OSSE
Student Hearing Office
July 29, 2013

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

PETITIONER,
on behalf of STUDENT,[1]

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: July 26, 2013

Hearing Officer: Peter B. Vaden

Case No:

Hearing Dates: July 18 and 22, 2013

Student Hearing Office, Rooms 2006, 2005
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the "Petitioner" or "MOTHER"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq*., and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("DCMR"). In her Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools ("DCPS") denied Student a FAPE by failing to develop and implement an appropriate Individualized Education Plan ("IEP"), including Extended School Year ("ESY") services, for Student as ordered in a May 1, 2013 Hearing Officer Determination (the "May 1, 2013 HOD").

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

Student, an AGE adolescent, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on June 7, 2013, named DCPS as respondent. Concurrent with filing her complaint, Petitioner filed a motion for an expedited due process hearing, which DCPS opposed. The undersigned Hearing Officer was appointed on June 11, 2013. The parties mutually waived resolution, effective June 12, 2013. The 45-day deadline for issuance of this Hearing Officer Determination began on June 13, 2013. On June 20, 2013, the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters. In light of the parties' agreement to waive the resolution period, I denied Petitioner's motion for an expedited hearing.

In its response to the due process complaint, DCPS moved to dismiss the complaint, in part, for want of sufficiency. In a June 19, 2013 order, I determined that the complaint was sufficient. On July 3, 2013, Petitioner filed a Motion for Partial Default, which I denied by order dated July 15, 2013. On July 11, 2013, Petitioner filed a Motion for Partial Summary Determination, which was opposed by DCPS. I will address this motion, which I took under advisement, in this decision.

The due process hearing was convened before the undersigned Impartial Hearing Officer on July 18 and 22, 2013 at the Student Hearing Office in Washington, D.C. The evidentiary portion was completed on July 18, 2013. The hearing was reconvened, by telephone, on July 22, 2013 for oral closing argument.[2] The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. DCPS was represented by COMPLIANCE CASE MANAGER

[2] The closing argument session was held, on the record, at the Student Hearing Office (Room 2005). DCPS' Counsel attended this session in person. Petitioner's Counsel and the Hearing Officer attended by telephone.

and DCPS COUNSEL.[3]

Petitioner testified and called as witnesses, Compliance Case Manager, EDUCATIONAL ADVOCATE, and EDUCATIONAL ADVISOR. DCPS called, as its only witness, Compliance Case Manager. Petitioner's Exhibits P-1 through P-32 were admitted into evidence without objection, with the exception of Exhibit P-8, which was admitted over DCPS' objection. Exhibit P-33 was not offered. DCPS' Exhibits R-1 through R-21 were admitted without objection, with the exceptions of Exhibits R-1, R-8 and R-11 through R-14, which were admitted over Petitioner's objections. Exhibits R-11 through R-14, recent psychological and related services evaluations of Student, were admitted as educational records, but not to establish the truth of the conclusions drawn or the recommendations made by the evaluators (who did not testify).

At the beginning of the hearing, I informed the parties that I deemed DCPS to have acknowledged for purposes of this case that the required accommodations identified in Student's May 28, 2013 IEP[4] are equally binding, regardless of whether the accommodations are stated in the Present Levels of Performance ("PLOP") or Classroom Accommodations sections of the IEP. Upon that notice, Petitioner's Counsel withdrew Petitioner's claim that the IEP is inappropriate because it identifies accommodations for Student in the PLOP section of the IEP, instead of in the Classroom Accommodations section.

Counsel elected not to make opening statements. At the conclusion of Petitioner's case in chief, DCPS made a motion for a directed finding against Petitioner which I denied, except with respect to the issue of whether Student's IEP is deficient for not identifying minimizing distractions and preferential seating as accommodations that will be provided for Student, as to

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[3] A DCPS summer law clerk also attended the hearing on July 18, 2013.

[4] In the pleadings in this case, the date of the IEP developed pursuant to the May 1, 2013 HOD is variously stated as May 24, 2013, May 30, 2013 and May 28, 2013. In this decision, I identify the IEP as the "May 28, 2013 IEP".

which I granted DCPS' motion. Counsel for both parties made closing argument on July 22, 2013. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

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

MAY 1, 2013 HEARING OFFICER DETERMINATION

On April 5, 2013, Impartial Hearing Officer Kimm Massey convened a due process hearing between the same parties in Case No. 2013-0090[5] on the issues of (1) whether DCPS had failed to provide an appropriate school placement for Student after October 2010; (2) whether DCPS failed to provide an appropriate annual IEP for Student for school year 2012-2013; and (3) whether DCPS failed to conduct reevaluations of Student after February 2011. Hearing Officer Massey concluded, *inter alia*, that DCPS denied Student a FAPE (i) by not convening a Multidisciplinary Team ("MDT") meeting for Student in June 2012 or thereafter; (ii) by not developing an IEP for Student for the 2012-2013 school year; and (iii) by failing to conduct a special education reevaluation of Student after February 2011. May 1, 2013 HOD at 10-11 (Exh. P-1). In the May 1, 2013 HOD, Hearing Officer Massey ordered:

> 1. DCPS shall convene an MDT meeting for Student within 15 days of the issuance of this Order to (i) review and revise, as appropriate, Student's IEP, and (ii) assign Student an educational placement where his IEP can be implemented for SY 2013/14 and for Summer 2013 ESY if appropriate;
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> 2. DCPS shall provide funding for Student's receipt of specialized instruction through his current private provider for the period beginning on Student's enrollment date of February 12, 2013 and continuing through the end of SY 2012/13, by providing $1,785 for the period from February 12 through April 10, 2013, and by providing funding at the same proportional rate from April 10, 2013 through the end of SY 2012/13.
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> 3. DCPS shall complete Student's reevaluation within 30 days of the issuance of this

[5] The instant case is the most recent of a series of due process cases and judicial appeals concerning the provision of FAPE to this student.

