuance motions, filed after this date.

² Counsel for Petitioner asserted during the prehearing conference that Respondent’s late filing of the Response did not prejudice Petitioner.

³ If the Local Education Agency (“LEA”) has not sent a prior written notice under 34 C.F.R. § 300.503 to the parent regarding the subject matter contained in the parent’s due process complaint, the LEA must, within 10 days of receiving the due process complaint, send to the parent a response that includes (i) an explanation of why the agency proposed or refused to take the action raised in the due process complaint; (ii) a description of other options that the IEP team considered and the reasons why those options were rejected; (iii) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (iv) a description of the other factors that are relevant to the agency’s proposed or refused action. 34 C.F.R. § 300.508(e).

On February 13, 2013, Petitioner filed three notices to appear. Petitioner sought to compel the testimony of a bus driver (“Driver 1”) who was assigned to transport the Student to school during the 2011-2012 school year and a second bus driver (“Driver 2”), who was assigned to transport the Student to school during the 2011-2012 school year. Petitioner also sought to compel the testimony of the bus attendant (“Attendant”) assigned to the Student’s school bus during the 2011-2012 and 2012-2013 school years. On February 16, 2013, the Chief Hearing Officer issued the three, signed notices to appear.

On February 20, 2013, the parties exchanged five-day disclosures in accordance with the deadline specified in the Prehearing Order. In her five-day disclosure letter, Petitioner indicated that she did not plan to present the testimony of Bus Driver 1.

On February 20, 2013, nearly two weeks after the deadline specified in the Prehearing Order, Respondent filed a Partial Motion to Dismiss (“Motion”).⁴ Respondent cited numerous facts in support of its assertion that this Hearing Officer should dismiss all of the claims certified for adjudication at the due process hearing. On February 22, 2013, Petitioner filed an opposition to the Motion.

On February 22, 2013, Petitioner filed a Motion for Sanctions (“Sanctions Motion”). In the Sanctions Motion, Petitioner asserted that Respondent made false statements in its motion to dismiss. Petitioner asserted that, by making these false statements in a motion, counsel for Respondent violated the District of Columbia Rules of Professional Conduct. Respondent did not file a response to Petitioner’s Sanctions Motion.

On February 25, 2013, two days before the due process hearing was scheduled to begin, the Office of State Superintendent of Education (“OSSE”) filed a motion to quash the notice to appear for Bus Driver II (“Motion to Quash”). On February 26, 2013, this Hearing Officer informed the parties that she would decide the Motion to Quash on February 28, 2013, at the outset of the second day of the due process hearing.

On the morning of February 27, 2013, this Hearing Officer issued a written order that denied Respondent’s Motion. This Hearing Officer issued a separate written order that denied Petitioner’s Sanctions Motion.

The due process hearing commenced on 10:00 a.m. on February 27, 2013, in room 2006. Present at the hearing were Petitioner and her counsel. Counsel for Respondent, and a local education agency (“LEA”) representative (“Representative 1”).

Petitioner requested an open hearing. Several observers, including the Chief Hearing Officer and three members of the press, attended the due process hearing.

⁴ Respondent filed its Motion thirteen days after the deadline for motions specified in the Prehearing Order. Respondent did not file a motion for leave to late file the motion or otherwise explain why it failed to file its Motion within the filing timeline.

At the outset of the due process hearing, Petitioner withdrew her claim that Respondent denied the Student a FAPE during the 2011-2012 and 2012-2013 school years by failing to provide him assistive technology, i.e., a laptop computer or iPad and related software to assist him with communication. This Hearing Officer granted Petitioner's request to dismiss this claim without prejudice.

Petitioner then withdrew her claim that Respondent denied the Student a FAPE during the 2011-2012 school year by failing to conduct an assistive technology assessment of the Student. Petitioner consented to this Hearing Officer dismissing this claim with prejudice.

This Hearing Officer then entered into evidence Petitioner's proposed exhibits,⁵ and Respondent's proposed exhibits.⁶ Petitioner testified and presented one witnesses on her behalf, an expert in pediatric medicine ("Pediatric Expert"). The due process hearing recessed at 5:00 p.m.

The due process hearing reconvened in room 2006 at 10:00 a.m. on February 28, 2013. Petitioner and OSSE presented argument on the Motion to Quash. This Hearing Officer orally granted the Motion to Quash on the grounds that the testimony of Bus Driver II would be duplicative of the testimony of the Attendant.

Petitioner presented four witnesses on her behalf, the Attendant, an expert in clinical psychology ("Psychology Expert"), an expert in occupational therapy ("Occupational Therapy Expert"), and an assistant director ("Assistant Director") of a network of nonpublic schools for students with autism. Petitioner then rested her case in chief. The due process hearing recessed at 4:15 p.m.

The due process hearing reconvened in room 2006 at 10:00 a.m. on March 4, 2013. Respondent presented its first witness, a DCPS Program Director ("Program Director"). Respondent sought to qualify this witness as an expert in special education programming and vision disabilities.

Petitioner objected to the qualification of the Program Director as an expert in vision disabilities on the grounds that she was not seeking compensatory education in the form of vision therapy or assistive technology. Petitioner then withdrew her request for compensatory education. Petitioner confirmed that this Hearing Officer should dismiss the compensatory education request with prejudice.

After Petitioner withdrew her request for compensatory education, Respondent opted not to present the testimony of the Program Director and the other six witnesses it had planned to present over the next two days of hearing. Instead, Respondent presented

⁵ This Hearing Officer admitted into evidence Petitioner's exhibits 1-54, inclusive.

⁶ This Hearing Officer admitted into evidence Respondent's exhibits 1-22, inclusive, and Respondent's exhibits 29-34 inclusive. Respondent did not disclose exhibits numbered 23 through 28.

the testimony of a single witness, a DCPS autism coordinator (“Autism Coordinator”). Respondent then rested its case.

Petitioner presented brief rebuttal testimony. Petitioner then rested her case. The due process hearing concluded at 11:45 a.m. on March 4, 2013.

Petitioner filed a written closing argument on March 5, 2013. Respondent did not present a closing argument. The record in this case closed at 11:59 p.m. on March 5, 2013.

III. ISSUES PRESENTED.

A. Whether Respondent denied the Student a free, appropriate, public education (“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 the present by failing to provide him 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.

Petitioner requests relief in the form of an order that would (1) require Respondent to place the Student in the nonpublic school (“Nonpublic School”) at public expense for the remainder of the 2012-2013 school year, (2) fund an independent developmental optometry assessment, and (3) hold a thirty-day review meeting at the nonpublic school to review the Student’s evaluations and review and revise his IEP.

For the reasons explained below, this Hearing Officer finds that Petitioner prevailed on issues B and C. Petitioner failed to present sufficient proof to prevail on issues A and E. The only relief to which Petitioner is entitled is an independent, developmental vision assessment of the Student.

IV. FINDINGS OF FACT

After consideration of the testimony presented and the documents admitted into evidence at the due process hearing, this Hearing Officer makes the following findings of fact:

1. The Student is an [REDACTED] eligible for special education services with autism spectrum disorder.⁷ He is in the sixth grade at a public middle school (“Middle School”).⁸ He is a pleasant young man who likes to succeed on academic tasks and is inclined to cooperate with adults.⁹

2. The Student exhibits behaviors typical of children with autism, including avoidance of sustained eye contact, rote verbal responses, rocking back and forth in his chair, making high-pitched sounds.¹⁰ He has trouble ceasing these repetitive behaviors.¹¹

3. The Student is largely nonverbal.¹² With the exception of expressing his basic needs, the Student lacks meaningful, communicative speech.¹³ Most of his communicative speech consists of one-word requests, such as “repeat” and “more.”¹⁴ The only complete sentences he is able to verbalize involve highly motivating needs, such as toileting.¹⁵ He is unable to complete any tasks that require him to verbally respond.¹⁶

4. At times, he repeatedly scripts movie scenes in English, Spanish, and Chinese.¹⁷ He engages in echolalia and repeats directions given by adults in a similar tone and with similar inflection.¹⁸ His communication deficits have impeded attempts to measure his cognitive abilities.¹⁹

⁷ Petitioner Exhibit 30 at 1 (June 13, 2012, Individualized Education Program (“IEP”).

⁸ Testimony of Petitioner.

⁹ Petitioner Exhibit 12 at 4 (November 15, 2010, Neuropsychological Evaluation); testimony of Petitioner.

¹⁰ Petitioner Exhibit 3 at 2 (January 26-27, 2009, Psychological Re-evaluation Report).

¹¹ Testimony of Psychology Expert.

¹² Testimony of Psychology Expert. He has globally impaired expressive and receptive language abilities. Petitioner Exhibit 3 at 2.

¹³ *Id.*

¹⁴ Petitioner Exhibit 3 at 2.

