

**DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
OFFICE OF COMPLIANCE & REVIEW
STATE ENFORCEMENT & INVESTIGATION DIVISION
STUDENT HEARING OFFICE**

CONFIDENTIAL

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HEARING OFFICER'S DETERMINATION

IN THE MATTER OF:)	
DOB)	
ID)	DATE OF HEARING
Petitioner,)	August 25, 2009
V.)	DATE OF COMPLAINT
)	June 22, 2009
The District of Columbia)	ATTENDING SCHOOL:
Public Schools,)	None
Respondent)	

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STUDENT HEARING OFFICE
2009 SEP 14 PM 12: 04

STUDENT¹, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S
DETERMINATION

September 11, 2009

Representatives:

Petitioner – Michael Eig
DCPS – Linda Smalls

Hearing Officer:

Jane Dolkart

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

HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This is a year old child diagnosed with autism spectrum disorder.² His parents are both fully involved in his treatment. The child was previously seen by DC Early Intervention and became eligible for services pursuant to the IDEA at age three. The child has significant delays in social/emotional interaction, speech/language (S/L), and motor skills. Additionally, the child has mild cerebral palsy. Currently the child receives 20 hours of in-home Applied Behavioral Analysis (ABA) therapy. An initial IEP meeting was convened on April 8, 2009. At that time, DCPS proposed that the child receive 25 hours of specialized instruction, 1 hour of S/L, 30 minutes of physical therapy (OT) and 1 hour of Occupational Therapy (OT) per week in an out of general education school-based autism program.

This due process complaint was brought on June 19, 2009, alleging that DCPS denied the child FAPE by failing to allow meaningful participation by the parent in the IEP meeting, failing to provide sufficient special education and related services, failing to provide a proper setting for services, and failing to provide an appropriate placement. Petitioner requests that the child be placed in a home-based program with intense ABA therapy.

This case was originally assigned to a different hearing officer. On August 20, 2009, the case was transferred to this hearing officer. On July 9, 2009, DCPS filed a Partial Motion to Dismiss Petitioner's Due Process Complaint. On July 22, 2009, Petitioner filed a Response and Opposition.

On July 22, 2009, a pre-hearing conference was held by the previous HO, and on July 28, 2009, a pre-hearing order was issued. The pre-hearing order indicated that Petitioner had withdrawn the issue upon which the partial motion to dismiss was based and the motion was moot. Subsequently this case was consolidated for hearing purposes with a virtually identical complaint brought on behalf of the child's twin brother. An Order of Consolidation was issued on August 20, 2009. A second pre-hearing conference was held on August 14, 2009, in order to discuss the conduct of the consolidated hearings, and a pre-hearing order was issued on August 20, 2009.

On August 27, 2009, a joint motion for continuance was filed in order to allow the parties more time to prepare post-hearing briefs. The continuance was granted on August 31, 2009.

II. JURISDICTION

² I refer to Petitioner as "the child" since he has never attended school and cannot properly be referred to as "the student".

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.*, 34 CFR Part 300 *et seq.*, and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

III. ISSUES

Has DCPS denied the student FAPE by

1. Failing to allow the parent meaningful participation in the April 8, 2009, IEP meeting?
2. Failing to provide a sufficiently intense ABA based program of instruction?
3. Failing to provide a placement?
4. Failing to consider or provide an appropriate setting for special education services?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated August 17, 2009, containing a list of witnesses with attachments P 1-27. The disclosure was admitted in its entirety. Petitioner called as witnesses the student's father, Ragan [REDACTED] from CARD, and [REDACTED] the DCPS case manager,

DCPS submitted a five day disclosure letter dated August 21, 2009, containing a list of witnesses with attachments DCPS 1-10. The disclosure was admitted in its entirety. DCPS called as witnesses [REDACTED] the DCPS case manager, [REDACTED] an autism special education specialist with DCPS, [REDACTED] a DCPS physical therapist, and [REDACTED] a DCPS school psychologist.