> Order, and within 15 days after the completion of the reevaluation, DCPS shall convene a meeting to review Student's assessments, revise Student's IEP as appropriate, and discuss and determine the location of services for implementation of the IEP. In the event DCPS fails to complete Student's reevaluation and related assessments within 30 days of the issuance of this Order, then DCPS shall provide funding for independent assessments for Student.
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> 4. DCPS shall provide the following items to Petitioner as compensatory award: (i) 150 hours of online instruction through the WECA Electrician Trainee Program, which includes an apprenticeship, to be begun at Student's discretion when appropriate after obtaining an academic foundation; and (ii) computer hardware and software consisting of a laptop of Student's choosing up to $1,500, printing/scanning hardware up to $500, and an 8 months subscription to Brain Pro Autism software for $4,200.

May 1, 2013 HOD, *supra*, at 12-13.

ISSUES AND RELIEF SOUGHT

This issues remaining to be determined in the instant case are:

- Whether DCPS' May 28, 2013 IEP for Student is inappropriate because it fails to identify the concomitant impairments which warrant Student's Multiple Disabilities ("MD") classification;
- Whether DCPS' May 28, 2013 IEP for Student is inappropriate because it provides insufficient hours of ESY services;
- Whether DCPS' May 28, 2013 IEP for Student is inappropriate because it omits piano lessons as related OT services that will be provided to Student;
- Whether DCPS' May 28, 2013 IEP for Student is inappropriate because it fails to identify a location, or particular school, where the IEP, including ESY services, is to take place;
- Whether DCPS denied Student a FAPE by failing to issue a prior written notice stating its reasons for not including the information, accommodations and services requested by Petitioner in Student's IEP; and
- Whether City High School, identified by DCPS in a prior written notice, is an unsuitable location to implement ESY services under the May 28, 2013 IEP.

For relief, Petitioner seeks an order for DCPS to fund Student's ESY and school year 2013-2014 private placement at ON-LINE SCHOOL, facilitated by Educational Advisor's company, with transportation. In addition, Petitioner seeks compensatory education services to

compensate for DCPS' alleged failure to provide Student appropriate ESY services during summer 2013.

FINDINGS OF FACT

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

1. Student, an AGE adolescent, resides with Mother in the District of Columbia. Testimony of Mother.

2. Student is eligible for special education and related services under the primary disability classification, Multiple Disabilities ("MD"). Exhibit R-4. His underlying diagnoses – current or by history – include, *inter alia*, cerebral palsy, hydrocephalus, epilepsy, autism, non-verbal learning disability, dysgraphia, and dysplasia. Testimony of Mother.

3. Student began receiving special education services early in elementary school. He attended a number of public and private schools and was also home-schooled at times. Exhibit P-7. For most of the 2012-0213 school year, Student's only educational instruction was provided at home or at Educational Advisor's office. Testimony of Mother. DCPS did not develop an IEP for Student for the 2012-2013 school year. May 1, 2013 HOD.

4. Student has received cognitive skills training from a private provide for 4 years on a 1 hour per day/five days a week schedule. For the last school year, Student has received speech-language therapy from the same private provider for two 1-hour sessions per week. Student also receives vision therapy services from a private provider 3 times a week in 1 hour sessions. The Cognitive Therapy and Vision Therapy programs are year-round and Student has received those services over the summer. Testimony of Mother.

5. Following issuance of the May 1, 2013 HOD, DCPS and Petitioner's Counsel

agreed to convene Student's IEP team on May 14, 2013. Exhibit P-10. Mother and Petitioner's Counsel attended the IEP meeting. The DCPS representative explained at the meeting that DCPS lacked adequate current educational data on Student to develop a revised IEP. Exhibit R-1. Petitioner agreed to extend, to May 24, 2013, the completion date for Student's "final" IEP. Exhibits R-1, P-17.

6. On May 21, 2013, Compliance Case Manager forwarded by email to Petitioner's Counsel a draft IEP for review by Student's current services providers. The IEP had been drafted by CASE MANAGER. Exhibit P-11. On May 24, 2013, Petitioner's Counsel provided Compliance Case Manager by email the current providers' comments and recommendations. Exhibit P-12, P-13. Case Manager returned the "finalized IEP" by email of May 28, 2013. Exhibit P-14.

7. The May 28, 2013 IEP identified Student's Primary Disability as MD. For Special Education and Related Services, the IEP provides:

Special Education Services

Service	Setting	Begin Date	End Date	Time/Frequency
Adapted Phys. Education	Outside Gen. Education	05/24/2013	05/23/2014	60 min per wk
Specialized Instruction	Outside Gen. Education	05/24/2013	05/23/2014	20 hr per wk
Specialized Instruction	Outside Gen. Education	05/24/2013	05/23/2014	5 hr per wk

Related Services

Service	Setting	Begin Date	End Date	Time/Frequency
Occupational Therapy	Outside Gen. Education	05/24/2013	05/23/2013	4 hr per wk
Speech-Language Path.	Outside Gen. Education	05/24/2013	05/23/2014	2 min [*sic*] per wk

Consultation Services

Service	Begin Date	End Date	Time/Frequency
Occupational Therapy	05/24/2013	05/23/2013	30 min per day
Speech-Language Path.	05/24/2013	05/23/2014	45 min per day

Exhibit R-4.