¹⁵ *Id.*

¹⁶ Petitioner Exhibit 2 at 3.

¹⁷ Petitioner Exhibit 22 at 3 (June 22, 2011, Comprehensive Occupational Therapy Evaluation).

¹⁸ *Id.*

¹⁹ Petitioner Exhibit 3 at 2.

5. The Student has significant weaknesses in executive functioning, i.e., planning and organization.²⁰ As a result, he struggles to sustain attention and inhibit his impulses.²¹ He has impaired working memory and weak clerical and conceptual organizational abilities.²²

6. The Student is able to attend to highly structured visual tasks with limited language comprehension demands.²³ He is a visual learner and performs best when information is presented in small, discrete chunks.²⁴ His attention deteriorates when he is presented with complex or multi-step verbal directions or asked to respond verbally.²⁵

7. The Student's memory for patterns is a relative strength.²⁶ He demonstrates an impressive rote memory for auditory information, as he can repeat entire scenes of movies hours after he had watched them.²⁷ He also has an extraordinary memory for music.²⁸ His significant language impairments prevent him from completing verbal memory tasks.²⁹

8. The Student's nonverbal and spatial reasoning are in the borderline range.³⁰ Within the nonverbal domain, he performs best on highly structured tasks with limited verbal directions, and when he receives clear and consistent feedback.³¹

9. The Student demonstrates significantly delayed adaptive functioning relative to his same-age peers, which is consistent with his diagnosis of autism.³² He struggles with a variety of activities related to social cognitive functioning.³³ He is capable of basic interaction with adults and engages in some reciprocal interactions.³⁴ He is responsive to praise and structure.³⁵

²⁰ Testimony of Psychologist; Petitioner Exhibit 12 at 2. Executive functioning refers to the mental processes associated with initiating, implementing, monitoring, and revising strategies and plans of action. Petitioner Exhibit 12 at 2.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 3-4.

²⁸ *Id.* at 4.

²⁹ *Id.*

³⁰ Petitioner Exhibit 12 at 2.

³¹ *Id.*

³² *Id.* at 4.

³³ *Id.*.

³⁴ *Id.*

³⁵ *Id.*

10. The Student has weaknesses in social cognition, social communication skills, and social motivation.³⁶ He struggles with core social interaction.³⁷ His eye contact is limited and he has difficulty interpreting and using nonverbal cues and gesturing in order to communicate.³⁸ His pragmatic language is impaired and he rarely engages in meaningful conversation.³⁹

11. The Student often lacks physical inhibition.⁴⁰ He constantly swings his legs, scripts lines from movies, hums, sings, and stands up.⁴¹ At times, he cannot be redirected to the task at hand.⁴² He does not appear aware of personal boundaries and does not appreciate personal space between himself and others.⁴³ He occasionally threatens others and uses profanity, although this may be part of a script.⁴⁴

12. He also exhibits significant weaknesses in flexibility.⁴⁵ He frequently engages in repetitive, ritualistic behavior.⁴⁶ At home, his possessions must be lined up and perfectly organized.⁴⁷ He becomes upset when the order is disturbed.⁴⁸ His eating habits are especially rigid.⁴⁹ These behaviors are considered typical of autistic students.⁵⁰

13. The Student has difficulty accepting changes to the routine in his classroom, becomes easily frustrated, has difficulty getting along with other children, and exhibits marked mood variations.⁵¹ He displays challenging behaviors when his teacher asks him to perform academically.⁵² His weaknesses in flexibility, his internal distractibility, and his comprehension deficits impede his ability to follow directions and attend to tasks.⁵³

14. He struggles with regulating his emotions, which is exacerbated by his inability to communicate effectively with others.⁵⁴ He is secretive, keeps things to himself,

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Petitioner Exhibit 12 at 3.

⁴⁶ Petitioner Exhibit 3 at 5.

⁴⁷ Petitioner Exhibit 12 at 3.

⁴⁸ Petitioner Exhibit 3 at 5.

⁴⁹ Petitioner Exhibit 12 at 3.

⁵⁰ Petitioner Exhibit 3 at 2.

⁵¹ Petitioner Exhibit 3 at 2.

⁵² *Id.*

⁵³ Petitioner Exhibit 12 at 3.

⁵⁴ Petitioner Exhibit 12 at 4.

has anxiety, and exhibits obsessive-compulsive behavior.⁵⁵ Occasionally, he is aggressive when frustrated.⁵⁶ At times, he behaves in an unreasonably fearful, frightened manner.⁵⁷

15. The Student's cognitive processing style renders him vulnerable to overload.⁵⁸ He appears confident in clearly defined and structured settings with limited distractions, prompting, and consistent reinforcement and praise.⁵⁹ He will not demonstrate the same level of facility in settings where he is not provided one-on-one support, clear task demands, rigid structure, and consistent feedback.⁶⁰

16. In general, he is at risk in any large, noisy, or stimulating group setting.⁶¹ He is susceptible to behavioral outbursts and nonfunctional repetitive behaviors when he experiences sensory overload.⁶² This is due to his limited ability to communicate his thoughts and feelings and his weak social problem-solving skills.⁶³

17. The Student struggles with gross motor coordination.⁶⁴ He has poor endurance, tires easily, and seems significantly weaker than his peers.⁶⁵ He has difficulty with skills such as hopping, jumping, skipping, and coordinated running.⁶⁶ He struggles with basic ball skills.⁶⁷ During throwing and catching exercises, he flaps his hands, grimaces, squints, and struggles to keep his body stationary.⁶⁸ He appears to not know how to move his body.⁶⁹ He has poor protective reactions when challenged.⁷⁰ In his physical education class, he lacks awareness during ball games and often does not see the ball.⁷¹

18. The Student's fine motor coordination skills are well below the average range in all areas.⁷² He performs below the first percentile of his same-age peers in fine motor precision, which is used for tasks such as filling in shapes, tracing through paths that

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Petitioner Exhibit 3 at 5.

⁵⁸ Petitioner Exhibit 12 at 5.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Petitioner Exhibit 22 at 3.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 5.

change direction, folding paper, and using scissors.⁷³ Similarly, he performs below the first percentile in fine motor integration and manual dexterity.⁷⁴

19. The Student has extreme difficulty with eye-hand coordination, such as dropping and catching a small ball with accuracy and control, dribbling a ball, catching with one or both hands, and throwing with control at a target.⁷⁵ He uses the side of his body to catch and stabilize the ball.⁷⁶ When throwing, he lacks directionality and force.⁷⁷ His poor depth perception makes him susceptible to being hit by a ball in his physical education class or during recess.⁷⁸

20. He initiates writing tasks with fair to poor posture.⁷⁹ Even with prompting, his posture decreases as his writing progresses.⁸⁰ He tends to lean his chest, chin, or head on the table, hold his legs wide to provide support, and push hard on the writing tool.⁸¹ He is able to write his name on paper but does so with poor alignment and letter closure.⁸² His handwriting is frequently sloppy or illegible.⁸³ He is hesitant to write sentences.⁸⁴ He has difficulty with drawing, coloring, cutting, and copying.⁸⁵

21. His overall visual-motor integration skills are in the very low range.⁸⁶ Difficulties in visual-motor integration could impact his performance on tasks related to reading, handwriting, and copying.⁸⁷ These difficulties also could impede further development of higher-level math skills.⁸⁸

22. He struggles with eye coordination, which contributes to motor development, reading skills, emotional security, and social skills.⁸⁹ He makes only fleeting eye contact.⁹⁰ He struggles to track an object across a field of vision and separate his head

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 6.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 6-7.

⁸² *Id.* at 7.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 8.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

and eye movements.⁹¹ He has difficulty bringing his eyes together and moving them apart, which is important for skills such as reading and copying from the board.⁹² He would benefit from visual supports.⁹³

23. The Student needs a developmental optometry assessment to ascertain the nature of his deficits in visual-motor integration, visual perception, visual processing, depth perception, and his fleeting eye contact, poor posture, oversensitivity to light, and difficulty separating his head and eye movement.⁹⁴ This assessment would examine how his eyes move together, his ability to track objects, his eye-hand coordination, the potential causes of his light sensitivity and other visual deficits.⁹⁵ The assessment may shed light on how to address these deficits through occupational therapy or other avenues.⁹⁶

24. The Student has notable sensory processing difficulties, which impede his ability to participate in and benefit from his school, classroom, and social environments.⁹⁷ He has deficits in auditory processing, visual processing, tactile processing,⁹⁸ and oral processing.⁹⁹ He is overly sensitive to light,¹⁰⁰ and complains of severe pain in his ears.¹⁰¹

25. The Student has difficulties with behavioral and emotional responses to sensory input.¹⁰² These sensory processing weaknesses are one of many causes of his distractibility.¹⁰³ Sensory processing issues and distractibility limit his ability to access academic instruction and benefit from the instruction.¹⁰⁴

26. Optimal auditory processing allows for the development of listening skills, language and speech skills, emotional security, social skills, and motor coordination.¹⁰⁵ The Student has difficulty with hypersensitivity to sounds and being distracted by sounds that

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Testimony of Occupational Therapy Expert.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Petitioner Exhibit 22 at 9.