V. FINDINGS OF FACT

1. This is a [REDACTED] year old child diagnosed with autism spectrum disorder and mild cerebral palsy. The child was previously seen by DC Early Intervention and became eligible for services pursuant to the IDEA at age three.
2. The child was first evaluated on March 6, 2008, pursuant to a referral from the DC Early Intervention program. The parents were concerned about the child's developmental delays. At that time the child was found to have below average skills in fine motor, cognitive, and adaptive behavior, and severe delays in his communication development. It was recommended that the child receive S/L therapy, which the parents began providing at their own expense. The child also began receiving OT therapy. (P2, 3)
3. In June 2008, the child was evaluated by a developmental pediatrician, Dr. [REDACTED] [REDACTED] diagnosed the child with autism spectrum disorder. Dr. [REDACTED] wrote that "This constellation of findings of delays in language development as well as atypical language development, along with self-directed behavior, preoccupation with interests, and difficulties with social interaction, are consistent with an autism spectrum disorder

diagnosis... Because of his diagnosis, [the child] will need an intensive program put in place." Dr. [REDACTED] referred the family to The Centers for Autism and Related Disorders (CARD), a source for ABA therapy. (P 3)

4. ABA is a methodology developed and tested with autistic children by Dr. [REDACTED] at the University of California at Los Angeles. Dr. [REDACTED] conducted research in the 1980's on methodologies for teaching autistic children and achieved significant results with ABA type therapy. Virtually all students in the study group showed significant improvement. A follow-up study published in 1993 found that 47% of the students who had received Dr. [REDACTED] intervention went on to become fully integrated into their general education classrooms. *Deal v. Hamilton County TN Bd. Of Ed.* Fn. 3(6th Cir. 2004). ABA therapy entails intensive and lengthy 1:1 instruction. *Henrico County School Bd. v. R.T. et al.* (E.D. Va. 2006).

5. Following Dr. [REDACTED] evaluation the child began 1.5 hours of S/L and 2 hours of OT therapy per week at the parents' expense. (P 4)

6. On July 14, 2008, the child was evaluated at CARD. CARD was founded by someone who worked with Dr. [REDACTED] and developed a curriculum based on ABA. CARD provides ABA therapy using the techniques employed by ABA, including discreet trial, a teaching technique that breaks down tasks and employs a structured, systematic way of teaching based on behavioral models. One of the primary purposes of ABA is to teach autistic children more socially appropriate behaviors with the hope of transitioning them into a school based setting. Each child must be individually evaluated to determine if they are ready for such a transition. (Testimony of Ms. [REDACTED])

7. The evaluation report noted that the child "presents delays in social interaction and communications skills. Specifically, he does not interact with other children and he is nonverbal. In addition, his eye contact and response to his name are inconsistent. Furthermore, [the child] engages in stereotyped and repetitive patterns of behavior, such as turning lights on and off, and he demonstrates other maladaptive behaviors including noncompliance and tantrums." CARD recommended that the child begin receiving 40 hours per week of 1:1 home based therapy, provided by therapists trained in ABA methods. CARD also recommended that the child's treatment be supervised by a qualified ABA consultant for 6 hours per month, and that all therapists implementing his program attend clinical meetings for 4 hours per month. (P 4)

8. Following the CARD evaluation the child's parents started him on a home based ABA program which continues to be followed as of the time of this hearing. The child's case supervisor from CARD, Ragan [REDACTED] testified concerning the child's program. Ms. [REDACTED] holds a BA in psychology and received an M.Ed in educational psychology from the University of Virginia in 2003. She was an independent therapist for autistic children from August 2000-August 2005, and has worked as a therapist, case consultant and case supervisor at CARD since September 2005. Ms. [REDACTED] was accepted as an expert on the use of ABA for autistic children. (P 27, Testimony of Ms. [REDACTED])

9. Ms. [REDACTED] testimony was found to be credible. She has substantial experience working with autistic children and using ABA therapy. Ms. [REDACTED] is very familiar with the child having worked with him as both a case supervisor and 1:1 therapist for over a year. Ms. [REDACTED] reviewed all of the documents submitted in this case. (Testimony of Ms. [REDACTED])