8. The May 28, 2013 IEP provides that ESY Services are required for the provision of FAPE and includes ESY goals for Academic-Mathematics, Academic-Reading, Academic-Written Expression, and Motor Skills/Physical Development. For ESY Special Education and Related Services, the IEP provides 20 hours per week[6] of Specialized Instruction, 4 hours per week of Occupational Therapy ("OT") and 2 hours per week of Speech-Language Pathology. The setting for all ESY services is Outside General Education. Exhibit P-4. For classroom accommodations, the IEP further provides that Student requires "1 on 1 with a teacher, 1 on 1 with a cognitive skills coach." This 1:1 requirement was inserted by Case Manager in the "Present Levels of Performance and Annual Goals" Section of the IEP instead of in the Classroom Accommodations Section because DCPS' electronic Special Education Data System ("SEDS") does not enable input of the data in the Classroom Accommodations section of an IEP. Exhibit P-14. The IEP affirms that "Any accommodations listed are in effect for the duration of the IEP unless otherwise indicated." Exhibit P-4.

9. The May 28, 2013 IEP does not identify the location of services where Student's special education and related services will be provided for either ESY or the 2013-2014 school year. Exhibit R-4.

10. A DCPS Location of Services team met in June 2013 to consider whether DCPS was able to implement Student's ESY requirements. The team determined that the ESY program at City High School would be able to implement Student's ESY program. Mother was not

[6] In a typographical error, the IEP states "20 hr per day" as the Time/Frequency for ESY Specialized Instruction.

invited to participate in the Location of Services team meeting and she was not represented at the meeting. Testimony of Compliance Case Manager.

11. On June 12, 2013, Compliance Case Manager provided notice to Petitioner's Counsel that the ESY part of Student's May 28, 2013 IEP would be implemented at City High School for the period July 8, 2013 through August 2, 2013. She stated that the hours of the ESY program would be 9:00 a.m. to 2:00 p.m. Exhibits P-24, R-9. On June 14, 2013, Petitioner's Counsel responded by email, requesting more information about City High School ESY, "for example regarding [Student's] proposed schedule and teachers." Exhibit P-26. Compliance Case manager referred counsel to ESY PROGRAM CONTACT. Exhibit P-17. However, the email address provided for ESY Program Contact was inoperable and Mother's attempts to reach the Contact by telephone were also unsuccessful. Testimony of Mother.

12. At the City High School ESY Program, Student would have received basically 4 hours per day of instruction and services in a multi-student classroom with a one hour break for lunch. Testimony of Educational Advocate.

13. Petitioner elected not to have Student attend the ESY program at City High School. She was concerned about the physical location of City High School and hours of services offered. She never took Student to visit the City High School ESY program. Testimony of Mother.

14. By email of July 3, 2013, Petitioner's Counsel give notice to DCPS Counsel that Mother intended to place Student at On-Line School, as facilitated by FACILITATOR, LLC for ESY and to hold DCPS responsible for the cost. Petitioner's Counsel stated that Petitioner rejected the ESY Placement at City High School because she had not been provided information regarding the nature of the school placement or the way in which it would meet Student's needs,

and because she had unspecified information that indicated that City High School was "not remotely appropriate" for Student. Exhibit P-28.

15. For the regular school year, DCPS is not able to implement the May 28, 2013 IEP in a public school. Compliance Case Manager has sent referral packets concerning Student's educational requirements for school year 2013-2014 to PRIVATE SCHOOL 1, PRIVATE SCHOOL 2, PRIVATE SCHOOL 3, PRIVATE SCHOOL 4 AND PRIVATE SCHOOL 5. Testimony of Compliance Case Manager. Mother has received this information and two of the private schools have contacted her. She intends to ask the private school staff questions about their programs and she is willing to visit these schools if assured that they can implement Student's IEP. Testimony of Mother.

16. Educational Advisor consults for On-Line School. On-Line School offers an on-line curriculum, in coordination with independent facilitators like Educational Advisor, who provide 1:1 instruction to enrolled students. Educational Advisor is the owner of a private company, Facilitator, LLC, which primarily provides school placement and educational services to special needs students. Testimony of Educational Advisor. On-Line School has no school campus or physical classrooms. Testimony of Mother.

17. The enrollment fee at On-Line School is $5,000 for the regular school year and $1,600 for the summer session. Educational Advisor charges an additional $75.00 per hour for her instruction services as a facilitator for On-Line School. Testimony of Educational Advisor. On-Line School does not have a current certificate of approval from the D.C. Office of the State Superintendent of Education. Hearing Officer Notice.

18. Educational Advisor started working with Student beginning two years ago. Most recently, she has instructed Student, working with the On-Line School curriculum, since

the spring of 2013. Testimony of Educational Advisor. During this period, Student attended 1:1 sessions at Educational Advisor's office, for 1 to 2 hours per session, 2 to 3 days a week. Testimony of Mother. In the May 1, 2013 HOD, Hearing Officer Massey ordered DCPS to reimburse Petitioner for Student's enrollment at On-Line School beginning in February 2013 and ordered to DCPS to fund Student's continued enrollment through the end of the 2012-2013 school year. Exhibit P-1. The sessions ended at the end of June 2013. Testimony of Mother.

19. During the period of his instruction by Educational Advisor, under the On-Line School program, Student has shown growth in his ability to comprehend and to get around. Testimony of Educational Advisor. Student has received benefit from the On-Line School program. Testimony of Mother.