⁹⁸ *Id.* Tactile processing refers to the sensations that the body receives through skin receptors. *Id.* at 11.

⁹⁹ *Id.*

¹⁰⁰ Testimony of Petitioner, Occupational Therapy Expert. Petitioner Exhibit 22 at 10.

¹⁰¹ Testimony of Petitioner; Petitioner Exhibit 3 at 2.

¹⁰² *Id.*

¹⁰³ Testimony of Psychology Expert.

¹⁰⁴ *Id.*

¹⁰⁵ Petitioner Exhibit 22 at 10.

others generally do not notice.¹⁰⁶ He is often distracted and has trouble functioning or completing tasks in the presence of background noise.¹⁰⁷

27. The Student holds his hands over his ears to protect himself from sound.¹⁰⁸ At times, he does not appear to hear when others speak.¹⁰⁹ He misses directions more than other students and may seem oblivious to the environment or activity.¹¹⁰ He can become distressed in large gatherings, assemblies, or group activities where there is a lot of talking.¹¹¹ He can become distressed by something as simple as a fan.¹¹² He does respond well to whispering or firm verbal cues of “shhhh” to assist him in gaining focus on tasks.¹¹³

28. The Student also has difficulty processing vestibular sensations¹¹⁴ and proprioceptive sensations.¹¹⁵ Together, these two systems influence muscle tone, balance, body awareness, motor control, motor planning, coordination, emotional security, academic learning, and social skills.¹¹⁶ The Student struggles to use, interpret, and respond appropriately to visual, vestibular, and proprioceptive input.¹¹⁷ He also has difficulty modulating his behavior and emotional responses¹¹⁸

29. The Student is often unaware of the location of his body in the space around him or his personal space versus the personal space of others.¹¹⁹ He trips and falls frequently, including at school during recess.¹²⁰ He occasionally seeks movement that interferes with learning or classroom routines, moves around more than other students, and finds reasons to approach the teacher repeatedly.¹²¹

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Testimony of Occupational Therapy Expert.

¹¹³ Petitioner Exhibit 22 at 10.

¹¹⁴ Vestibular sensations are received through the inner ear and provide information about movement, balance, and gravity. Testimony of Occupational Therapy Expert; Petitioner Exhibit 22 at 10.

¹¹⁵ Proprioceptive sensations are received through muscle and joint receptors and provide information about body position, force, direction, and movement of body parts. Testimony of Occupational Therapy Expert; Petitioner Exhibit 22 at 10-11.

¹¹⁶ Testimony of Occupational Therapy Expert; Petitioner Exhibit 22 at 11.

¹¹⁷ Petitioner Exhibit 22 at 12.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 11.

¹²⁰ *Id.*

¹²¹ *Id.*

30. The Student's tactile processing deficits impede his visual processing, motor planning, body awareness, emotional security, academic learning, and social skills.¹²² Tactile processing provides information about size, texture, temperature, pressure, vibration, movement, and pain.¹²³ The Student avoids getting his hands messy during activities such as painting.¹²⁴ He is easily upset by minor injuries and is fidgety and disruptive when standing in line with peers.¹²⁵ He occasionally comes too close when talking and touches people to the point of irritating them.¹²⁶ He is a picky eater and will eat only a limited range of food types, textures, and temperatures.¹²⁷

31. The Student would respond well to a sensory diet that is implemented daily.¹²⁸ The diet would be designed to minimize his sensory concerns, deficits, and defensiveness to make him more available for learning.¹²⁹ As part of the sensory diet, the Student would have access to adaptive seating, such as a ball chair that produces movement.¹³⁰ He also would receive movement breaks in which he would collect work from other students or engage in other positive activities that require movement so that he can move as much as he needs to then sit and learn.¹³¹ This would help decrease destructive movement that prevents him from focusing on his classroom assignments.¹³² The sensory diet also would help the Student remain calm, improve his coordination, and foster social skill awareness.¹³³

32. The Student requires multiple interventions for his sensory processing issues.¹³⁴ These interventions include small class sizes to reduce auditory stimulation, sound dampening material on the classroom walls, and providing the Student physical and tactile items, such as knobby seat pads, to reduce his reaction to classroom stimuli.¹³⁵

33. ABA is a method of behavior modification based on consistent expectations and consequences.¹³⁶ It has been recognized as one of the most effect treatments for students with autism.¹³⁷ ABA therapy is a behavioral modification technique designed to

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Testimony of Occupational Therapy Expert.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Petitioner Exhibit 22 at 4.

¹³⁴ Testimony of Psychology Expert.

¹³⁵ Testimony of Psychology Expert.

¹³⁶ Testimony of Psychology Expert.

¹³⁷ Testimony of Autism Coordinator.

increase functional behavior and decrease inappropriate behaviors.¹³⁸ Licensed ABA therapists continually monitor student progress on maladaptive, adaptive, and functional behavior such as communication and life skills.¹³⁹

34. ABA therapy will produce desired behaviors only if the behavior management plan is specific and properly implemented by therapists trained in ABA methodology.¹⁴⁰ The role of the ABA therapist is to develop clearly defined behavioral expectations and consequences.¹⁴¹ The ABA therapist tracks a student's behaviors throughout the school day, in small increments, to identify the antecedents of those behaviors.¹⁴² Once the ABA therapist understands why a student's behaviors occur, the therapist can track these behaviors and implement specific consequences.¹⁴³ The goal is to replace inappropriate behaviors with functional behaviors so students can function outside of school, function appropriately, and develop social skills.¹⁴⁴

35. The Student received ABA therapy outside the school setting several years ago.¹⁴⁵ The ABA therapy helped the Student increase his functional communication.¹⁴⁶ The Student has not received ABA therapy at the Middle School.¹⁴⁷ The Middle School does not employ trained ABA therapists.¹⁴⁸

36. The Student requires a highly structured academic environment with a low student-teacher ratio.¹⁴⁹ To make behavioral progress necessary to access the curriculum, he must receive ABA therapy throughout the school day.¹⁵⁰ ABA therapy will enable the Student to gain an understanding of what is expected of him and the consequences he will face when he fails to meet those expectations.¹⁵¹ The ABA therapy must be provided to the Student by licensed, trained ABA therapists.¹⁵²

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Testimony of Psychology Expert. An ABA plan is much more thorough than a behavior management plan. Testimony of Autism Coordinator.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Testimony of Program Director.

¹⁴⁵ Testimony of Petitioner.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; testimony of Psychology Expert.

¹⁴⁸ Testimony of Autism Coordinator.

¹⁴⁹ Testimony of Psychology Expert.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

The 2011-2012 School Year

37. On August 4, 2011, Respondent held a meeting of the Student's IEP team.¹⁵³ Petitioner and her attorney attended the meeting.¹⁵⁴ Also present at the IEP meeting were a special education coordinator, a speech and language pathologist, an occupational therapist, a special education teacher, and a compliance case manager.¹⁵⁵ The meeting participants discussed the Student's recent occupational therapy evaluation.¹⁵⁶ Petitioner and her attorney requested that Respondent conduct a "behavioral optometrist evaluation" as recommended by the evaluator who prepared the occupational therapy evaluation report.¹⁵⁷ The DCPS occupational therapist replied that it would revisit Petitioner's request at a thirty-day review meeting.¹⁵⁸

38. The IEP team discussed the fact that the Student often fell down on the playground.¹⁵⁹ They agreed that the Student would participate in a sensory diet.¹⁶⁰

39. The Student's IEP team then developed an IEP for the Student.¹⁶¹ In the August 2011, IEP, the IEP team indicated that the Student required a highly structured classroom environment with predictable routines and a low student-to-staff ratio.¹⁶² The IEP reflected that the Student would receive a "picture schedule" each day to assemble and read.¹⁶³ It reflected that the Student required direct instruction to acquire and maintain targeted skills and that the Student's lessons would be delivered in small, achievable objectives to avoid confusing him.¹⁶⁴ He would receive visual supports, such as picture communication symbols and visually depicted classroom rules to reinforce and facilitate verbal communication.¹⁶⁵ The Student would be taught social skills and functional communication explicitly and incidentally.¹⁶⁶

40. The August 4, 2011, IEP reflected that the Student's teacher would implement a token economy system whereby the Student would earn five tokens to promote positive behavior and decrease behaviors, such as scripting and

¹⁵³ Petitioner Exhibit 23 at 4 (August 4, 2011, IEP).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1-3.

¹⁵⁷ *Id.* at 1.

¹⁵⁸ *Id.* at 2.

