

**STATE OF SOUTH CAROLINA
BEFORE THE LOCAL DUE PROCESS HEARING OFFICER**

IN THE MATTER OF)
)
██████████ on behalf of)
her son, ██████████)
)
Petitioner,)
)
v.)
)
York County School District Four,)
)
Respondent.)
_____)

**NOTICE OF DECISION
AND DECISION
(FINDINGS OF FACT AND
CONCLUSIONS OF LAW)**

I. INTRODUCTION AND STATEMENT OF THE CASE

This due process hearing request was initiated on July 21, 2009, pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), by ██████████ (hereinafter ██████████ or "Parent") on behalf of her disabled son, who will be referred to hereinafter by his initials ██████████ hearing request, received by the District on July 27, 2009, asserted 15 grounds upon which ██████████ claimed that the District has denied a "free appropriate public education" (FAPE) to ██████████ during the 2008-2009 and 2009-2010 school years. Following a resolution session on August 10, 2009, ██████████ continues to pursue 13 grounds upon which she is seeking a determination through an IDEA due process hearing:

1. Violation of ██████████ IEP by failing to ensure that specialized instruction was provided by a teacher who is appropriately certified and highly qualified to teach students with severe disabilities;
2. Violation of ██████████ IEP by failing to provide 1:1 supervision inside and outside of the classroom;

3. Violation of [REDACTED] IEP by failing to provide adequate SL and OT therapies;
4. Failure to consider Parent's requests for services;
5. Failure to treat Parent as equal partner in planning [REDACTED] IEP
6. Failure to provide special assistance (child care) so Parent could participate in IEP meetings;
7. Failure to document Parent's concerns and recommendations on IEP;
8. Failure to move [REDACTED] to another classroom for the 2008-09 and 2009-10 school years;
9. Failure to provide adequate compensatory services;
10. Failure to adequately evaluate the extent of [REDACTED] disabilities;
11. Failure to provide copies of [REDACTED] data and school records;
12. Failure to provide a safe environment for [REDACTED] special education; and
13. Failure to provide an appropriate Behavior Intervention Plan

In addition to the above-referenced allegations, [REDACTED] also requested a change in placement to a home-based program. (LHO Exh. 1). A two-day due process hearing was held before this Local Due Process Hearing Officer on October 1-2, 2009. Based on the evidence presented at the hearing, and the application of the law under the IDEA, the Hearing Officer now issues his Decision.

II. FINDINGS OF FACT

Based on the testimony and documentary evidence presented at the hearing, the following facts are determined.

EDUCATIONAL BACKGROUND

1. I FIND that [REDACTED] whose date of birth is [REDACTED] is a 17-year-old child who resides with his mother and father at [REDACTED] South Carolina.

2. I FURTHER FIND that [REDACTED] presently is enrolled in the District and is eligible to receive special education services under the IDEA classification of Autism. Records reflect that [REDACTED] was diagnosed medically with autism disorder at age five.

3. I FURTHER FIND that by all accounts, [REDACTED] functions on a Pre-Kindergarten level with limited verbal communication skills. Recent testing obtained by Parent demonstrates that [REDACTED] IQ score is 36 (P. Exh. 13); however, he does demonstrate "scatter" or "splinter" skills that indicate many additional skills may remain unmeasured. (D. Exh. 4). [REDACTED] a multi-sensory learner who requires a structured and systematic learning environment, works on IEP goals in the areas of functional academics, daily living and social skills, and communication.

4. I FURTHER FIND that [REDACTED] first enrolled in the District in August 2006 for the 2006-2007 school year. From the evidence, Parents have moved several times during [REDACTED] school years. Prior to his enrollment in the District, [REDACTED] was home-schooled by [REDACTED] following his unilateral removal by Parent from the Galloway School District in New Jersey in June 2005.

5. I FURTHER FIND that upon enrollment, [REDACTED] was assigned to a special setting class at Fort Mill Middle School, taught by Ms. Julie Warner. [REDACTED] stated that she liked Ms. Warner very much and was pleased with [REDACTED] progress while in that class.

6. I FURTHER FIND that starting with the 2007-2008 school year, [REDACTED] ninth-grade year, he was placed in a special setting class at Nation Ford High School that was taught by Ms. Nancy Thompson. [REDACTED] testified that she also liked Ms. Thompson very much and was pleased with [REDACTED] participation while in that class.

7. I FURTHER FIND that with the tragic death of Ms. Thompson at the end of the 2007-2008 year, the District hired Ms. Vicki Ball to teach the special setting class at Nation Ford High School, beginning in July 2008. [REDACTED] was assigned to Ms. Ball's classroom.

8. I FURTHER FIND that Ms. Ball has a Master's Degree in Special Education with a focus in autism. In addition, Ms. Ball has over 10 years experience educating students with autism. She is a Board Certified Associate Behavioral Analyst who also has training in TEACCH and PECS teaching methodologies. (D. Exh. 14). Ms. Ball also testified to a variety of trainings that she herself conducted on autism, as well as those she continues to attend to continue to educate herself in her chosen field. Ms. Ball stated that she has high expectations for her students and her goal is to ensure that each student, despite his or her disability, is as independent as feasible when he or she completes a public school program.