20. Student has received piano lessons as therapy for poor muscle tone caused by his dysgraphia condition. Mother has observed that the piano lesson therapy helps to strengthen Student's finger and hand muscles, and is effective because Student is an auditory learner. Testimony of Mother.

21. Pursuant to the May 1, 2013 HOD order to reevaluate Student, DCPS completed Occupational Therapy, Physical Therapy, Speech and Language and Psychological assessments of Student in May and June 2013. The last of these evaluation reports was completed by June 18, 2013. Exhibit R-11 through R-14. Mother undertook to obtain a DCPS funded, Independent Educational Evaluation ("IEE"), vision assessment of Student. By email of July 10, 2013, Petitioner's Counsel informed Compliance Case Manager that the vision assessment was scheduled for August 8, 2013. Exhibit R-21.

22. By email of July 10, 2013, Compliance Case Manager inquired of Petitioner's Counsel about convening a meeting to review Student's evaluations which had already been

completed. Petitioner's Counsel responded, "Possibly. Is there an advantage for us all in doing it then instead of waiting for all evals at once?" Exhibit R-21. Compliance Case Manager is waiting for completion of Student's vision assessment to convene an MDT meeting to review Student's reevaluation. Testimony of Compliance Case Manager.

CONCLUSIONS OF LAW

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

BURDEN OF PROOF

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006). *See, also, Hinson ex rel. N.H. v. Merritt Educational Center*, 579 F.Supp.2d 89, 95 (D.D.C.2008) (Plaintiff, as the party challenging the IEP, had the burden of proof to show that the plan was inappropriate, citing *Schaffer v. Weast*, *supra*, 546 U.S. at 62.)

ANALYSIS

1. APPROPRIATENESS OF MAY 28, 2013 IEP

In the May 1, 2013 HOD, Hearing Officer Massey ordered DCPS, *inter alia*, to convene an MDT meeting for Student to "(i) review and revise, as appropriate, Student's IEP, and (ii) assign Student an educational placement where his IEP can be implemented for SY 2013/14 and for Summer 2013 ESY if appropriate." Student's IEP team met on May 14, 2013 and, agreed to obtain input from Student's current, non-DCPS, education and related services providers before completing the IEP. Following receipt of extensive input from those providers and Mother,

DCPS developed the final May 28, 2013 IEP. Petitioner contends that the final IEP is inappropriate for Student because (a) the IEP fails to identify the specific accompanying impairments which warrant Student's MD classification, (b) the IEP omits piano lessons as an OT service, (c) the IEP provides insufficient hours of ESY services and (d) the IEP does not identify a location, or particular school, where the IEP will be implemented.

The provide a FAPE, the IDEA requires that "[t]he IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005) (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). To determine whether a FAPE has been provided, courts must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *N.T. v. District of Columbia* 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003). The IEP issues asserted by Petitioner in this case all concern the second prong of the inquiry.

a. Is DCPS' May 28, 2013 IEP inappropriate because it fails to identify the concomitant impairments which warrant Student's Multiple Disabilities ("MD") classification?

Petitoner's first concern, that the May 28, 2013 IEP does not list Student's concomitant disabilities that make up his Multiple Disabilities classification, is without merit. A child's entitlement under the IDEA is to FAPE and not to a particular label in his IEP. The child's identified needs, not the child's disability category, determine the services that must be provided to him. *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006). *See, also, Heather S. v. State of Wis.*,

125 F.3d 1045, 1055 (7th Cir. 1997) (IDEA not concerned with labels, but with whether a student is receiving a FAPE); *B.B. ex rel. Brunes v. Perry Tp. School Corp.*, 2008 WL 2745094, 9 (S.D.Ind.Jul. 11, 2008) (Issue under the IDEA is whether the school district is providing an appropriate education to the child, which may or may not be affected by whether the diagnosis or label is correct.) The Petitioner offered no evidence that Student's needs identified in the May 28, 2013 IEP, or the services to be provided to him, are in any way affected by whether the concomitant disabilities, which warrant Student's Multiple Disabilities[7] classification, are identified in the IEP.

b. Is the May 28, 2013 IEP inappropriate because it provides insufficient hours of ESY services?

The May 28, 2013 IEP provides, as ESY services for Student, 20 hours per week of Specialized Instruction, 4 hours per week of Occupational Therapy ("OT") and 2 hours per week of Speech-Language Pathology. Petitioner argues that these ESY hours are insufficient because they are less than the hours of special education and related services which the IEP provides in Student's regular school year program. Petitioner misapprehends the IDEA's requirements for ESY programming. "ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537–38 (4th Cir.2002); *see also S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F.Supp.2d 56, 68–69 (D.D.C.2008) (adopting the standard from *MM*); *Johnson v.*

[7] The category Multiple Disabilities is not found in the IDEA. In its guidance on the 2004 amendments to the Act, the U.S. Department of Education explained that the purpose in including the Multiple Disabilities definition in the IDEA regulations is to ensure that children with more than one disability are not counted more than once for the respective States' annual report of children served, because States do not have to decide among two or more disability categories in which to count a child with multiple disabilities. *See* Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, Analysis of Comments and Changes, 71 Fed. Reg. 46550 (August 14, 2006).

District of Columbia, 873 F.Supp.2d 382, 386 (D.D.C.2012) (same).