¹⁵⁹ *Id.* at 1.

¹⁶⁰ *Id.* at 2.

¹⁶¹ *Id.* at 4.

¹⁶² *Id.* at 5.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

noncompliance.¹⁶⁷ The Student would be allowed to exchange the tokens for a desired reinforcement or activity, such as computer time, toys, and hugs.¹⁶⁸

41. The IEP included annual goals and short-term objectives in mathematics, reading, written expression, and daily living skills.¹⁶⁹ It provided annual goals and short-term objectives in speech and language; emotional, social and behavioral development; and motor skills and physical development.¹⁷⁰

42. The August 4, 2011, IEP provided that the Student would receive 24.5 hours per week of specialized instruction outside the general education setting, thirty minutes per week of adapted physical education, and thirty minutes per week of specialized instruction in the general education setting.¹⁷¹ The IEP specified that the Student would receive all of his specialized instruction, including his adaptive physical education, in a self-contained classroom due to the severity of his disability.¹⁷²

43. The August 4, 2011, IEP provides that the Student would receive four hours per month of speech and language therapy and 240 minutes per month of occupational therapy outside the general education setting.¹⁷³ The IEP provided that the Student would receive fifteen minutes per month of occupational therapy consultative services and assistive technology for communication.¹⁷⁴ It provided that he would receive extended school year services.¹⁷⁵

44. The August 4, 2011, IEP provided that the Student would receive classroom accommodations, including extended time for academic tasks, instruction in small groups with a two-to-one student-teacher ratio, and structured breaks scheduled throughout the school day.¹⁷⁶ The IEP provided that he would use graphic organizers and receive a visual schedule.¹⁷⁷

45. The August 4, 2011, IEP provided that the Student would participate in a general education computer lab with specialized instruction for thirty minutes per week.¹⁷⁸ It provided that he would have access to a computer in his classroom.¹⁷⁹

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 5-12.

¹⁷⁰ *Id.* at 6-17.

¹⁷¹ *Id.* at 18.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 18.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

46. The Student began attending the Middle School at the beginning of the 2011-2012 school year.¹⁸⁰ The Student's classroom had a total of eight children, one classroom teacher ("Teacher I"), and four classroom aides.¹⁸¹

47. Petitioner observed the Student's classroom on the first day of the 2011-2012 school year.¹⁸² She expressed concern to Teacher 1 that the Student may need to be placed in a higher functioning classroom.¹⁸³ Shortly thereafter, Teacher I sent an email to Petitioner stating that the Student was bored in his classroom.¹⁸⁴

48. Between August 25, 2011, and the end of September 2012, the Student was involved in approximately ten incidents at school in which he sustained injuries that required medical attention, including a bruised wrist, a sprained arm and neck, and head injuries.¹⁸⁵ The Student often had headaches following this series of injuries.¹⁸⁶ By October 19, 2011, the Student had missed fifteen days of school.¹⁸⁷

49. The Student had become reluctant to attend school because he feared of one of the classroom aides ("Classroom Aide").¹⁸⁸ He threw tantrums in class, used profanity, and exhibited fear of the Classroom Aide.¹⁸⁹

50. On October 21, 2011, the Middle School held an IEP team meeting.¹⁹⁰ Petitioner, Teacher 1, a special education coordinator ("SEC"), speech-language pathologist, occupational therapist, and a member of the DCPS autism team attended the meeting.¹⁹¹ A private applied behavioral analysis ("ABA") provider also attended the meeting.¹⁹²

51. The purpose of the October 21, 2011, meeting was to conduct a thirty-day review of the Student's August 4, 2011, IEP.¹⁹³ The IEP team also discussed the Student's behavior and academic performance.¹⁹⁴

¹⁸⁰ Testimony of Petitioner.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Testimony of Petitioner.

¹⁸⁶ *Id.*

¹⁸⁷ Respondent Exhibit 18 at 1 (Period to Daily Conversion Attendance Summary, August 15, 2011, to June 14, 2012).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Petitioner Exhibit 25 at 1 (October 21, 2011, Meeting Notes).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

52. Petitioner informed the IEP team that the Student had trouble transitioning from elementary to middle school.¹⁹⁵ She explained that the Student had developed a fear of certain individuals at the Middle School.¹⁹⁶ Yet, at no time during the meeting did Petitioner express concern about the Student's safety or inform the IEP team that the Student had suffered injuries at the Middle School.¹⁹⁷

53. Teacher I expressed concern about the Student's physical aggression and the number of school days he had missed.¹⁹⁸ He informed the IEP team that he had implemented the token economy and visual schedule required by the Student's August 4, 2011, IEP.¹⁹⁹ He said that the Student was making academic progress that would be expected with his attendance record.²⁰⁰

54. The occupational therapist informed the IEP team that the Student required sensory breaks during activities.²⁰¹ She said that the Student was making progress.²⁰²

55. The speech and language pathologist informed the IEP team that the Student had missed fifty percent of his speech and language therapy sessions.²⁰³ She said that she had trouble assessing his true progress due to his absences.²⁰⁴ She added that a token economy had been used throughout the school day.²⁰⁵

56. During the October 21, 2011, meeting, the IEP team changed the date on the Student's IEP from August 4, 2011, to October 21, 2011.²⁰⁶ The IEP team made no other changes to the IEP other than eliminating the ESY services.²⁰⁷

57. At the end of the October 21, 2011, IEP meeting, the full IEP team agreed that the Middle School was able to implement the Student's IEP.²⁰⁸

58. Between October 29, 2011, and January 20, 2013, the Student made no progress on the annual goals in the October 21, 2011, IEP.²⁰⁹ The Student's lack of academic progress was due to his many absences from school.²¹⁰

¹⁹⁵ *Id.* at 2.

¹⁹⁶ *Id.*

¹⁹⁷ Petitioner Exhibit 25 at 1-4.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Petitioner Exhibit 25 at 4.

²⁰⁷ Petitioner Exhibit 25 at 4-18.

²⁰⁸ *Id.* at 3.

59. When the Student attended school, he often returned home with scratches, bruises, and other minor injuries.²¹¹ The Middle School staff was unable to explain to Petitioner how the Student had been injured.²¹²

60. The Student became reluctant to board the school bus in the mornings.²¹³ On some of the days he rode the bus to school, he would hide in the back of the bus as it approached the Middle School.²¹⁴ On several occasions, Petitioner had to drive the Student to school.²¹⁵ On several occasions after Petitioner dropped the Student off at the Middle School, he would run after her instead of entering the school building.²¹⁶

61. The Student soon became unwilling to go to school.²¹⁷ He would rock back and forth and indicate he was afraid to go to school.²¹⁸ At times, he would have tantrums that lasted for hours.²¹⁹ At other times, he exhibited fear of boarding the school bus.²²⁰ He also exhibited fear in the presence of the Classroom Aide.²²¹

62. In December 2011, the Student was hit in the head several times by weighted basketballs during his adaptive physical education class.²²² The Student was injured in at least three such incidents, including one in which he was knocked to the floor.²²³

63. Within weeks, the Student was hospitalized with Bell's Palsy.²²⁴ Symptoms of Bell' Palsy include ringing in one or both ears, headache, and hypersensitivity to sound.²²⁵

64. Following his hospitalization and diagnosis of Bell's Palsy, the Student had chronic headaches and eye pain.²²⁶ The eye pain may have been a symptom of migraine

²⁰⁹ Petitioner Exhibit 27 at 1-5 (January 25, 2012, IEP Progress Report – Annual Goals).

²¹⁰ *Id.*

²¹¹ Testimony of Petitioner.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Testimony of Expert in Pediatric Medicine.

²²¹ Testimony of Petitioner; testimony of Attendant.

²²² Testimony of Petitioner.

²²³ *Id.* At the time of the incident, the Student weighed between 140 pounds and 150 pounds. *Id.*

²²⁴ *Id.* Bell's Palsy is a form of temporary facial paralysis resulting from damage or trauma to the facial nerves. Testimony of Psychology Expert; Petitioner Exhibit 44 at 1 (Bell's Palsy Fact Sheet).

²²⁵ *Id.* at 2.

headaches.²²⁷ He also became extremely sensitive to light.²²⁸ Even low wattage light bulbs were too bright and he wore sunglasses most of the time, even when he showered.²²⁹ He temporarily lost his hearing.²³⁰

65. Following the winter break, the Student attended school sporadically.²³¹ The Middle School gradually transitioned the Student into another special education classroom taught by Teacher II.²³² In this classroom, the children were higher functioning than the children in the Student's former classroom.²³³ The Classroom Aide was not present in this class.²³⁴

66. The day after he returned to school, the Student had an altercation with a student in his new classroom.²³⁵ The Student punched the other child in the nose, causing his nose to bleed.²³⁶ The Student had at least one other altercation with this student.²³⁷

67. Other than his difficulties with his classmate, the Student enjoyed the time he spent in his new class.²³⁸ He had no difficulties boarding the school bus and attended school regularly.²³⁹ He did not return home from school with any observable injuries.²⁴⁰

68. In March 2012, the Student was hospitalized because he was experiencing extreme pain in his eyes and ears.²⁴¹ His vision and hearing had deteriorated.²⁴²

69. The Student's doctors informed Petitioner that he would not be able to return to school during the remainder of the school year.²⁴³ By June 12, 2012, the last day of the 2011-2012 school year, the Student had been absent from school for 103 days.²⁴⁴

²²⁶ Testimony of Petitioner; Petitioner Exhibit 28 at 1 (February 2, 2012, letter from Dr. Miller to Dr. Avery, Children's National Medical Center).