9. I FURTHER FIND that prior to the start of the 2008-2009 school year, [REDACTED] expressed concern over the inclusion of another student in the same classroom as her son, [REDACTED] believing that the other student would exhibit violent behaviors that could place her son at risk. (P. Exh. 2). The District understood [REDACTED] concerns and, although limited in the amount and type of information they

could share under laws governing confidentiality of student records, reassured [REDACTED] that the classroom environment was safe for all students.

10. I FURTHER FIND that as it relates to safety precautions implemented for the entire classroom, as well as the other students, inclusion of this particular student did not impose any safety risks for [REDACTED]. Following a transition period re-integrating this other student into the classroom during the 2007-2008 school year, additional supports were in place during the 2008-2009 school year, including structural and physical supports, additional staff, and other behavioral supports. In addition, the other student was governed by a BIP. Although the other student has a prior history of violent "meltdowns," the testimony of school personnel established the student exhibited very few behavioral incidents during the 2008-2009 school year, none of which required physical restraint. [REDACTED] was not injured or harmed by the other student in any respect.

11. I FURTHER FIND that [REDACTED] also expressed concern with the level of independence that Ms. Ball wished [REDACTED] to attain and the strategies that Ms. Ball utilized. Over the course of the school year, the District held several meetings to discuss [REDACTED] concerns, including meetings on January 27, March 16, April 1, May 12, May 22, and August 13, 2009. [REDACTED] attended each of these meetings and provided information and input for the team's consideration. Changes were implemented in [REDACTED] school day and programming as a result of [REDACTED] input.

12. I FURTHER FIND that in addition to the aforementioned meetings, both Ms. Julie Warner, Program Specialist, and Ms. Carolyn Logue, Director of Special

Services, investigated concerns raised by [REDACTED] regarding Ms. Ball's treatment of and demeanor toward [REDACTED]. Neither found any evidence to corroborate Parent's concerns. Frequent observers in the classroom, including Amy Morgan, Jen Godwin, and Julie Warner, did not observe any behavior or conduct that caused them any concern. There is no credible evidence to establish that the classroom was unsafe for [REDACTED].

13. **I FURTHER FIND** that following an incident on May 6, 2009, wherein [REDACTED] believed that Ms. Ball reacted inappropriately and improperly disciplined [REDACTED]. [REDACTED] removed [REDACTED] from school on May 7, 2009. She did not return [REDACTED] to school for the remainder of the school year. Ms. Logue allowed [REDACTED] to receive ESY services at Nation Ford High School from Ms. Kimberly Long, a certified special education teacher, beginning June 15, 2009. Ms. Long is presently co-teaching with Ms. Ball in the special setting classroom to which [REDACTED] is assigned.

14. **I FURTHER FIND** that the IEP team met on May 12, May 22, and August 13, 2009 to develop an IEP for [REDACTED] for the 2009-2010 school year. An IEP was proposed on May 22, 2009. (D. Exh. 15). Following further evaluation of [REDACTED] the IEP team met again on August 13, 2009, to propose an IEP for the 2009-2010 school year. (D. Exh. 16).

15. **I FURTHER FIND** that pursuant to a re-evaluation review held on May 12, 2009, evaluations were conducted for [REDACTED] in the areas of Occupational Therapy and Speech Language Communication. Parent expressly limited the IEP team's re-evaluation review to occupational and speech-language therapy. ([REDACTED] 146-147).

16. **I FURTHER FIND** that the Occupational Therapy evaluation was conducted by Ms. Lori Huechtker on July 22, 2009. Based on the evaluation, Ms. Huechtker recommended 30 minutes of monthly consultative services to address [REDACTED] sensory needs. Consultative services allow supports and objectives throughout [REDACTED] day. A Listening Skills Inventory Summary was completed on that date by Isabelle Witzel to determine whether a therapeutic listening program might be beneficial for [REDACTED] (D. Exh. 8).

17. **I FURTHER FIND** that Tamara Kasper, Director for the Center for Autism Treatment conducted a Speech-Language/Verbal Behavior Assessment of [REDACTED] on July 6 and 7, 2009. (D. Exh. 4). Ms. Kasper is one of only 40 people in the country who have a dual background in the area of behavioral analysis and speech pathology. (D. Exh. 4). She was qualified as an expert in the area of Autism during the pendency of the due process hearing in this matter. Ms. Kasper has been retained by the District on an as-needed basis for consultative services in this, and other, matters.

18. **I FURTHER FIND** that Ms. Kasper's evaluation included observation and direct testing over a two-day period, as well as input by [REDACTED] and District personnel. Among Ms. Kasper's recommendations, she states in her report that "thirty minutes of direct speech-language therapy with 30 minutes of training/collaboration/monitoring of staff implementation by SLP as dictated in the IEP should be sufficient to meet [REDACTED] needs." She also suggests that "a minimum of 15 minutes per week of parent-school collaboration and training" in the procedures utilized by the school staff "to ensure generalization of skills across contexts." Ms. Kasper's report also indicates that [REDACTED] requires systematic and well-implemented teaching

strategies in order to maintain cooperation and compliance during structured tasks. (D. Exh. 4).

19. **I FURTHER FIND** that Ms. Kasper participated as a member of the August 13, 2009 IEP meeting to discuss the results of her evaluation with [REDACTED] and the other members of the team. (D. Exh. 16). Ms. Kasper's proposals as to the amount and type of speech language services that [REDACTED] required to progress matched those provided to [REDACTED] by the District during the 2008-2009 school year, as well as those proposed by [REDACTED] IEP team during the May 22, 2009 IEP meeting. (D. Exh. 4, P. Exh. 5, D. Exh. 15).