In closing argument, Petitioner's counsel argued that Student's ESY services must be exactly the same as the services provided to him during the regular school year. This is contrary to the *MM* standard adopted by the Courts in this jurisdiction. *Cf. JH ex rel. JD v. Henrico County School Bd.*, 326 F.3d 560, 565 (4th Cir. 2003) (overturning, as contrary to *MM* decision, finding of Hearing Officer that child "needs the ESY with the same level of instruction in speech/language and OT that he received in kindergarten.") Additionally, the U.S. Department of Education's Office of Special Education Programs (OSEP) has issued interpretive guidance recognizing that "a child's IEP for ESY services will probably differ from the child's regular IEP, *since the purpose of the ESY program is to prevent regression and recoupment problems.*" *See Letter to Myers*, 16 IDELR 290 (OSEP 1989) (emphasis in original). While these kinds of agency interpretive memoranda do not have the force of law, they "are entitled to respect" to the extent that they are persuasive. *See Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000).

In the present case, Student was without a current IEP during the 2012-2013 school year. (According to Mother, he did receive 2 to 6 hours a week of 1:1 instruction from Educational Advisor, 5 hours a week of Cognitive Skill training, and 2 hours per week of speech-language therapy.) Even assuming that for the 2012-2013 school year, Student had been provided the much more extensive regular school year services specified in the May 28, 2013 IEP, Petitioner has not established that Student's expected gains during the school year would have been significantly jeopardized if he were not provided more ESY services than offered in the May 28, 2013 HOD.

c. Is the May 28, 2013 IEP inappropriate because it omits piano lessons as related OT services that will be provided to Student?

Petitioner also complains that the May 28, 2013 IEP fails to provide piano lessons as a related service. "Related Services" is identified in the IDEA to mean transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. *See* 34 CFR 34 CFR § 300.34(a). The U.S. Supreme Court has given the term "related services" a broad construction, reading it to encompass services that enable disabled children to gain "meaningful access to education that Congress envisioned." *DL v. District of Columbia*, 277 F.R.D. 38, 45 (D.D.C.2011) (citing *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 74, 119 S.Ct. 992, 143 L.Ed.2d 154 (1999)), *vacated on other grounds sub nom. DL v. District of Columbia*, 713 F.3d 120 (D.C. Cir. 2013).

Mother testified that Student benefits from piano lessons he receives as occupational therapy for his dysgraphia condition. While DCPS did not dispute this testimony, proof that a loving parent can craft a better IEP than a state offers does not, alone, entitle her to prevail under the IDEA. *See, e.g., Kerkam v. McKenzie*, 862 F.2d 884, 887 (D.C.Cir.1988). *See, also, Reid, supra*, 401 F.3d at, 525 (Ordinary IEPs need only provide some benefit.) Here, there was no evidence, expert or otherwise, that Student requires piano lessons in order to gain meaningful access to education or that without piano lessons, the May 28, 2013 IEP does not confer educational benefits.

d. Is the May 28, 2013 IEP inappropriate because it fails to identify a location, or particular school, where the IEP, including ESY services, is to take place?

The May 28, 2013 IEP provides a statement of the extensive special education and related services, supplementary aids and services, and program modifications/classroom supports that are to be provided to Student, including ESY services. However the IEP does not identify a location where Student is to receive his IEP services for either ESY or the 2013-2014 school

year. Petitioner contends that the omission of a location of services makes the May 28, 2013 IEP inappropriate. DCPS argues, to the contrary, that, while the IDEA requires that a child's parents be part of the team that creates the IEP and determines the educational placement for the child, "educational placement," as used in the Act, means the educational program – not the site location where the program will be implemented.

Each party is able to cite case law, including decisions from this jurisdiction, which tends to support its position. Petitioner relies upon *Eley v. District of Columbia,* 2012 WL 3656471, 7 -8 (D.D.C.2012). U.S. Magistrate Judge Facciola's Report and Recommendation in *Eley*, citing the Fourth Circuit's decision in *A.K. ex rel. J.K. v. Alexandria City School Board*, 484 F.3d 672, 681 (4th Cir.2007), held that an "IEP must contain a location where the services will be provided." *Eley* at 7-8. The Court further stated that excluding the parent from DCPS' unilateral decision on the location for the child's IEP to be implemented "impaired the right of the parent to participate in the process" and was a denial of FAPE. *Id.* at 9. No objection to Magistrate Judge Facciola's Report and Recommendation having been filed by either party, the Report and Recommendation was adopted in full. *Id.* at 1. DCPS cites seemingly contrary authority from the U.S. District Court for the District of Columbia and other jurisdictions. In *James v. District of Columbia*, 2013 WL 2650091, 3 (D.D.C. Jun. 9, 2013), U.S. District Judge Leon considered whether DCPS' designation of a replacement school to implement the child's IEP, after the original school recommended by the IEP team closed, was a change in educational placement that required parental involvement. The Court held that "'Educational placement,' as used in the IDEA, means educational program – not the particular institution where the program is implemented" and that "[a] change in location of services does not constitute a change in educational placement where the new setting replicates the educational program contemplated by the student's original assignment." *Id.* at 3 (citations and internal quotations omitted.) The

Court concluded that the child's reassignment to the replacement school did not require DCPS to involve his parents or his IEP team, and there was no denial of a FAPE. *Id. See, also,* decisions cited in *A.M. v. District of Columbia,* 2013 WL 1248999, 6 (D.D.C. Mar. 28, 2013): *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C.Cir.1984) (stating that educational "placement" under the IDEA refers to the general educational program in which a child is enrolled, not to a specific location); *A.W. ex rel. Wilson v. Fairfax Cnty. Sch. Bd.*, 372 F.3d 674, 682 (4th Cir.2004) (finding that under the IDEA, "'educational placement' is not the location to which the student is assigned but rather the environment in which educational services are provided"); *T.Y. v. N.Y. City Dep't of Educ.*, 584 F.3d 412, 419 (2nd Cir.2009), *cert. denied*, —— U.S. ——, 130 S.Ct. 3277, 176 L.Ed.2d 1183 (2010) ("'Educational placement' refers to the general educational program – such as the classes, individualized attention and additional services a child will receive – rather than the 'bricks and mortar' of the specific school."); *Aikens v. District of Columbia* 2013 WL 3119303, 6 (D.D.C. Jun. 21, 2013) (Where there was no showing of a "fundamental change in" or "elimination of" a basic element of child's educational program when he was moved to new school, there was no change in educational placement. Without such a change, DCPS was not required to provide prior written notice or involve parent in the decision to move the child.)