²²⁷ Petitioner Exhibit 28 at 2.

²²⁸ Testimony of Petitioner.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Respondent Exhibit 18 at 1; testimony of Petitioner.

²³² Testimony of Petitioner.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Respondent Exhibit 18 at 1.

70. The staff at the Middle School offered to provide home-based instruction to the Student.²⁴⁵ Yet, Respondent delayed providing the Student home-based instruction and speech and language therapy until after the end of the 2011-2012 school year.²⁴⁶ Respondent provided the home-based instruction to the Student only once or twice per week.²⁴⁷

71. The Student returned to the Middle School for the 2012-2013 school year.²⁴⁸ On September 10, 2012, the Student arrived at school upset and crying.²⁴⁹ He complained of chest pain.²⁵⁰ The Student continued to cry throughout the morning.²⁵¹ He repeatedly asked to go home and used foul language.²⁵²

72. When the Student was instructed to line up to go to his adaptive physical education class, he punched another child in the eye.²⁵³ The school staff separated the two children, and the Student remained in school for the remainder of the school day.²⁵⁴

73. On September 11, 2012, one of the Student's classmates became aggressive toward Teacher 1.²⁵⁵ The classmate then rushed toward the Student and pushed him in the back and onto the concrete floor.²⁵⁶

74. The following day, the Student was treated for a dislocated finger.²⁵⁷ He also lost a tooth in the incident.²⁵⁸

75. On September 30, 2012, Petitioner sent an email to the SEC expressing concern about the incident on September 11, 2012, in which the Student was injured.²⁵⁹ She informed the SEC the Student had informed his doctors that he was afraid of getting hurt if he returned to the Middle School.²⁶⁰

²⁴⁵ Testimony of Petitioner.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Petitioner Exhibit 31 at 1 (September 10, 2012, Incident Report).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*; testimony of Petitioner.

²⁵³ Petitioner Exhibit 31 at 1.

²⁵⁴ *Id.*

²⁵⁵ Petitioner Exhibit 32 at 1 (September 11, 2012, letter).

²⁵⁶ *Id.* at 2.

²⁵⁷ Petitioner Exhibit 33 at 2 (September 12, 2012, Emergency Department Patient Discharge Summary).

²⁵⁸ Petitioner Exhibit 47 at 13 (September 30, 2012, email from Petitioner to SEC).

²⁵⁹ Petitioner Exhibit 47 at 12-13.

²⁶⁰ *Id.* at 13.

76. Petitioner informed the SEC that she did not want the Student to return to the Middle School.²⁶¹ Petitioner informed the SEC that she wanted the Student to remain at home and receive home-based instruction, until such time as the Middle School identified a suitable autism program for him.²⁶²

77. On October 25, 2012, the Expert in Pediatric Medicine diagnosed the Student with school avoidance.²⁶³ He filled out a form indicating that the Student would be unable to return to school.²⁶⁴

78. On November 28, 2012, the Expert in Pediatric Medicine faxed to the Middle School an explanation of the Student's school refusal.²⁶⁵ The Expert requested that the Middle School provide the Student home-based instruction.²⁶⁶

79. School refusal is a type of emotional distress experienced by individuals who have fears of attending school.²⁶⁷ Children who are bullied are likely to become depressed, develop anxiety, and avoid school.²⁶⁸ Their grades decline and their ability to learn is impaired.²⁶⁹ The Student has developed school refusal as a result of being the victim of longstanding bullying on the school bus and at the Middle School.²⁷⁰

80. To date, the Student has remained at home and has not returned to the Middle School or any school.²⁷¹ He continues to experience excruciating back pain.²⁷²

81. From September 2012 to January 25, 2013, the Student received no visiting instruction.²⁷³ He has made no progress on any of the goals and short-term objectives on his IEP.²⁷⁴

82. The Student's return to the school environment should be incremental and carefully planned.²⁷⁵ He must feel safe in his new environment.²⁷⁶

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Petitioner Exhibit 35 at 2 (October 25, 2012, Letter from Expert in Pediatric Medicine).

²⁶⁴ *Id.*; testimony of Expert in Pediatric Medicine.

²⁶⁵ Testimony of Petitioner; Petitioner Exhibit 40 at 1-2 (November 26, 2012, Physician Verification Form).

²⁶⁶ *Id.*

²⁶⁷ Testimony of Psychology Expert.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ Petitioner Exhibit 34 at 1 (September 17, 2012, Note from Petitioner).

²⁷² Testimony of Petitioner; Petitioner Exhibit 54 (February 20, 2013, letter).

²⁷³ Testimony of Petitioner.

²⁷⁴ Respondent Exhibit 15 at 1 (February 1, 2013, IEP Progress Report – Annual Goals).

²⁷⁵ Testimony of the Psychology Expert.

83. The Nonpublic School integrates ABA therapy into its classrooms.²⁷⁷ The Nonpublic School staffs each classroom with behavioral therapists who are certified in ABA therapy.²⁷⁸ The behavioral therapists work with each student's teachers and related service providers to ensure a multidisciplinary approach to the student's ABA therapy.²⁷⁹ The teachers and related service providers are trained in implementing each student's behavioral plan.²⁸⁰

84. At the Nonpublic School, each student's ABA plan incorporates the student's daily routine and the structure of the student's classroom.²⁸¹ Most students receive positive behavioral support throughout the day.²⁸²

85. The Nonpublic School staff are trained in crisis prevention.²⁸³ The Nonpublic School's crisis prevention methodology focuses on proactive, positive interventions.²⁸⁴ The staff also is trained in physical restraint interventions.²⁸⁵

86. The Nonpublic School has a total enrollment of twenty-four students.²⁸⁶ It has four classrooms with four to five students in each classroom.²⁸⁷ Each classroom has one teacher and two paraprofessionals.²⁸⁸

87. Each classroom has sensory integration equipment, such as weighted blankets and sensory balls.²⁸⁹ Students are provided sensory breaks throughout the day.²⁹⁰ The students' sensory diets are structured and scheduled throughout the day.²⁹¹ The classrooms and hallways have low-spectrum lighting to accommodate students with light sensitivities.²⁹²

²⁷⁶ *Id.*

²⁷⁷ Testimony of Program Director.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

88. The Nonpublic School has a life skills program that teaches students to cook, wash laundry, and take care of their belongings.²⁹³ It provides students an opportunity to develop independent living skills, healthy habits, and proper hygiene.²⁹⁴ The students practice these skills in the Nonpublic School's model apartment.²⁹⁵

89. Because it is a small school, the Nonpublic School can manipulate the classroom environment to serve a student's needs.²⁹⁶ The program is designed to serve students with school-based anxiety.²⁹⁷

90. Students at the Nonpublic School are supervised at all times.²⁹⁸ The school staff continuously monitors the lunchroom and bathrooms.²⁹⁹ No more than seven or eight students are allowed in the lunchroom at one time.³⁰⁰

91. The Nonpublic School has an OSSE certificate of approval.³⁰¹ The Nonpublic School would provide the Student the educational and emotional supports he requires to make meaningful educational progress.³⁰² The Nonpublic School has accepted the Student for admission into the school.³⁰³

92. Petitioner provided credible testimony about the Student's early developmental deficits, his autism spectrum disorder, his educational history, and his history of being bullied. She testified in detail about the Student's numerous physical injuries and ailments, including the nature of his Bell's Palsy. The documents in the record corroborate Petitioner's testimony about the meetings she attended, her interactions with the staff at the Middle School, and her efforts to obtain home-based instruction for the Student. However, this Hearing Officer does not find credible Petitioner's testimony about the Student's communication skills. Petitioner testified that the Student explained to her that the Classroom Aide had injured him and the manner in which the Classroom Aide injured him. Yet the testimony of the Psychology Expert and the Expert in Pediatric Medicine that the Student is essentially nonverbal undermines Petitioner's assertion that the Student described the incidents to her.