20. **I FURTHER FIND** that Ms. Kasper testified that she believes that the August 13, 2009 IEP developed for [REDACTED] is appropriate and designed to allow [REDACTED] to receive educational benefit, particularly as it relates to the area of speech language/behavior.

21. **I FURTHER FIND** that Ms. Kasper further testified that she believes that District personnel, including the classroom staff, is fully capable of implementing the recommendations and strategies outlined in her report.

22. **I FURTHER FIND** that [REDACTED] 2008-2009 IEP states that [REDACTED] requires 1:1 supervision." (P. Exh. 5). Absent [REDACTED] members of the 2008-2009 IEP team did not believe that [REDACTED] required 1:1 adult supervision at all times. Following discussions between the District and [REDACTED] however, the remaining members of the IEP team acquiesced to Parent by including the language "[REDACTED] requires 1:1 supervision."

23. I FURTHER FIND that throughout the 2008-2009 school year, [REDACTED] was consistently assigned a separate adult to work with and/or supervise him throughout the school day.

24. I FURTHER FIND that [REDACTED] testified that she was expected and/or assigned to supervise [REDACTED] during a community-based outing to Wal-Mart, allegedly in violation of [REDACTED] IEP requiring 1:1 adult supervision. Ms. Ball expected parents who were attending community-based instruction activities to assist in supervision responsibilities, although school staff was still assigned for instructional purposes. On those occasions that Parent did not attend field trips or community-based instruction activities, [REDACTED] was assigned adult supervision by school staff.

25. I FURTHER FIND that during the May 12 and 22, 2009 IEP meetings, the IEP team members again discussed [REDACTED] need for 1:1 supervision. Absent [REDACTED] the IEP team members determined that [REDACTED] did not require 1:1 adult supervision at all times. In addition, the IEP team wished to prevent, to the extent feasible, over-dependence on the constant presence of an adult. The team agreed that [REDACTED] still required 1:1 adult supervision in many circumstances, such as when working at his individual work station and during field trips, but determined that he did not require separate 1:1 adult supervision at all times.

26. I FURTHER FIND that testimony by [REDACTED] own expert witness, Dr. Buford, further confirmed that [REDACTED] did not require 1:1 adult supervision at all times, stating that [REDACTED] was able to participate in small group instruction.

27. I FURTHER FIND that as part of the IEP proposed on May 22, 2009, and August 13, 2009, for the 2009-2019 school year, the IEP team proposed the

following language: [REDACTED] requires adult supervision to participate in activities and 1:1 adult assistance to remain on task and to complete tasks at this individual work station. He will be supervised by an adult in whole group instruction or activities when in a classroom or educational setting. He will receive 1:1 adult supervision on field trips.” (D. Exh. 15, D. Exh. 16).

28. I FURTHER FIND that the May 13, 2008 IEP denotes that [REDACTED] required 30 minutes of direct and 30 minutes of indirect services weekly in the area of communication/language/pragmatics. The May 13, 2008 IEP also denotes that [REDACTED] was to receive monthly consultative services in the area of Occupational Therapy, particularly as it relates to [REDACTED] sensory needs. (P. Exh. 5). Indirect services or consultation consists of the service provider and classroom teacher/staff collaborating to incorporate and/or embed services and supports throughout a student’s programming and education. In the area of speech-language, [REDACTED] received 30 minutes of direct services on a weekly basis from Sally Hoynacki, as well as weekly consultative services in the amount of 30 minutes per week. (P. Exh. 15). In the area of occupational therapy, [REDACTED] received consultative services in the amount of at least 30 minutes per month. (P. Exh. 15).

29. I FURTHER FIND that [REDACTED] further asserts that the District failed to provide an appropriate Behavior Intervention Plan for [REDACTED] [REDACTED] did engage in potentially interfering behaviors (i.e. spitting or mouthing items), which the IEP team addressed through positive behavioral interventions, supports, and strategies throughout the 2008-2009 school year, including behavior supports built into the classroom setting and [REDACTED] daily environment. Because [REDACTED] behaviors were easily

redirected, District staff did not believe that consideration of a FBA/BIP was warranted until there was an observed increase in [REDACTED] spitting behavior during the Spring 2009 semester.

30. **I FURTHER FIND** that during a meeting on March 16, 2009, between [REDACTED] and District personnel, the parties discussed [REDACTED] increasing behaviors. At that time, it was determined that the District would review [REDACTED] behaviors to determine if a Functional Behavior Assessment (FBA) or Behavior Intervention Plan (BIP) may be beneficial. In addition, the District requested that [REDACTED] execute a Release of Information form to assist in determining if any medical conditions impacted [REDACTED] spitting behaviors. ([REDACTED] 287-289).

31. **I FURTHER FIND** that the District began collecting data in early April. Data was collected over eight non-consecutive days across settings, demands, and personnel, to include data collected by [REDACTED] in the home setting. (D. Exh. 9). In addition, the District conducted a Functional Assessment Interview with [REDACTED] [REDACTED] (P. Exh. 6).