10. The child began with 15 hours per week of ABA therapy, moved to 20 hours per week, and is now ready for 25 hours per week. Optimally, a child receives 40 hours per week of therapy, but the child becomes fatigued and cannot sustain that level of intensity. The goal is to increase his hours up to 40 hours per week as the child is ready. (Testimony of Ms. [REDACTED])

11. Ms. [REDACTED] testified that the child is non-verbal (he babbles), and has poor receptive language skills. He has a poor attention span, does not understand most commands, does not imitate the actions of others, has low independent play skills, is unable to parallel play, and does not play interactively. The child also engages in maladaptive behaviors like banging his head, scratching and biting himself and severe tantrums or meltdowns. The child is not potty trained.

Ms. [REDACTED] believes and I so find, that the child has benefited from his ABA therapy. Since starting ABA therapy the child's receptive language skills have increased so that, e.g., he now understands that to go outside he must put his shoes on. One year ago the child could barely do a one piece puzzle. He now has the attention span to do 12-16 piece puzzles. The child now has a more spontaneous demand repertoire and can use the Picture Exchange Communication System (PECS) to help communicate when prompted. The child has improved his imitative skills and can follow simple instructions. The child can be taken to the playground, although he goes off and plays by himself. These improvements have been accomplished using a 1:1 therapist who is there to provide the immediate prompts the child requires to do most tasks and to learn new ones. CARD provides quarterly patient evaluation reports. There are 4 such reports in the record, starting on October 14, 2008, and ending on July 13, 2009. The reports provide clear evidence of the progress being made by the student.

(P 6, 12, 20, 26, Testimony of Ms. [REDACTED])

12. Autistic students involved with ABA therapy are transitioned to a school setting as soon as possible, but in increments. The child may go to the playground, then may go to see the classroom, then may go to school for a few hours a week, etc. Such transitions must be very carefully planned. In general, any kind of transition is hard for autistic children and they must be prepared and ready to work in a school setting and gain a rapport with the new teacher. It is critical to involve the ABA providers in a transition from home to school to make sure the child retains what he has learned and to ensure consistency. Ms. [REDACTED] has worked with school systems in the area to effectuate transitions from home to school.

Ms. [REDACTED] testified that the child is not ready to transition to a school setting. He presently has difficulty even going to a new grocery store, is bothered by other children and loud noises, and is likely to engage in serious maladaptive behavior which would be a safety risk. Any school-based program not using 1:1 ABA therapy would be inappropriate for the student. Ms. [REDACTED] testified that she is hopeful that within 2 years the child may be able to transition to a school setting with an ABA therapist and continued after school home-based ABA therapy.

(Testimony of Ms. [REDACTED])

13. Ms. [REDACTED] testified that no one at DCPS consulted with her or asked her opinion concerning appropriate services for the child. Although DCPS observed the child at his home when Ms. [REDACTED] was present, no one asked if the ABA therapy was working, what progress had been made, the beneficial amount of such therapy, or if the child was ready for school. DCPS did not invite Ms. [REDACTED] to the student's initial IEP meeting, nor did the child's parents request that she attend. (Testimony of Ms. [REDACTED])

14. On January 8, 2009, a meeting was held pursuant to the DC Early Intervention Program, to discuss the student's transition from this program to DCPS upon reaching the age of 3. Following this meeting a Student Evaluation Plan (SEP) was developed recommending that DCPS conduct educational, S/L, OT, PT, psychological, and social history evaluations. (P 11, 13)

15. In March 2009, 5 evaluation reports were completed for evaluations all of which were conducted in the child's home. The evaluations were conducted based on implementation in a school setting. The findings were completely consistent with previous evaluations and are not in dispute. The social work evaluation provided no new information. The child's OT evaluation showed that he is functioning in the below average range for grasping and poor range for visual motor skills. The child also has difficulty processing sensory information in the areas of auditory, tactile, and oral sensory processing. (P 15, 16, 17, 18, 19, DCPS 9)