93. The Expert in Pediatric Medicine provided credible testimony about the Student's limited communication abilities, the bullying he endured, and the injuries he

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

sustained. The Expert in Pediatric Medicine failed to explain the medical basis for his opinion that the Student had an anxiety disorder that prevented him from attending school. Instead, he admitted that he based his opinion on Petitioner's impressions of the Student's behavior. The Expert in Pediatric Medicine failed to explain how the Student's perceived school avoidance differs from a well-founded fear that another student would injure him or the Classroom Aide would discipline him if he returns to school. Additionally, the Expert in Pediatric Medicine failed to address the sudden disappearance of the Student's school avoidance when he was placed in the classroom of Teacher II at the Middle School. For this reason and as explained below, this Hearing Officer does not credit his opinion that the Student has developed either school phobia or school avoidance.

94. This Hearing Officer finds the testimony of the Psychology Expert credible in most respects. The Psychology Expert has thirteen years of experience assessing individuals with autism and developmental and cognitive neurology. She provided credible testimony about the Student's autism spectrum disorder, the bullying he endured at the Middle School, and the type of academic program the Student requires in order to make progress. This Hearing Officer credits her testimony that the Student's transition into school should be incremental and carefully planned. This Hearing Officer does not credit the Psychology Expert's opinion that the Student has developed school avoidance for the same reasons she does not credit the opinion of the Expert in Pediatric Medicine.

95. The Occupational Therapy Expert provided credible testimony. She conducted the Student's occupational therapy evaluation and has first-hand knowledge of his functioning. She explained in detail the Student's deficits and the benefits of a sensory diet. The Occupational Therapy Expert provided a detailed analysis of her recommendation that the student receive a developmental vision assessment. The documentary evidence generally corroborated the testimony of the Occupational Therapy Expert.

96. The Program Director provided credible testimony about the programs and services that the Nonpublic School provides its students. She has twenty years of experience working with students on the autism spectrum. For this reason, this Hearing Officer finds credible the Program Director's opinion that the Student would receive educational benefit at the Nonpublic School.

97. The Autism Coordinator is a board certified behavior analyst and provided credible testimony about the implementation of ABA for children with autism. She testified credibly that the DCPS functional behavior assessment in Respondent's Exhibit 8 did not contain sufficiently rigorous analysis to support an ABA plan. She testified credibly that an ABA plan would be more thorough than a typical behavior implementation plan. She testified credibly that that ABA is one of the most effective treatments for students with autism, but the Middle School staff cannot provide ABA therapy because it has no ABA therapists on staff.

V. CONCLUSIONS OF LAW

The purpose of IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.”³⁰⁴ Implicit in the congressional purpose of providing access to a FAPE is the requirement that the education to which access is provided be sufficient to confer some educational benefit on the handicapped child.³⁰⁵

FAPE is defined as:

Special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the State Education Agency . . . include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program.³⁰⁶

A school district need not maximize the potential of children with disabilities, but the door of public education must be opened in a meaningful way, and the IEP must provide the opportunity for more than “trivial advancement.”³⁰⁷

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child’s right to FAPE, significantly impeded the parent’s opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.³⁰⁸ In other words, an IDEA claim is viable only if at least one of procedural violations affected the student’s *substantive* rights.³⁰⁹

The burden of proof is properly placed on the party seeking relief.³¹⁰ Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.³¹¹ 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.³¹² In other words,

³⁰⁴ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (2008) (citing 20 U.S.C. § 1400(d)(1)(A)).

³⁰⁵ *Rowley*, 458 U.S. at 200; *Hinson*, 579 F. Supp. 2d. at 98 (citing *Rowley*, 458 U.S. at 200).

³⁰⁶ 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.

³⁰⁷ *P. v. Newington Bd. of Educ.*, 546 F.3d. 111 (2nd Cir. 2008) (citations omitted).

³⁰⁸ 34 C.F.R. § 300.513 (a)(2).

³⁰⁹ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).

³¹⁰ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

³¹¹ 20 U.S.C. § 1415 (i)(2)(c). *See also Reid*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

³¹² *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotation marks omitted).

preponderance of the evidence is evidence that is more convincing than the evidence offered in opposition to it.³¹³ Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk of error in roughly equal fashion,³¹⁴ except that when the evidence is evenly balanced, the party with the burden of persuasion must lose.³¹⁵

VI. DISCUSSION

A. Petitioner Failed to Prove Respondent Denied the Student a Free, Appropriate Public Education (“FAPE”) During the 2011-2012 and 2012-2013 School Years By Failing to Stop Other Students and the Classroom Aide from Bullying the Student, which Prevented Him from Accessing the Curriculum, and Resulted in His Developing School Phobia.

Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential.³¹⁶ A student’s school is responsible for addressing harassment incidents about which it knows or reasonably should have known.³¹⁷

The general requirements of IDEA are well established but the question of whether bullying can be grounds for finding that an LEA denied a student a FAPE has not been decided in the District of Columbia. Three circuit courts of appeals have expressly noted that bullying can be a basis for denial of a FAPE.³¹⁸ Yet, a common framework under which to analyze the issue has not emerged.³¹⁹

The U.S. Court of Appeals for the Second Circuit has indicated only that that it might be willing to extend FAPE protections to bullying.³²⁰ The U.S. Court of Appeals for the Third Circuit did not provide the rubric under which it analyzed the claims looked at the alleged

³¹³ *Greenwich Collieries v. Director, Office of Workers’ Compensation Programs*, 990 F.2d 730, 736 (3rd Cir. 1993), *aff’d*, 512 U.S. 246 (1994).

³¹⁴ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (internal quotation marks omitted).

³¹⁵ *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

³¹⁶ *Dear Colleague Letter*, 55 IDELR 174 (OCR, October 26, 2010).

³¹⁷ *Id.*

³¹⁸ *See M.L. v. Fed. Way. Sch. Dist.*, 394 F.3d. 634 (9th Cir. 2005); *Shore Regional High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194 (3d Cir. 2004); *Charlie F. ex rel. Neil F. v. Bd. of Educ.*, 98 F.3d 989, 993 (7th Cir. 1996).

³¹⁹ *T.K. v. New York City Bd. of Ed.*, 779 F. Supp. 2d 289, 293 (2011).

³²⁰ *See Smith v. Guilford Board of Education*, 226 Fed. Appx. 58, 2007 WL 1725512 (2d Cir. 2007).

conduct to find that the lack of a school environment free from harassment was grounds for finding a denial of FAPE.³²¹

The Seventh Circuit Court of Appeals found that, at least in principle, harassment can be a denial of a FAPE.³²² The court was unable to delve deeper into the merits of the claims because the parents bringing the case on behalf of the child had not exhausted their administrative remedies.³²³

The Court of Appeals for the Ninth Circuit has developed a test.³²⁴ The test asks whether a teacher was deliberately indifferent to bullying and the abuse so severe that a child can derive *no* educational benefit.³²⁵

The U.S. District Court for the Eastern District of New York derived another test. This test posits that, if bullying reaches a level where a student is substantially restricted in learning opportunities, she has been deprived a FAPE.³²⁶

Here, the Student began attending the Middle School at the beginning of the 2011-2012 school year. Between August 25, 2011, and the end of September 2012, the Student was involved in about ten incidents at school in which he sustained injuries that required medical attention, including a bruised wrist, a sprain in his arm and neck, and head injuries. The Student often had headaches following this series of injuries.

By October 19, 2011, the Student had missed fifteen days of school. The Student had become reluctant to attend school because he feared the Classroom Aide. He threw tantrums in class, used profanity, and exhibited fear of the Classroom Aide.

Between October 29, 2011, and January 20, 2013, the Student made no progress on the annual goals in the October 21, 2011, IEP. His lack of academic progress was due to his absences from school.

When the Student attended school, he often returned home with scratches, bruises, and other minor injuries. In December 2011, the Student was hit in the head several times by weighted basketballs during his adaptive physical education class. The Student was injured in at least three such incidents, including one in which he was knocked to the floor.

Within weeks, the Student was hospitalized with Bell's Palsy. Symptoms of Bell' Palsy include ringing in one or both ears, headache, and hypersensitivity to sound.

³²¹ *P.S.*, 381 F.3d at 197, 201-202

³²² *Charlie F.*, 98 F.3d at 993.

³²³ *Id.*

³²⁴ *M.L.*, 394 F.3d at 650.

³²⁵ *Id.* ("If a teacher is deliberately indifferent to teasing of a disabled child and *the abuse is so severe that the child can derive no benefit* from the services that he or she is offered by the school district, the child has been denied a FAPE.") (emphasis added).

³²⁶ *T.K.*, 779 F. Supp. 2d 318.

Following the winter break, The Middle School gradually transitioned the Student into another special education classroom taught by Teacher II. In this classroom, the children were higher functioning than the children in the Student's former classroom. The Classroom Aide was not present in this class.

The day after he returned to school, the Student got into an altercation with a student in his new classroom. The Student punched the other child in the nose, causing his nose to bleed. The Student had at least one other altercation with this student.