32. **I FURTHER FIND** that upon analysis of the data, Jen Godwin and Julie Warner completed a FBA for review and discussion by the IEP team. The FBA indicated that [REDACTED] behavior served the following functions: to allow escape from demand; to provide direct attention from others, to provide sensory stimulation, and to allow [REDACTED] to gain access to help from adults. (D. Exh. 9). Using this information, Jen Godwin and Julie Warner, in conjunction with the IEP team, prepared a BIP designed to teach [REDACTED] appropriate replacement behaviors that would serve the same function as spitting. As part of the BIP, the team addressed prevention strategies, instruction

strategies, and a crisis plan. The BIP was reviewed on May 12, May 22, and again on August 13, 2009. (D. Exh. 9).

33. **I FURTHER FIND** that [REDACTED] presented the testimony and report of Dr. Rhonda Buford to challenge the appropriateness of the District's FBA and proposed BIP. (P. Exh. 14). Dr. Buford conducted a Functional Behavioral Analysis for [REDACTED] on June 5, 2009, for four hours in her clinic in Piedmont, SC. Dr. Buford stated that her report was based solely on the four hour clinic visit and parent input. She acknowledged that her report does not include any information from the District or its personnel, although such information may have been of assistance. Dr. Buford's report determined that [REDACTED] spitting behaviors (finger flicking/saliva play) were self-stimulation behaviors likely to increase when left alone with or without tangible items. (P. Exh. 14). Dr. Buford also opined that the May 22, 2009 BIP proposed by the District was inappropriate because it allowed [REDACTED] access to reinforcing sensory activities without limitation on the amount of time such activity would be allowed.

34. **I FURTHER FIND** that Jen Godwin is a Behavior Specialist with the District. Ms. Godwin was qualified as an expert in the fields of Autism and Behavioral Analysis during the pendency of the hearing as the result of her extensive experience and education in the field of behavior analysis. She testified that changes had been made to the BIP on August 13, 2009, to include clarification that [REDACTED] sensory breaks would be frequent, but short in duration. Ms. Godwin stated that, in her professional opinion, the BIP developed by the District on August 13, 2009, was appropriate and individually designed to address [REDACTED] behaviors. Ms. Godwin was also of the

professional opinion that the District and classroom staff was qualified to implement the BIP.

35. **I FURTHER FIND** that [REDACTED] asserts the District violated [REDACTED] IEP by failing to ensure that specialized instruction was provided by a teacher who is appropriately certified and highly qualified to teach students with severe disabilities.

36. **I FURTHER FIND** that South Carolina State Department of Education documents indicate that Vicki Ball is certified and highly qualified in the area of Special Education – Multi-Categorical, effective July 1, 2008. (D. Exh. 12). Prior to the 2009-2010 school year, Ms. Ball obtained all necessary coursework for certification in the area of Severe Disabilities. (D. Exh. 13). As a result, Ms. Ball is also certified, pursuant to a Restrictive Alternative Certificate (RAC) in the area of Special Education – Severe Disabilities for the 2009-2010 school year, following submission of a filing request with the South Carolina Department of Education. Notwithstanding a RAC in that area, Ms. Ball has also been granted highly qualified status in the area of Severe Disabilities.

37. **I FURTHER FIND** that Parent asserts that the District was obligated to provide copies of [REDACTED] educational records to her. Parent requested copies of [REDACTED] records on June 2, 2009. By letter dated June 4, 2009, Ms. Logue advised Parent that the records would be available for her review and inspection at the district office on June 10, 2009. Ms. Logue further advised Parent that the District would arrange for a different date or time if June 10, 2009, was not convenient for Parent. Parent did not avail herself of the opportunity to review the records maintained by the District, but continued to insist that she was entitled to copies.

III. CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and the law of IDEA, the following legal conclusions are reached:

1. **I CONCLUDE** that the Hearing Officer has jurisdiction over this matter pursuant to the IDEA, 20 U.S.C. § 1415(f)(1)(A), (3)(A)-(B). The undersigned is mindful of the proposition that “administrative officers must give appropriate deference to the decision of professional educators.” MM v. School District of Greenville County, 303 F.3d. 523, 533 (4th Cir. 2002).

2. **I FURTHER CONCLUDE** that ■■■ is a child with a disability under IDEA and is eligible for services in the IDEA category of autism. 34 C.F.R § 300.8(c)(1). As such, he is entitled to a “free appropriate public education” (FAPE). FAPE is defined to mean: 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) include an appropriate . . . secondary school education in the State involved; and (d) are provided in conformity with an IEP that meets the requirements of 34 C.F.R § 300.320-300.324. See 34 C.F.R § 300.17.

3. **I FURTHER CONCLUDE** that Parent alleges, for several reasons, that, as to the 2008-2009 school year and IEP as well as the proposed IEP for the 2009-2010 school year, (1) the District has violated the IDEA and failed to provide a FAPE; and (2) the parental placement in the home is appropriate. See M.S. and Simchick v. Fairfax County Sch. Bd., 553 F.3d 315, 324-25 (4th Cir. 2009) (citing Sch. Comm. of Burlington v. Dep’t. of Educ. of Mass., 471 U.S. 359, 369 (1985)(second)).

4. **I FURTHER CONCLUDE** that the inquiry as to whether the District has failed to provide a FAPE is limited to two questions: first, has the District complied with the procedural requirements of IDEA; and, second, "is the [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982). Relatedly, a school district has an obligation to implement a child's IEP.