16. A comprehensive developmental evaluation was conducted which showed significant severe developmental delays in all areas tested. (P 17)

17. A physical therapy evaluation confirmed that the child has been diagnosed with spastic diplegic cerebral palsy and receives weekly PT. The child walks on his toes and has ankle foot braces to help maintain his ankles in a neutral position (P 18)

18. A comprehensive S/L evaluation determined that the child has significant delays in his communicative functioning. The evaluator provided a detailed description of her observations on the two days she visited the child in his home. The description shows with great detail the child's maladaptive behaviors and his need for constant 1:1 attention and cuing. (P 15)

19. A psychological evaluation attempted to determine the child's cognitive functioning , but insufficient data was obtained because of the student's lack of interest and inability to sustain attention. The report indicates that the evaluator's results were similar to those obtained by Dr. [REDACTED] and in the CARD assessment. He noted that the child exhibits noncompliance and tantrum behaviors and has delays in the areas of social interaction and communications skills. (P 19)

20. On April 8, 2009, DCPS held an eligibility meeting for the child and presented the child's first IEP. Present at the meeting were DCPS Early Stages Case Manager Nicole [REDACTED] who chaired the meeting, a DCPS social worker, a special education teacher, and the persons who had conducted the evaluations, as well as the child's father. (P 21)

21. The child's father attended the meeting without counsel because of financial constraints. He was given a 14 page summary of the child's evaluations. He had not previously seen the evaluations. He was also given an IEP listing present levels of educational performance, and proposed goals. The IEP proposed to provide the child with 25 hours of specialized instruction, 60 minutes of S/L, and 60 minutes of OT per week, as well as 30 minutes per week of S/L consultation services. The education was to be provided in an out of general education school-based setting. (P 21)

22. The father's testimony was very credible. He is an involved and caring father who wants to do the best for his child. Nevertheless, in the course of his testimony he honestly testified as to things he did or did not do that were not necessarily in the best interests of his case.

23. The father had no disagreement with the evaluations, their findings or their basic recommendations. The evaluations were discussed with each of the evaluators at the meeting. (Testimony of father)

24. The IEP goals were reviewed at the meeting in some detail and the father did not have problems with the goals as he saw them as aspirational. At no time was there a discussion concerning the needs of the child, how the goals were to be implemented, or how the child was to transition to a school-based setting. (Testimony of father, Testimony of Ms. [REDACTED])

25. The IEP provided to the father was based on placing the student in a DCPS in-school autism program. No one from DCPS then or later explained why DCPS believed the student was ready for a school-based program. The father expressed concern that his child was not ready for a school-based program. The father was told by Ms. [REDACTED] that that in the Early Stages program DCPS only provided children with school-based services and that home-based services were not a possibility unless he filed a due process complaint. No specific placement was discussed at the meeting. Ms. [REDACTED] mentioned two possible programs at [REDACTED] and [REDACTED]. There was no one at the meeting from either program, nor did anyone at the meeting have any information about the programs except to confirm that neither provided 1:1 teaching. The father was told that he could contact the head of the Autism program to find out more information on the two

schools. The father was never provided a copy of the MDT notes of the meeting in which the names of the schools was mentioned. Further, the meeting notes indicate in the first paragraph, during Ms. [REDACTED] introductory statement and before any discussion of the evaluations or goals in the IEP, that placement in a DCPS school will be offered. The father did not sign the IEP. (Testimony of father, Testimony of Ms. [REDACTED] DCPS 2).