Other than his difficulties with his classmate, the Student enjoyed the time he spent in his new class. He had no difficulties boarding the school bus and attended school regularly. He did not return home from school with any observable injuries.

In March 2012, the Student was hospitalized because he was experiencing extreme pain in his eyes and ears. His vision and hearing had deteriorated. The Student's doctors informed Petitioner that he would not be able to return to school during the remainder of the school year.

By June 12, 2012, the last day of the 2011-2012 school year, the Student had been absent from school for 103 days.

The Student returned to the Middle School for the 2012-2013 school year. On September 10, 2012, the Student arrived at school upset and crying. He complained of chest pain. The Student continued to cry throughout the morning. He repeatedly asked to go home and used foul language.

When the Student was instructed to line up to go to his adaptive physical education class, the Student punched another child in the eye. The school staff separated the two children, and the Student remained in school for the remainder of the school day.

On September 11, 2012, one of the Student's classmates became aggressive toward Teacher 1. The classmate then rushed toward the Student and pushed him in the back and onto the concrete floor. In the incident, the Student dislocated his finger and lost a tooth.

On September 30, 2012, Petitioner sent an email to the SEC expressing concern about the incident on September 11, 2012, in which the Student was injured. She informed the SEC the Student had informed his doctors that he was afraid of getting hurt if he returned to the Middle School. Petitioner informed the SEC that she did not want the Student to return to the Middle School.

On October 25, 2012, the Expert in Pediatric Medicine diagnosed the Student with school avoidance. He filled out a form indicating that the Student would be unable to return to school.

Petitioner proved that the Student had scratches on his arms but failed to show that the scratches weren't a result of his tantrums, clumsiness, or horseplay. Far from being bullied, the record shows that the Student was the aggressor in at least one violent incident.

Petitioner presented no evidence to show that the Classroom Aide caused the cuts and scratches on the Student's arms or bullied him, She presented no evidence that to show that the Student had even been bullied at the Middle School.

Rather, the evidence shows that the Student had difficulty regulating his behavior, threw tantrums in class, and used profanity. The Student is often unaware of the location of his body in the space around him or his personal space versus the personal space of others. He trips and falls frequently, including at school during recess. He occasionally seeks movement that interferes with learning or classroom routines, moves around more than other students, and finds reasons to approach the teacher repeatedly

It is unfortunate that the Student sustained serious injuries in December 2011 when he was repeatedly hit in the head with a weighted ball. Considering the Student's gross motor incidents, this may have been accidental. As the Occupational Therapy Expert stated in her report, in his physical education class, the Student lacks awareness during ball games and often does not see the ball.

Petitioner also failed to show that the Student failed to make academic progress during the 2011-2012 school year because he was bullied by other students and the Classroom Aide. Instead, the Student's failure to make progress was due to his missing 103 school days that year.

Petitioner failed to show that the Student developed school avoidance during the 2012-2013 school year because the Classroom Aide and other students had bullied him at the Middle School. Petitioner failed to prove that the Student's refusal to attend school was not due to his disability, including his unreasonable fears, or his Bell's Palsy.

Even if Petitioner proved that Respondent denied the Student a FAPE by failing to protect him from bullies, the remedy would be compensatory education. When a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education, "i.e., replacement of educational services the child should have received in the first place."³²⁷ However, Petitioner withdrew her claim for compensatory education with prejudice during the due process hearing.

For this reason, this Hearing Officer finds that Respondent prevailed on this claim.

³²⁷ *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

B. Petitioner Proved that Respondent denied the Student a FAPE during the 2011-2012 School Year by Failing to Conduct a Developmental Vision Assessment of the Student.

An evaluation consists of procedures used to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.³²⁸ A reevaluation is defined as an evaluation conducted after the initial evaluation.³²⁹

A public agency must ensure that a reevaluation of each child with a disability is conducted if the child's parent or teacher requests a reevaluation, but not more than once a year unless the parent and public agency agree otherwise.³³⁰ Reevaluations should be conducted in a "reasonable period of time," and "without undue delay," as determined in each individual case.³³¹

The Student has extreme difficulty with eye-hand coordination, such as dropping and catching a small ball with accuracy and control, dribbling a ball, catching with one or both hands, and throwing with control at a target. His poor depth perception makes him susceptible to being hit by a ball in his physical education class or during recess.

He initiates writing tasks with fair to poor posture. Even with prompting, his posture decreases as his writing progresses. His handwriting is frequently sloppy or illegible. He is hesitant to write sentences. He has difficulty with drawing, coloring, cutting, and copying.

His overall visual-motor integration skills are in the very low range. Difficulties in visual-motor integration could impact his performance on tasks related to reading, handwriting, and copying. These difficulties also could impede further development of higher-level math skills.

He struggles with eye coordination, which contributes to motor development, reading skills, emotional security, and social skills. He struggles to track an object across a field of vision and separate his head and eye movements. He has difficulty bringing his eyes together and moving them apart, which is important for skills such as reading and copying from the board. He would benefit from visual supports.

The Student needs a developmental optometry assessment to ascertain the nature of his deficits in visual-motor integration, visual perception, visual processing, depth perception, and his fleeting eye contact, poor posture, oversensitivity to light, and difficulty

³²⁸ 34 C.F.R. § 300.15.

³²⁹ D.C. Mun. Reg. tit. 5-E § 3001.1.

³³⁰ 34 C.F.R. § 300.303 (a)(2).

³³¹ *Herbin v. District of Columbia*, 362 F. Supp. 2d 254, 259 (D.D.C. 2005) (upholding hearing officer's determination that four-month delay in reevaluating a student with a current IEP was not unreasonable) (citations omitted).

separating his head and eye movement. This assessment would examine how his eyes move together, his ability to track objects, his eye-hand coordination, the potential causes of his light sensitivity and other visual deficits. The assessment may shed light on how to address these deficits through occupational therapy or other avenues.

Petitioner proved that, in the absence of these evaluations, the Student's IEP team cannot determine the nature and extent of the special education and related services that he needs. The Student has severe deficits in eye-hand coordination, visual-motor integration, eye coordination. Thus Petitioner proved that the Student requires visual supports to access the curriculum. Without these supports, he may continue to get injured, have difficulty reading and copying from the board, and writing his name.

Thus, this Hearing Officer finds that Respondent denied the Student a FAPE. Petitioner is the prevailing party on this claim.

C. Petitioner Proved that Respondent Denied the Student a FAPE from October 25, 2012, through the Present by Failing to Provide Home-based Instruction.

A homebound placement may be necessary for a student with a disability who is unable to attend school for medical or psychological reasons.³³² Nothing in the IDEA requires a district to provide a full day of instruction to a homebound student, or to provide the same amount of special education instruction the student would have received while attending school.³³³ However, the amount of homebound instruction provided to a student with a disability must be based on the student's unique needs.³³⁴

³³² See, e.g., *Tindell v. Evansville-Vanderburgh Sch. Corp.*, 57 IDELR 71 (S.D. Ind. 2011) (homebound placement was appropriate for student who had such severe anxiety that he was unable to attend classes outside the home); *Mt. Zion Unit Sch. Dist. No. 3*, 111 LRP 51317 (SEA IL 2011) (because district had no way to limit exposure to dangerous levels of stimuli, a homebound placement was the only reasonable option for a teenager with post-concussion syndrome); *Georgetown Indep. Sch. Dist.*, 45 IDELR 116 (SEA TX 2005) (student with severe aplastic anemia required a homebound placement due to his immune-suppressed condition and the high risk of infection at school).

³³³ *Renton Sch. Dist.*, 111 LRP 72136 (SEA WA 2011); *Georgetown Indep. Sch. Dist.*, 45 IDELR 116 (SEA TX 2005); *Montrose County Sch. Dist. RE-1J*, 37 IDELR 207 (SEA CO 2002); *Greenville Indep. Sch. Dist.*, 102 LRP 12471 (SEA TX 2002); *Independent Sch. Dist. of Boise No. 1*, 35 IDELR 147 (SEA ID 2001).

³³⁴ See, e.g., *Torrance Unified Sch. Dist.*, 111 LRP 19380 (SEA CA 2011) (five hours of home instruction a week was not adequate for student with severe needs); *Student with a Disability, In re*, 111 LRP 5952 (SEA CT 2010) (appropriate long-term homebound program must include all the classes and services for which a student is eligible, and may not be limited by the 10 hours a week regulatory minimum for high school students); *Trico Cmty. Unit Sch. Dist. 176*, 108 LRP 42817 (SEA IL 2008) (district denied FAPE to a high school

Here, Respondent has failed to provide homebound instruction the Student even though Petitioner submitted all the necessary documentation. The Student has received no academic instruction or related services for five months.