5. **I FURTHER CONCLUDE** that the party challenging the IEP bears the burden of proof at a due process hearing. Schafer v. Weast, 546 U.S. 49 (2005). Therefore, in this case, the Parent bears the burden of persuasion on both the issue of denial of FAPE and the appropriateness of the parental placement.

6. **I FURTHER CONCLUDE** that for the following reasons, the first question in determining whether FAPE has been denied, whether the District has complied with the procedural requirements of IDEA, must be answered in the affirmative.

A. Alleged Procedural Violations

7. **I FURTHER CONCLUDE** that [REDACTED] due process request alleges several procedural violations of the IDEA as the basis for the claimed denial of FAPE, including denial of her right to meaningful parental participation as an equal member of [REDACTED] IEP team; failure to provide an appropriately certified teacher; failure to adequately evaluate the extent of [REDACTED] disabilities; failure to provide copies of [REDACTED] data and school records to [REDACTED] and failure to develop a behavior intervention plan. (LHO Exh. 1).

8. I FURTHER CONCLUDE that a violation of a procedural requirement of the IDEA (or one of its implementing regulations) must actually interfere with the provision of FAPE in order to result in a denial of a child's rights under the IDEA. To the extent that any procedural violations do not actually interfere with the provision of FAPE, such violations are not sufficient in and of themselves to support a finding that a district failed to provide FAPE. Gadsby by Gadsby v. Grasmick, 109 F.3d 940, 956 (4th Cir. 1997).

9. I FURTHER CONCLUDE that [REDACTED] due process request includes several separate allegations asserting that she, as a parent, was denied the right of meaningful parental participation as an equal member. Specifically, [REDACTED] states in her request that the District failed to consider her requests for services, failed to treat the parent as an equal partner in planning [REDACTED] IEP, failed to provide her special assistance in the form of child care during those times that the IEP met, and failed to document her concerns and recommendation on the completed IEP. (LHO Exh. 1). Absent the allegation related to child care, however, [REDACTED] presented no evidence regarding the above-referenced allegations, beyond the conclusory allegations outlined in her request.

10. I FURTHER CONCLUDE that the District readily agreed that parental input was important when developing an IEP and provided testimony that leaves no doubt that [REDACTED] was an active and engaged participant in meetings related to her son. As an initial matter, the testimony of Ms. Laura Antinoro, as further confirmed by meetings minutes from May 13, 2008, clearly establish that [REDACTED] provided meaningful input as a member of [REDACTED] IEP team charged with preparing the

2008-2009 IEP. (D. Exh. 10). In fact, changes were made in response to [REDACTED] [REDACTED] input. In addition, it is clear that the District, in response to concerns raised by [REDACTED] held meetings on January 27, March 16, and April 1, 2009, with various District and school-level personnel. As a result of those meetings, changes were implemented during [REDACTED] school day, to include termination of the use of hand sanitizer and increased use of hand-holding as a method of supervising [REDACTED]. In addition, IEP meeting minutes and [REDACTED] own testimony further confirm that [REDACTED] [REDACTED] was given the opportunity to provide meaningful input in the three IEP different IEP meetings that the District held as it attempted to formulate an IEP for the 2009-2010 school year.

11. I **FURTHER CONCLUDE** that although [REDACTED] due process request alleges that she was not afforded an opportunity to participate as an equal member of [REDACTED] IEP team, the IDEA does not permit parental participation to rise to the level of parental consent or parental veto power. The right to provide meaningful input is not the same as the right to dictate an outcome. A.W. ex rel. Wilson v. Fairfax County Sch. Bd., 372 F.2d 674 (4th Cir. 2004) ("the right conferred by the IDEA on parents to participate in the formulation of their child's IEP does not constitute a veto power over the IEP team's decisions). There is clear evidence that the IEP team requested, considered and discussed concerns and suggestions raised by [REDACTED] [REDACTED] in various meetings and, as a result, [REDACTED] was not denied an opportunity to participate in the IEP meetings.

12. I **FURTHER CONCLUDE** that the due process hearing request also includes an allegation that the District failed to provide child care so that [REDACTED]

could participate in IEP meetings. Based on [REDACTED] testimony, this allegation relates to that period of time when she had removed [REDACTED] from Nation Ford, prior to the conclusion of the 2008-2009 school year. While the District has no obligation to provide child care so that a parent may attend an IEP meeting, the District must make reasonable efforts to ensure a parent's presence or opportunity to participate by scheduling IEP team meetings "at a mutually agreed time and place," including use of alternative methods to ensure parent participation, such as conference telephone calls. 34 C.F.R. 300.322. Although it appears that [REDACTED] correspondence prior to the May 12, 2009 IEP meeting included no reference to her inability to attend for lack of child care, and instead cited other reasons for wishing to cancel and/or reschedule the meeting, [REDACTED] did advise Ms. Logue in writing during the May 12, 2009 meeting that she was forced to attend with [REDACTED] because she had no one to watch [REDACTED] while he was not in school. (P. Exh. 9). There is, however, insufficient evidence to establish that [REDACTED] informed the District, prior to arriving at the May 12, 2009 IEP meeting, that she was unavailable for the meeting.

13. **I FURTHER CONCLUDE** that there also is no evidence that [REDACTED] expressed any concern with the scheduling of the remaining IEP meetings. While it may not have been preferable to have [REDACTED] in attendance, the District established that, once it learned [REDACTED] was present, it made accommodations to keep [REDACTED] occupied during the course of the duration of the meetings. Moreover, [REDACTED] was able to attend and participate in the IEP meetings.