26. The father testified that that he has observed meaningful progress in the child's development as a result of the ABA therapy. The child now responds to his own name and sometimes responds when called. The child is also able to do puzzles and sorting tasks, skills he did not have a year ago. (Testimony of the father)

27. The father testified concerning attempts to place the child in a group setting this summer. The parents enrolled the child in a "Summer Buddies" program, a class of eight children, 1:1 ration, and two directors with extensive special education backgrounds. The program was five weeks long, meeting 2 times per week. The parents made attempts each program day to bring the child into the program. They sent him with various combinations of themselves and his therapists, to no avail. The child went into the classroom once, on the first day. Thereafter, he ran up the stairs and hid on the top floor of the church and would often start screaming loudly. By the end of the 5 weeks, as soon as they drove into the church parking lot the child would start screaming and hitting himself. (Testimony of the father)

28. The father testified that he had a strong pre-disposition towards placing the child in a home-based program but that he was willing to listen to any other proposal by DCPS. (Testimony of father)

20. The cost of the child's home-based services is presently about [REDACTED] per year. (Testimony of father).

29. Following the filing of this complaint, the parent attended a dispute resolution meeting with DCPS on July 9, 2009. Ms. [REDACTED] was also at the meeting. Both the father and Ms. [REDACTED] testified that there was no one at the meeting with any information concerning any possible DCPS placements. (Testimony of father, Ms. [REDACTED])

30. No Prior Notice of Placement (PNOP) was ever issued for the child. (Testimony of Ms. [REDACTED])

31. At this hearing [REDACTED] a DCPS Autism Special Education Specialist testified for the first time concerning the DCPS autism programs at Takoma and [REDACTED]. Both schools have pre-K programs for autistic children. There is one teacher and two aides in each classroom with no more than 6 children. At least one of the teachers is a trained ABA therapist. The aides learn on the job. The program uses a mix of ABA therapy and verbal behavioral therapy. The PECS communication system is utilized in the program [REDACTED] had no knowledge about this child and was not

able to testify concerning whether the program was appropriate for him. (Testimony of Ms. [REDACTED])

VI. DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.*, guarantees “all children with disabilities” “a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. ¶ 1400 (d)(1)(A). The IDEA defines FAPE as

Special education and related services that – (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the State educational agency..., (c) Are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 – 300.324.

Central to the IDEA’s guarantee of FAPE “is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The educational agency must provide a “basic floor of opportunity” for students with disabilities. It need not provide the best education possible, but the educational benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16*, 331 IDELR 10 (3rd Cir. 1988).

As a condition of receiving funds under the Act, IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See*, 20 U.S.C. ¶ 1413. In addition, school districts must develop comprehensive plans for meeting the special education needs of disabled students. *See*, 20 U.S.C. ¶ 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include “a statement of the child’s present levels of educational performance, ... a statement of measurable annual goals, [and] a statement of the special education and related services ... to be provided to the child....” 20 U.S.C. ¶ 1414(d)(1)(A).

Pursuant to IDEA § 1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Petitioner has the burden of proof in this case. *Schaffer et al. v. Weast*, 546 U.S. 49 (2005).

A. Procedural Violations

Pursuant to IDEA § 1415 (f)(3)(E)(ii), 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.

1. Did DCPS pre-determine the child's placement, depriving his parents of the opportunity to meaningful participate in the IEP process

As a condition of receiving funds under the Act, IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See*, 20 U.S.C. ¶ 1413. The IDEA Regulations, at 34 C.F.R. § 300.501 (c) require that:

(c) Parent involvement in placement decisions. (1) Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.

(2) ...the public agency must use procedures consistent with the procedures described in § 300.322(a) through (b)(1).

Parent participation is a corner-stone of the IDEA process. *See, Hoing v. Doe*, 484 U.S. 305, 327 (1988). "Congress repeatedly emphasized through the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness. *Id.* at 311-312, *See also, Rowley* at 458 U.S. at 205-06.

The parents' contention is that they had no *meaningful* participation in the placement meeting. The fact that the parents disagreed with the DCPS placement does not, by itself, show that they did not participate meaningfully. *Paolella v. District of Columbia*, 2006 WL 3697318 (2006)(unpublished opinion). However, in this case, the record is clear that even before the parent walked into the IEP meeting, DCPS had determined that the student would be placed in a DCPS school-based program. In fact, Ms. [REDACTED] informed the father that no other type of placement was allowed in the early stages program, regardless of the child's needs, and that in order to get a home-based placement, the parents would have to file a due process complaint. *H.B. v. Las Virgenes Unified School Dis't*, 239 Fed. Appx. 342 (9th Cir. 2007)(unpublished opinion) has stated that "predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives."