On September 30, 2012, Petitioner emailed the SEC to express concern about the incident. She informed the SEC the Student had told his doctors that he was afraid of getting hurt if he returned to the Middle School. She stated that she did not want the Student to return to the Middle School. Petitioner said that she wanted the Student to remain at home and receive home-based instruction, until such time as the Middle School identified a suitable autism program for him.

On October 25, 2012, the Expert in Pediatric Medicine diagnosed the Student with school avoidance. He filled out a form indicating that the Student would be unable to return to school. On November 28, 2012, the Expert in Pediatric Medicine faxed to the Middle School an explanation of the Student's school refusal. The Expert requested that the Middle School provide the Student home-based instruction.

To date, the Student has remained at home and has not returned to the Middle School or any school. Since September 2012 he not received visiting instruction. As a result, he has made no progress on any of the goals and short-term objectives on his IEP.

Petitioner proved that Respondent denied the Student a FAPE.

When a school system fails to provide special education or related services to a disabled student, the student is entitled to compensatory education, "i.e., replacement of educational services the child should have received in the first place."³³⁵ However, Petitioner withdrew her claim for compensatory education with prejudice during the due process hearing. Thus, there is no relief for this Hearing Officer to order.

D. Petitioner Failed to Prove that 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., a Separate, Special Education Day School for Students with Autism.

The term "educational placement" refers to the type of educational program prescribed by the IEP.³³⁶ "Educational placement" refers to the general educational program, such as the classes, individualized attention, and additional services a child will

junior with post-traumatic stress disorder and depression by providing only five hours of homebound tutoring a week, as the student could not learn the "increasingly rigorous curriculum" on her own).

³³⁵ *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

³³⁶ *T.Y. v. N.Y. Dept. of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009) (citation omitted).

receive, rather than the “bricks and mortar” of the specific school.³³⁷

Placement decisions must be made in conformity with the child’s IEP.³³⁸ The decision to place a student before developing an IEP on which to base that placement violates the IDEA regulations.³³⁹ It also violates the spirit and intent of IDEA, which emphasizes parental involvement.³⁴⁰ After the fact involvement is not enough.³⁴¹ Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate.³⁴²

The IDEA requires that unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.³⁴³ In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs.³⁴⁴ A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.³⁴⁵

In August 2011, the Student’s IEP team developed his operative IEP for the 2011-2012 and 2012-2013 school year. The IEP team provides that he is to be placed in a highly structured classroom environment with predictable routines and a low student-to-staff ratio. The IEP provides that he would receive a “picture schedule” each day to assemble and read. It reflects that he requires direct instruction to acquire and maintain targeted skills and that his lessons would be delivered in small, achievable objectives to avoid confusing him.

The IEP provides receive visual supports, such as picture communication symbols and visually depicted classroom rules to reinforce and facilitate verbal communication. It provides that the Student would be taught social skills and functional communication explicitly and incidentally.

The August 4, 2011, IEP reflects that the Student’s teacher would implement a token economy system whereby the Student would earn five tokens to promote positive behavior and decrease behaviors, such as scripting and noncompliance. The Student would be allowed to exchange the tokens for a desired reinforcement or activity, such as computer time, toys, and hugs.

³³⁷ *Id.*

³³⁸ 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Reg. tit. 5-E § 3013 (2006); *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258 (4th Cir. 1988).

³³⁹ *Spielberg*, 853 F.2d at 258.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *See Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006).

³⁴³ 34 C.F.R. § 300.116 (c).

³⁴⁴ 34 C.F.R. § 300.116 (d).

³⁴⁵ . *Id.* at (e)

The IEP provides that the Student would receive 24.5 hours per week of specialized instruction outside the general education setting, thirty minutes per week of adapted physical education, and thirty minutes per week of specialized instruction in the general education setting. The IEP specifies that the Student would receive all of his specialized instruction, including his adaptive physical education, in a self-contained classroom due to the severity of his disability.

It provides that the Student would receive four hours per month of speech and language therapy and 240 minutes per month of occupational therapy outside the general education setting. The IEP provides that the Student would receive fifteen minutes per month of occupational therapy consultative services, assistive communications technology, and extended school year services.

The IEP provides that the Student would receive classroom accommodations, including extended time for academic tasks, instruction in small groups with a two-to-one student-teacher ratio, and structured breaks scheduled throughout the school day. It provides that he would use graphic organizers and receive a visual schedule.

Finally, the IEP provides that the Student would participate in a general education computer lab with specialized instruction for thirty minutes per week. It provides that he would have access to a computer in his classroom.

The Nonpublic School is a segregated, nonpublic day school that serves children with autism. It integrates ABA therapy into its classrooms. It staffs each classroom with certified ABA therapists. Most students receive positive behavioral support throughout the day.

The Nonpublic School has a total enrollment of twenty-four students. It has four classrooms with four to five students in each classroom. Each classroom has one teacher and two paraprofessionals.

Each classroom has sensory integration equipment, such as weighted blankets and sensory balls. Students are provided sensory breaks throughout the day. The students' sensory diets are structured and scheduled throughout the day. The classrooms and hallways have low-spectrum lighting to accommodate students with light sensitivities.

Petitioner asserts that Respondent denied the Student a FAPE during the 2011-2012 and 2012-2013 school years by failing to place him in a more restrictive setting, i.e., a segregated, nonpublic day school for children with autism.

The considerations relevant to determining whether a particular placement is appropriate for a particular student include the nature and severity of the student's disability; the student's specialized educational needs; the link between those needs and

the services offered by the school; the placement's cost; and the extent to which the placement represents the least restrictive environment.³⁴⁶

To prevail, Petitioner was required to prove that the Middle School was not an appropriate placement. She had to prove that the Middle School was not the Student's least restrictive environment, i.e. that, in order to access the curriculum, the Student had to be educated in a more restrictive environment. Petitioner failed to meet this burden.

Instead, Petitioner's case focused solely on proving that the Nonpublic School can meet the Student's needs, particularly for ABA therapy, the low lighting, and the sensory diet. Petitioner proved that, unlike the Middle School, the Nonpublic School has staff trained in implementing ABA therapy. Petitioner asserts that these aspects of the Nonpublic School placement are exactly what the Student requires to make meaningful academic progress. These are the main aspects of the Nonpublic School program that set it apart from the Middle School.³⁴⁷

However, ABA therapy is an instructional methodology, which is generally addressed in a student's IEP.³⁴⁸ Including instructional methodologies in a child's IEP is a decision left to the IEP team.³⁴⁹ In order to address a failure by the Middle School to provide ABA to the Student, Petitioner was required to challenge his IEP. In her due process complaint, Petitioner did not raise any issues relating the Student's IEP team.³⁵⁰

Thus, Petitioner failed to prove that Respondent denied the Student a FAPE.

³⁴⁶ *Branham*, 427 F.3d at 12 (citing *Rowley*, 458 U.S. at 202). *See also* D.C. Mun. Reg. tit. 5-E § 3013 (in selecting the least restrictive environment, consideration shall be given to any potential harmful effect on the child or on the quality of services that the child needs).

³⁴⁷ Like the Nonpublic School, the Middle School has small, segregated classes with low student-teacher ratios.

³⁴⁸ See 34 C.F.R. § 300 (a)(1) (An IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child (i) To advance appropriately toward attaining the annual goals; (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.).

³⁴⁹ Comments to Federal Regulations, 71 Fed. Reg. 46665.

³⁵⁰ The Prehearing Order states that the parties may file comments and corrections within three business days of the issuance of the order. Petitioner did not object to the issues certified or otherwise assert that she should be allowed to proceed on a claim regarding the Student's IEP. On February 27, 2013, at the outset of the due process hearing, this Hearing Officer read the issues certified for hearing. Neither counsel objected to the issues this Hearing Officer had certified for hearing.

ORDER

Based upon the findings of fact and conclusions of law herein, on the sixteenth day of March 2013, it is hereby:

ORDERED that, by March 30, 2013, Respondent shall provide Petitioner a letter of authorization to obtain an independent, developmental vision assessment of the Student at DCPS expense;

IT IS FURTHER ORDERED that Petitioner shall obtain the independent vision assessment of the Student within thirty calendar days of receiving authorization for the assessment;

IT IS FURTHER ORDERED that Petitioner shall provide a copy of the independent vision assessment report to Respondent by May 10, 2013;

IT IS FURTHER ORDERED that Petitioner's claim that Respondent denied the Student a FAPE during the 2011-2012 and 2012-2013 school years by failing to provide him assistive technology, i.e., a laptop computer or iPad and related software, is dismissed without prejudice; and

IT IS FURTHER ORDERED that Petitioner's request for compensatory education, in the form of vision therapy, assistive technology training, and tutoring, is dismissed with prejudice.

By: /s/ Frances Raskin
Frances Raskin
Hearing Officer

NOTICE OF APPEAL RIGHTS

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

Distributed to:

Counsel for Petitioner
Counsel for Respondent
Student Hearing Office