14. **I FURTHER CONCLUDE** that although [REDACTED] asserts that Ms. Ball is not certified and “Highly Qualified” (HQ)¹ to teach students with severe disabilities, I find that, pursuant to South Carolina regulations governing special education classification and teacher certification, Ms. Ball was, and is, appropriately certified to teach [REDACTED] a child classified as having “Autism” under IDEA. Parent characterized [REDACTED] as having a “severe disability” and presented expert testimony and a medical diagnosis to establish that [REDACTED] level of autism falls within the severe range. Though there is conflicting information as to whether [REDACTED] is severely or moderately autistic, I conclude that a decision on this issue is not determinative for purposes of determining [REDACTED] special education services, including appropriate teacher certification.

15. **I FURTHER CONCLUDE** that [REDACTED] teacher, Ms. Ball, is certified in the area of multi-categorical special education. Ms. Ball is also HQ in this area. Under S.C. Reg. 43-62(III)(E), a teacher certified in multi-categorical special education may serve students with mild to moderate disabilities, to include autism, emotional disabilities, learning disabilities, mental disabilities, and traumatic brain injury. There are no state regulations or guidelines establishing the criteria for moderate levels of functioning, as it relates to autism. Pursuant to South Carolina regulations, specifically 43-241.1(H), children who qualify for IDEA special education services under the category of “Autism” are not further classified as mildly, moderately, or severely autistic for purposes of special education services. Moreover, a student’s team is not required to administer a standardized individual measure of intelligence or academic cognitive ability for students receiving services under the category of “Autism.” To the extent that

¹ HQ status is a requirement of the No Child Left Behind legislation. The only aspect of HQ status at issue in this case is the State certification question. If Ms. Ball is properly certified under State requirements, she also is HQ.

██████████ has presented an IQ score demonstrative of ██████ level of cognitive ability, however, that score, 36, establishes that ██████ functions within the moderate range of cognitive ability. See 43-243.1(C)(2)(b) (scores within the range 25-48 are considered to be within the moderate range of intellectual functioning). As a result, I find that Ms. Ball's certification in the area of multi-categorical special education is in compliance with 34 C.F.R. §300.18, which requires the District to ensure that specialized instruction is provided by appropriately certified and highly qualified personnel.²

16. **I FURTHER CONCLUDE** that The South Carolina Department of Education's guidelines, as outlined in its manual Required Credentials for Professional Staff Members in the Instructional Programs of South Carolina's Public Schools, provide that for the 2009-2010 school year "acceptable certification for a teacher of a self-contained special education class is determined by the area of disability in which all or the majority of the teacher's students are classified." (D. Exh. 13). Therefore, I conclude that, notwithstanding ██████ level of disability, cognitive functioning, or classification, Ms. Ball's certification in the area of multi-categorical qualifies her to teach ██████ during the present school year based on the classification of the majority of the other students in her class.

17. **I FURTHER CONCLUDE** that even if Ms. Ball lacked the appropriate certification at any time relevant, any such procedural violation did not result in a denial of FAPE. The record presented to this Hearing Officer clearly established that Ms. Ball has had a long and successful career serving students with autism at all

² To the extent the S.C. State Department of Education, in the recent Level I complaint determination, reached a contrary conclusion, I decline to accept that conclusion. The determination made in this due process case is based on a more thorough evidentiary presentation on the issue than available under the Level I complaint process and on legal analysis by a Hearing Officer who is a practicing attorney and a special education hearing official trained by the State.

levels. In addition, the evidence established that Ms. Ball has all necessary coursework in the area of Severe Disabilities and, as a result, was able to obtain a Restrictive Alternative Certification in the area of Severe Disabilities, effective during the 2009-2010 school year simply by filing a request with the State Department. This Hearing Officer concludes that the mere fact that Ms. Ball had not filed the necessary paperwork with the SDE, even if a procedural violation, is insufficient by itself to establish a denial of FAPE.

18. **I FURTHER CONCLUDE** that although the due process hearing request further asserts that the District failed to evaluate appropriately the extent of [REDACTED] disabilities, based on the testimony presented by [REDACTED] her allegation is premised on the District's alleged failure to determine [REDACTED] level of autism. As previously addressed, once a child is classified under the category of "Autism" the District is not obligated to make any further determinations as to the child's level of autism. As it relates to a child's functioning level or "present levels," however, the team must obtain sufficient information related to the child's level of functioning for program planning and placement decisions. In this case, District personnel exhibited a keen awareness that a student's IEP should be based on the individual needs of the student, including his or her present levels, instead of the student's IDEA classification.