The fact that the child would be placed in a school-based program was stated in the introductory paragraph of the meeting notes, even before the evaluations or IEP goals had been discussed. Placement decisions must be made in conformity with the child's IEP. 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006). Thus, it is the IEP which determines whether a placement is appropriate, not the other way around. *See, Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (DDC 2006).

Additionally, there was no discussion at the IEP meeting concerning what placement

would be appropriate for the child, why DCPS believed the child was ready to attend school, or how the child would transition from a home-based to a school-based program. Indeed, there was no discussion of the particular program being offered because there was no one present at the meeting with any knowledge of the program. Thus, DCPS could not even answer any questions the father might have about the program. At the July 9, 2009 resolution session, DCPS again failed to provide anyone with knowledge about any DCPS autism programs, in clear violation of 34 CFR 300.510, which requires the school system to include in the meeting all relevant members of the IEP team who have specific knowledge of the facts in the complaint.

Without question, DCPS predetermined placement in this case and denied Petitioner FAPE by failing to provide the parents an opportunity to participate in the placement decision.

2. Did DCPS deny the student FAPE by failing to provide the parent with prior written notice of placement?

DCPS admits that it never issued a PNOP for this child. The IDEA requires written prior notice to the parents whenever the local education agency proposes to initiate or change the educational placement of a child. 20 USC 1415(b)(3). The PNOP must contain a detailed explanation as to why the school system is making the placement, a description of other options considered, and a statement of the parents' due process protections. 20 USC 1415(c)(1). The fact that two DCPS schools were mentioned at the IEP meeting does not cure the procedural violation. No information was provided about either school and the father never received a copy of the MDT meeting notes.

In *A.K. v. Alexandria City School Board*, 484 F.3d 672, 682 (4th Cir 2007), the Fourth Circuit noted "the important policies served by the requirement of a formal written offer, namely, creating a clear record of the educational placement and other services offered to the parents and assist[ing] parents in presenting complaints with respect to any matter relating to the educational placement of the child." Further, written notice helps to eliminate disputes between the school district and parents about proposed placements. *Knable v. Bexley City School District*, 238 F.3d 755 (6th Cir. 2001).

While issuance of a PNOP is important and may, in some cases, deny a student FAPE, this is not such a case. The failure to issue a PNOP simply left the child in his home-based program, where the parents wanted him to be. Had the failure to issue a PNOP left the child without any placement the situation would be different. There is no denial of FAPE for failing to issue a PNOP in this case.

B. Substantive Issues

1. Is the placement of the child in a school-based program inappropriate and a denial of FAPE?

The Supreme Court has spoken on the level of education that the states are required to provide to disabled children. “[T]he education must be sufficient to confer some educational benefit upon the handicapped child.” *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. V. Rowley*, 458 U.S. 176, 200-01 (1982). While a free and appropriate education (FAPE) does not require the best possible education, it clearly requires more than a program calculated to enable the child to derive *de minimis* educational benefit. *Doe ex rel. Doe v. Smith*, 879 F.2d 1340 (6th Cir. 1989). The IEP must confer a meaningful educational benefit gauged to the child’s potential. *T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000).

Many courts have held that the failure to fund home-based ABA services as an integral part of an autistic child’s educational program is a denial of FAPE. See, *Deal v. Hamilton County Bd. of Ed.* 392 F.3d 840 (6th Cir 2004); *School Board of Henrico County Va. V. R.T., et al.* (E.D. Va. 2006); *T.H. v. Board of Education of Palatine Community Consolidated School District* 55 F. Supp. 830 (D.Ct. N.Dist. II, Eastern Division 1999), *T.P. and S.P. ex rel S.P. v. Mamoroneck Union Free Sch. Dist.*, 2007 WL 5396672 (S.D.N.Y. 2007), *Bucks County Dept. of Mental Health/Mental Retardation v. De Mora*, 227 F. Supp.2d 426 (E.D. Pa. 2002).