In the instant case, assuming there is a conflict between the lines of cases exemplified in *Eley* and *James*, it is not necessary to reconcile the respective holdings. As will be discussed more fully below in this determination, DCPS did provide Mother timely prior notice of Student's assignment to City High School for ESY. However, I conclude that the ESY program at City High School is not able to implement the requirements of Student's IEP and therefore was not a suitable location of services. I also conclude that DCPS was not required to identify a 2013-2014 school year location of services in the May 28, 2013 IEP, before Student's IEP team

met to consider his reevaluations conducted pursuant to the May 1, 2013 HOD.

With regard to identifying a location of services for the 2013-2014 school year, when the May 28, 2013 IEP was being developed, DCPS was in the process of conducting the reevaluation of Student ordered in the May 1, 2013 HOD. On July 5, 2013, Compliance Case Manager informed Petitioner's Counsel that DCPS would like to meet to review Student's evaluations and determine a location of services for the 2013-2014 school year as soon as the last assessment – Student's vision assessment being arranged by Mother – was completed. I find that this order of procedure – deferring the location decision until after the evaluation data is received and reviewed by the MDT team – did not violate the IDEA. Under the IDEA, the placement decision for a child is made by a group of persons, including the parents, and other persons knowledgeable about the child and the placement options and must be informed by the child's evaluation data. *See* 34 CFR § 300.116(a). The placement determination must be "based on the child's IEP," *id.*, § 300.116(b), and DCPS must match the child with a school capable of fulfilling his IEP needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C.Cir. 1991). For DCPS or Student's IEP team to have identified Student's location of services for the 2013-2014 school year before receiving his reevaluation reports would have run afoul of the IDEA's requirement that the IEP team consider, *inter alia*, a child's evaluation data and may have implicated predetermination concerns. *Cf. Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 259 (4th Cir.1988) (School Board committed a procedural violation by predetermining the child's placement and then developing an IEP to carry out its decision.)

The facts in the present case are distinguishable from *Eley, supra*, where the Court found that the school year began without the child being placed at a specific school. ("This child, despite his severe disabilities, had no school to attend when the school year began, and all the other children had been assigned a school. Therefore, DCPS's failure to do so denied [the child]

FAPE." *Id.* at 8.) Here, Compliance Case Manager testified that the process of locating a suitable 2013-2014 placement for Student is on schedule. She has sent Student's educational requirement referral packets to five private schools and provided this information to Mother. Mother acknowledged both receiving the information and being contacted by two of the private schools. Unlike the case in *Eley*, *supra*, there was no evidence here that DCPS' timetable for identifying a school for Student would result in Student's not having a school to attend by the beginning of the school year. I conclude, therefore, that DCPS' not identifying Student's 2013-2014 location of services in the May 28, 2013 IEP[8] was not a denial of FAPE[9]

With regard Petitioner's claim that the IEP is inappropriate because it does not identify the location for Student's summer 2013 ESY services, I find no provision in the IDEA or the implementing regulations which would require that a child's ESY location be identified in his IEP. However, even if Petitioner were correct that the location for ESY services must be identified in a child's IEP, the failure to do so in this case would be a harmless procedural violation because DCPS notified Parent by letter of June 12, 2013 of the location for Student's ESY services, as well as the duration and frequency of the services. *See Lesesne v. Dist. of*

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[8] As of the July 18, 2013 due process hearing, DCPS had not identified a location of services to implement Student's IEP. This Hearing Officer notes that the *Eley* decision leaves no doubt that DCPS would have a duty to identify an appropriate location of services in time for Student to enroll before the beginning of the 2013-2014 school year.

[9] Petitioner also makes much of the May 1, 2013 HOD requirement for DCPS to convene an MDT meeting within 15 days to review and revise Student's IEP, and to "assign Student an educational placement where his IEP can be implemented for SY 2013/14 and for Summer 2013 ESY if appropriate." Petitioner argues that DCPS was required by the order to identify Student's location assignment at the May 14, 2013 IEP meeting convened pursuant to the HOD. However, the HOD also required DCPS to complete a reevaluation of Student within 30 days, and upon completion to "convene a meeting to review Student's assessments, revise Student's IEP as appropriate, and discuss and determine the location of services for implementation of the IEP." DCPS' interpretation of the HOD, that it must determine Student's location of services after the reevaluation is completed, is not unreasonable. Regardless, the IDEA does not empower this Hearing Officer to enforce the May 1, 2013 HOD. *See, e.g., Dominique L. v. Board of Educ. of the City of Chicago*, 2011 WL 760019, 3-4 (N.D.Ill.2011) (Without a civil action, the IDEA does not provide for further action on a hearing officer's decision.)

Columbia, 447 F.3d 828, 834 (D.C. Cir.2006) (In the absence of a showing that the child's education was substantively affected, no relief may be awarded. *Id.*)

In summary, I find that Petitioner has not met her burden of proof to establish that the May 28, 2013 IEP was deficient in any of the particulars she asserts, or that the IEP was not reasonably calculated to provide Student educational benefits.