19. **I FURTHER CONCLUDE** that as it relates to evaluations, the District complied with 34 C.F.R. 300.303, which obligated the District to conduct a re-evaluation at least once every three years. A re-evaluation planning meeting was conducted May 13, 2008, during which the IEP team, including [REDACTED] determined that no additional evaluations or information was needed to provide [REDACTED]

appropriate special education services. [REDACTED] signed her consent to and agreement with that decision. (D. Exh. 11). On May 12, 2009, at the request of [REDACTED] the IEP team again conducted a re-evaluation planning meeting to address [REDACTED] concerns, although [REDACTED] expressly limited the team's discussion to the areas of speech and occupational therapy. [REDACTED] 146-147). Thereafter, the District timely conducted speech therapy and occupational therapy evaluations. (D. Exh. 8, 4). As a result, I find that there are no procedural or substantive violations of the IDEA as it relates to the District's evaluations of [REDACTED]

20. **I FURTHER CONCLUDE** that under 34 C.F.R. 300(c)(1)(i), a school district must obtain informed parental consent before conducting a reevaluation of a child with a disability. To the extent that [REDACTED] now alleges that additional evaluations were necessary, she is precluded from asserting a denial of FAPE on those grounds because she herself limited the team's discussion on the need for additional evaluations. "As a general matter, it is inappropriate, under the IDEA, for parents to seek cooperation from a school district, and then to seek to exact judicial punishment on the school authorities for acceding to their wishes." M.M. v. Sch. Dist. of Greenville County, 303 F.3d 523, 533, n. 14 (4th Cir. 2002).

21. **I FURTHER CONCLUDE** that while the due process request alleges that the District violated the IDEA by failing to provide [REDACTED] copies of [REDACTED] data and school records, the District complied with the IDEA by timely providing [REDACTED] with an opportunity to inspect and review those educational records maintained by the District. Although [REDACTED] requested copies of [REDACTED] educational records, a school district is only required to provide copies of educational

records "if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records." 34 C.F.R. 300.613(b)(2). The Office of Special Education Programs (OSEP) has interpreted this provision to apply to a parent who resides beyond commuting distance and, thus, who lives too far from the school district to make inspection in person a reasonable option. 71 Fed. Reg. 46,688 (2006); Letter to Kincaid, 213 IDELR 271 (OSERS 1989). I further conclude that the Family Policy Compliance Office, the agency responsible for enforcing FERPA, has indicated that it considers a distance of within 50 miles from the school to be "commuting distance." Letter re: Karns City Sch. Dist., 7 FAB 13 (FPCO 2003). Moreover, I conclude that a parent does not have a right to request copies for use by his or her representative, even if the failure to permit or provide copies would prevent a distantly located representative from reviewing them altogether. Letter to Longest, 213 IDELR 173 (OSEP 1988). Since it is apparent that [REDACTED] resides within commuting distance of the school and district office, the District was obligated to permit her to review and inspect records pertaining to [REDACTED] but not make copies as requested. The records were available for [REDACTED] review and inspection, and copying by her, in early June 2009³. It appears that [REDACTED] simply did not avail herself of this opportunity.

22. I FURTHER CONCLUDE that although the due process request alleges that the District failed to provide [REDACTED] an appropriate behavior intervention plan in

³ To the extent that [REDACTED] alleges that her right to review and inspect educational records was infringed upon because the entirety of all records may not have been available at the time Ms. Logue responded to [REDACTED] records request, "education records" (as understood under FERPA) are those that are maintained by a single custodian, such as a registrar. The Supreme Court has opined that Congress could not have meant every single record kept by any individual related to a student. Owasso Independent School District v. Falvo, 534 U.S. 426, 434-435, 122 S.Ct. 934, 151 L.Ed.2d 896 (2002) Therefore, to the extent that there were stray documents in the possession of other staff, the District did not violate its obligation to provide [REDACTED] access to [REDACTED] records nor has it denied [REDACTED] an opportunity to receive FAPE.

violation of the IDEA, the District timely considered and responded to [REDACTED] behaviors. As it relates to FBAs and BIPs, the IDEA only requires that a student with a disability who is subjected to a change in placement for disciplinary violations "receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications that are designed to address the behavior violation so it does not recur." 34 C.F.R. 300.530. I conclude that there is no evidence that [REDACTED] was subjected to a change in placement based on disciplinary infractions.

23. **I FURTHER CONCLUDE** that an IEP team is, however, required to consider the use of positive behavioral interventions and supports, and other strategies to address behavior that impedes the child's learning when developing an IEP for a student. 34 C.F.R. 300.324. Although the evidence indicates that [REDACTED] did engage in potentially interfering behaviors (i.e. spitting or mouthing items), the IEP team timely and appropriately implemented positive behavioral interventions, supports, and strategies throughout the 2008-2009 school year to address behaviors exhibited by [REDACTED] so that those behaviors would not impede his learning or educational progress. School and District personnel testified to various behavior supports built into the classroom setting and environment, including classroom structure, adult supervision, and sensory activities. The evidence presented indicated that the supports in place for [REDACTED] adequately addressed [REDACTED] behaviors and, by all accounts, he was easily redirected. District staff did not believe that consideration of a FBA/BIP was warranted until there was an observed increase in [REDACTED] spitting behavior during the Spring 2009 semester. Because the District adequately addressed [REDACTED] behaviors, they did not deny [REDACTED] a FAPE by failing to provide a BIP. See A.C. and M.C., on behalf of M.C. v. Bd. of Educ. of the

Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 (2nd Cir. 2009) (school district satisfied requirement of considering use of positive behavioral interventions and supports and its decision not to also conduct a FBA did not rise to the level of denying student FAPE).

24. **I FURTHER CONCLUDE** that based on the record as a whole, this Hearing Officer determines that the District timely implemented appropriate strategies to address [REDACTED] behaviors, including the development of an appropriate BIP designed to further address said behaviors.