This does not mean that all autistic children are in need of home-based ABA services. The first issue in this case is whether the services and placement in a school setting proposed by DCPS is appropriate. The record overwhelmingly supports the conclusion that this child is not ready to attend school and that the proposed DCPS placement is inappropriate and will not provide the child with educational benefit. The testimony of the child’s father and his ABA supervisor, as well as descriptions of the child’s behavior in DCPS’ own evaluations provide ample reasons why a school-based program is inappropriate.

The most compelling testimony is the parents’ experience attempting to get the child to participate in the Summer Buddies program. The parents wanted more than anything for the child to be able to attend some kind of group program. They and their trained ABA therapists tried every strategy to get the child into the room with the other children. They succeeded only on the first day. It is incomprehensible to imagine that this child will attend a DCPS autism program for 27 hours per week. DCPS has clearly given no thought to whether this child is ready for a school-based program and even less thought to how they would transition him into such a program.

The father and Ms. [REDACTED] also testified concerning the child’s serious maladaptive behaviors, including head banging, tantrums, biting and scratching. Ms. [REDACTED] indicated that the child needs to develop a longer attention span, better socialization, and improved compliance skills in following directions before he would be ready to access a school-based environment.

DCPS provided absolutely no testimony concerning how they would transition the student into a school setting or why they believe the student can function successfully in a school setting. In fact, although Ms. [REDACTED] described DCPS’ autism program, she

had no familiarity with the child and could not provide any insight into whether this program could work for this child.

DCPS' proposed school-based placement is inappropriate for this child and constitutes a denial of FAPE.

2. Is placement and funding of the child in his current in-home ABA therapy program proper?

Once a school district's proposed placement is found to be a denial of FAPE, the parent is entitled to funding and placement at a parentally provided placement. A private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits." *Florence County Sch. Dist. Four v. Carter*, 950 F.2d 156 (4th Cir. 1991 *aff'd*, 510 U.S. 7 (1993 (quoting *Rowley*, 458 U.S. at 207; See also *Burlington Sch. Comm. V. Dep't of Educ.*, 471 U.S. 359 (1985)). The parent need only show that a private placement is beneficial, not that it is the least restrictive placement or the best placement possible. Where the school system has failed to provide an appropriate placement under the IDEA and the parent has placed the child in a "proper" placement, the parent is entitled to full reimbursement retroactive to the date when the student was first denied an appropriate education.

Petitioner more than meets his burden of proof that the current placement is appropriate. Ms. [REDACTED] and the father both testified to the progress the child is making in improving his attention span, his ability to communicate, and his task completion skills. DCPS has not taken issue with the appropriateness of the child's present program or the fact that he is making progress. Further, the record establishes that the child requires a home-based program.

Ms. [REDACTED] testified that the student should receive 25 hours per week of in-home ABA therapy, to be increased to the target 40 hours per week as appropriate. Additionally, the child should receive 1 hour per week of S/L services and 1 hour per week of OT services as proposed in the child's IEP.

VII. SUMMARY OF RULING

1. DCPS has denied the student FAPE by predetermining placement and failing to provide the parents an opportunity to participate in the placement decision.
2. DCPS has denied the student FAPE by providing the student with an inappropriate school-based placement. Petitioner's placement in an ABA home-based program is proper. DCPS shall fund 25 hours of ABA therapy per week, to be increased up to 40 hours per week as appropriate, 1 hour/week of S/L, 30 minutes per week of PT, and 1 hour/week of OT.

VIII. ORDER

It is hereby **ORDERED** that

1. DCPS shall place and fund the child at his home-based ABA therapy program administered by CARD, retroactive to April 14, 2006, the date the student turned 3 and became eligible for services. DCPS shall fund 25 hours per week of home-based ABA therapy to be increased up to 40 hours per week as CARD finds appropriate.
2. DCPS shall fund 1 hour of speech and language therapy per week, 30 minutes of OT therapy per week, and 1 hour of occupational therapy per week, retroactive to April 14, 2006, to be provided by providers of the parents' choice at the child's home.
3. Any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

/s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: September 11, 2009