2. DID DCPS DENY STUDENT A FAPE BY FAILING TO ISSUE A PRIOR WRITTEN NOTICE STATING ITS REASONS FOR NOT INCLUDING THE INFORMATION, ACCOMMODATIONS AND SERVICES REQUESTED BY PETITIONER IN STUDENT'S IEP?

Following the May 14, 2013 IEP meeting for Student, Case Manager wrote a draft IEP for Student, which Compliance Case Manager forwarded to Petitioner's Counsel for review. On May 24, 2013, Petitioner's Counsel forwarded to Compliance Case Manager an extensive list of edits and requested changes to the IEP draft, including, *inter alia*, Petitioner's concerns addressed above in the Analysis section of this determination. Petitioner contends that DCPS denied Student a FAPE by not issuing a prior written notice ("PWN"), which stated its reasons for not making all of the changes her representatives requested in the final IEP. The IDEA and its implementing regulations require DCPS to provide written notice to parents before it initiates or refuses a change in a student's identification, evaluation, or educational placement. 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a). Specifically, the written notice must contain:

> (A) a description of the action proposed or refused by the agency;
>
> (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
>
> (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
>
> (D) sources for parents to contact to obtain assistance in understanding the provisions of

this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b).

In this case, DCPS did not make all of the changes to the draft IEP requested by Petitioner's Counsel in his May 24, 2013 email. DCPS explained its reasons in email communications with Petitioner's Counsel. However, DCPS did not subsequently provide the parent with a PWN that complied with the requirements of 34 C.F.R. § 300.503(b). I find that DCPS' failure to give the required PWN was a procedural violation of the IDEA. *See Honig v. Doe*, 484 U.S. 305, 312, 108 S.Ct. 592, 598 (1988) (Safeguards include prior written notice whenever the responsible educational agency refuses to change the child's placement or program.) Only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See, e.g., Lesesne, supra,* 447 F.3d at 834.

The main purpose behind the PWN requirement "is to provide sufficient information to protect the parents' rights under the Act. It should enable the parents to make an informed decision whether to challenge the DCPS's determination and to prepare for meaningful participation in a due process hearing on their challenge." *Hymes v. District of Columbia*, 2005 WL 486430, 2-3 (D.D.C. Mar. 2, 2005), quoting *Kroot v. District of Columbia*, 800 F.Supp. 976, 982 (D.D.C.1992). *See, also, M.B. ex rel. Berns v. Hamilton Southeastern Schools*, 668 F.3d 851, 861-862 (7th Cir.2011) (The purpose of the prior written notice requirement "is to ensure that parents are aware of the decision so that they may pursue procedural remedies." *Id.*) In this case, Mother has been represented at all times by able special education counsel, who

accompanied her to the May 14, 2013 IEP meeting, communicated on her behalf with DCPS and filed the present due process complaint only 9 days after the May 28, 2013 IEP was adopted. DCPS' failure to provide a formal PWN regarding the IEP did not impair Mother's ability to participate in the process or result in harm to Student. I find, therefore, that DCPS' failure to provide a PWN after not accepting all of Mother's requested changes to the IEP did not result in denial of FAPE.

3. WAS CITY HIGH SCHOOL AN UNSUITABLE LOCATION TO IMPLEMENT STUDENT'S ESY SERVICES UNDER THE MAY 28, 2013 IEP?

For her final claim, Petitioner contends that City High School is not an appropriate location that is capable of implementing Student's ESY program under the May 28, 2013 IEP. I agree. In *Catalan ex rel. E.C. v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C.Cir. Sept. 11, 2007), the Court followed the standard for failure-to-implement claims articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 348-49 (5th Cir.2000). In *Bobby R.*, the court wrote:

> [T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.

Bobby R., 200 F.3d at 349. Thus, a Hearing Officer reviewing failure-to-implement claims under IDEA must ascertain whether the aspects of the IEP that were not followed were "substantial or significant," or, in other words, whether the deviations from the IEP's stated requirements were "material." *See Catalan, supra* at 75.

The May 28, 2013 IEP provides that Student requires, for ESY, 20 hours per week of Specialized Instruction, 4 hours per week of Occupational Therapy ("OT") and 2 hours per week

of Speech-Language Pathology. As classroom accommodations, Student requires, *inter alia*, "1 on 1 with a teacher, 1 on 1 with a cognitive skills coach." DCPS argues that although these 1:1 classroom accommodations are required for the regular school year, they are not required for Student's ESY services. However, the IEP states expressly that all accommodations listed in the Classroom Accommodations section are in effect for the duration of the IEP unless otherwise indicated. The IEP does not, elsewhere, indicate that Student does not require 1:1 instruction for ESY services.

Very little evidence was adduced at the due process hearing concerning how City High School would implement Student's ESY services. Mother never visited the program or spoke to school staff. However, Educational Advocate, who worked for more than 25 years as a special education teacher and administrator for DCPS, testified that she was recently informed by the Special Education Coordinator of the City High School ESY program that there had been no discussion of providing ESY services to Student outside of the school's multi-student classrooms. DCPS did not rebut this testimony, and, in fact, offered no evidence of how City High School would implement Student's ESY program. I conclude that Petitioner has met her burden to establish that City High School is not a location capable of implementing Student's ESY requirement for 1:1 instruction. I further find that this deviation from the May 28, 2013 IEP's requirements was material, resulting in a denial of FAPE.

4. <u>COMPENSATORY EDUCATION REMEDY</u>

The IDEA gives courts "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See Reid, supra*, 401 F.3d at 522-23. The award must "provide the educational benefits that likely would have accrued from special education services" that the school district "should have supplied in the first place." *Id.* at 524. A compensatory education award must "rely on individualized assessments" after a "fact

specific" inquiry. *Id.* "In formulating a new compensatory education award, the hearing officer must determine 'what services [the student] needs to elevate him to the position he would have occupied absent the school district's failures.'" *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010) *(*quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527.) *See, also, e.g., Turner v. District of Columbia*, 2013 WL 3324358, 10 -11 (D.D.C. July 2, 2013).

I have found that Student has been denied a FAPE by DCPS' failure to accommodate his requirement for 1:1 instruction in the City High School ESY program. Mother rejected Student's inappropriate ESY placement at City High School and did not enroll him in the 4-week program. Student's IEP ESY services include 20 hours per week of Specialized Instruction, in addition to 4 hours per week of Occupational Therapy ("OT") and 2 hours per week of Speech-Language Pathology. Student's private cognitive therapy and vision therapy programs are year-round and he has received those services over the summer. The evidence does not establish whether Student was harmed by not receiving ESY OT and Speech-Language Pathology services. However, the evidence does establish that Student's Specialized Instruction sessions with On-Line School ended in June 2013. I conclude therefore that due to DCPS' failure to offer 1:1 Specialized Instruction in Student's ESY program, Student was denied 80 hours (20 hours per week for 4 weeks) of ESY Specialized Instruction required by his IEP.

In order to determine what services Student needs "to elevate him to the position he would have occupied" absent DCPS' failure to provide 1:1 Specialized Instruction, I have considered Educational Consultant's opinion that hour-for-hour compensation for missed ESY services would be appropriate, because the gap in services encompassed a very short period of time and can be remedied quickly. Educational Advisor testified that she would be able to provide 20 hours a week of 1:1 instruction to Student. As of this writing, only 4 weeks remain

before DCPS' regular 2013-2014 school year begins. In order to allow time to schedule Student's compensatory services, I will order DCPS to fund 20 hours per week of 1:1 instruction of Student by Educational Advisor for three weeks, or a total of 60 hours, to be completed before the end of DCPS' summer break. *See Reid, supra*, 401 F.3d at 524 (There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.)

SUMMARY

In this decision I have found that Petitioner has failed to establish that DCPS' May 28, 2013 IEP was not reasonably calculated to provide Student Educational Benefits and that Student was not harmed by DCPS' failure to issue a Prior Written Notice to Mother after the IEP was finalized. I have further found that DCPS denied Student a FAPE by failing to offer ESY services that met his IEP requirement for 1:1 instruction and that an award of 60 hours of 1:1 instruction by Educational Advisor is an appropriate, equitable, compensatory education remedy.

PETITIONER'S MOTION FOR PARTIAL SUMMARY DETERMINATION

On July 11, 2013, Petitioner filed a Motion for Summary Determination on three issues, *to wit*:

> 1. Student's entire IEP Team agreed that the setting requirements and accommodations listed in the present levels of Performance sections of the IEP were necessary elements of a school placement;
>
> 2. Student's entire IEP Team agreed that the IEP should prescribe the same number of hours for ESY as it does for the regular school year; and
>
> 3. The Doctrine of Issue Preclusion prevents DCPS from contesting the appropriateness of Petitioner's proposed private placement.

DCPS filed its response in opposition to Petitioner's motion on July 13, 2013. Because there was insufficient time to consider the motion prior to the due process hearing date, I took it under advisement. I now deny the motion as to the first two issues based upon my findings of fact and

conclusions of law in this decision. The third issue invokes the doctrine of issue preclusion.

> "Under the [ ] doctrine of collateral estoppel, or issue preclusion, an issue of fact or law that was actually litigated and necessarily decided is conclusive in a subsequent action between the same parties or their privies." *Johnson v. Duncan*, 746 F.Supp.2d 163, 168 (D.D.C.2010). When the determination "is essential to the judgment, [it] is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Consol. Edison Co. of N.Y. v. Bodman*, 449 F.3d 1254, 1258 (D.C.Cir.2006) (citation and internal quotation marks omitted); *see Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) ("Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.").

Brodie v. Department of Health and Human Services, 2013 WL 3227731, 8 (D.D.C.) (D.D.C. Jun. 27, 2013). The doctrine of issue preclusion does not apply to whether Petitioner's proposed private placement of Student at On-Line School would be appropriate for the 2013-2014 school year. *See Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C.Cir.2005). That issue was neither litigated by the parties, nor decided in Case No. 2013-0090.

ORDER

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

1. As compensatory education relief for DCPS' denial of FAPE to Student by not offering 1:1 instruction for his ESY program, DCPS is ordered to provide Student, at public expense, up to 60 hours of instruction by Educational Advisor or another Facilitator, LLC instructor. The schedule for the instruction shall be arranged between the parent and Educational Advisor. Notwithstanding, these compensatory education services must be completed before the beginning of DCPS' 2013-2014 school year. If Education Advisor uses the On-Line School curriculum, DCPS shall also fund the On-Line School's charges for the said up to 60 hours of instruction. DCPS shall provide transportation for Student to Education Advisor's office or reimburse the parent for her reasonable transportation expenses. DCPS shall issue the requisite authorization for such services within 5 business days of this order.

2. Petitioner's Motion for Partial Summary Determination is denied; and

3. All other relief requested by the parties in this matter is denied.

Date: July 26, 2013

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

NOTICE OF RIGHT TO APPEAL

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