B. Alleged Substantive Violations

25. **I FURTHER CONCLUDE** that for the following additional reasons, the second question in determining whether the District failed to provide a FAPE, whether the IEP is reasonably calculated to enable the child to receive educational benefits and whether proper implementation has occurred, also must be answered in the affirmative.

26. **I FURTHER CONCLUDE** that [REDACTED] due process request alleges several substantive violations of the IDEA as the basis for the alleged denial of FAPE, including failure to implement services outlined in [REDACTED] 2008-2009 IEP; failure to change [REDACTED] teacher assignment; failure to provide a safe environment for [REDACTED] special education services, and failure to provide an appropriate Behavior Intervention Plan. (LHO Exh. 1). Based on [REDACTED] prayer for relief, she also is requesting a determination on the appropriateness of the IEP proposed by the District for the 2009-2010 school year.

27. **I FURTHER CONCLUDE** that [REDACTED] due process request alleges that the District failed to provide adequate compensatory services. I

conclude, however, that [REDACTED] failed to present any evidence regarding this alleged violation, absent the allegations outlined in her request.

28. I FURTHER CONCLUDE that applicable Fourth Circuit case law holds that a FAPE must be calculated to confer some educational benefit on a disabled child; however, FAPE does not require "the best possible education that a school system could provide if given access to unlimited funds." Barnett by Barnett v. Fairfax County School Bd., 927 F.2d 146 (4th Cir. 1991); Bd. of Educ. of Hendrick Hudson Central Sch. Dist. Westchester County v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982) (free appropriate public education to which access is provided should be sufficient to confer some educational benefit upon the handicapped child; no requirement to furnish every special service necessary to maximize each handicapped child's potential); M.M. v. Sch. Dist. of Greenville County, 303 F.3d 523, 526 (4th Cir. 2002) (a FAPE must be reasonably calculated to confer some educational benefit on a disabled child). Instead, the provision of FAPE requires that the Local Educational Agency (LEA) provide personalized instruction with sufficient support services to permit a disabled child to benefit educationally. M.M. at 527. Once FAPE is offered, the school district need not offer additional educational services. M.M. at 527 (citing Matthew v. Davis, 742 F.2d 825 (4th Cir. 1984)). Whether FAPE has been provided is determined by whether the student was provided with sufficient support services to permit him to receive "some educational benefit." M.M. at 526.

29. I FURTHER CONCLUDE that [REDACTED] alleges that the District failed to implement certain portions of [REDACTED] IEP during the 2008-2009 school year, specifically as it relates to the provision of 1:1 adult supervision, occupational

therapy, and speech therapy. (P. Exh. 5). The evidence clearly establishes, however, that the District implemented all accommodations, modifications, and services outlined in [REDACTED] IEP. I therefore conclude that [REDACTED] cannot prevail on her claim for denial of FAPE based on any alleged failure to implement.

30. I FURTHER CONCLUDE that [REDACTED] 2008-2009 IEP indicates that he was required to receive 30 minutes of direct speech therapy, as well as 30 minutes of indirect/consultative services on a weekly basis. The lesson plan summaries completed by Ms. Hoynacki establish that [REDACTED] was receiving the direct services contemplated in [REDACTED] IEP, while Ms. Ball and Ms. McGuirt provided credible testimony to substantiate that the weekly consultation services were also provided to [REDACTED] (P. Exh. 15). The IEP also indicated that [REDACTED] should receive monthly consultation in the area of Occupational Therapy. Ms. Huechtker's notes provide ample confirmation to her testimony, as well as to that of Ms. Ball, that [REDACTED] received the occupational therapy services outlined in his IEP. (P. Exh. 15). Because the IEP team provided the services mandated by [REDACTED] IEP, there can be no denial of FAPE resulting from a failure to implement these services.

31. I FURTHER CONCLUDE that [REDACTED] request for compensatory education services in the area of Speech Language and Occupational therapy is not justified. The remedy of compensatory education "involves discretionary, prospective, injunctive relief crafted ... to remedy ... an educational deficit created by an ... agency's failure over a given period of time to provide a FAPE to a student." G. v. Fort Bragg Dependent Schools, 343 F.3d 295, 308-09 (4th Cir. 2003). Compensatory education should be reasonably calculated to restore a student to the position he would have been in absent the school district's failures. In the absence of a denial of FAPE or

failure to implement educational services, compensatory education is not appropriate or warranted.

32. **I FURTHER CONCLUDE** that [REDACTED] further alleges that the District violated [REDACTED] IEP by failing to provide 1:1 supervision. I conclude, however, that a separate adult was assigned to supervise [REDACTED] a conclusion that is based on testimony provided by Ms. Ball and Ms. Mary Eileen White. I further conclude that, even if [REDACTED] was expected to provide supervision to [REDACTED] on those occasions that she attended community-based activities, this practice is not a substantive violation of [REDACTED] IEP resulting in a denial of FAPE. I find it reasonable that a classroom teacher may expect parents who attend or participate in community-based activities or field trips to assist in providing supervision to their own child, if not to other students as well. Moreover, there is no evidence that [REDACTED] was required to attend the community activities to ensure that 1:1 services were provided to [REDACTED]. To the contrary, Ms. Ball presented evidence that established she and classroom staff provided 1:1 supervision to [REDACTED] on field trips where his mother did not attend. Therefore, there is no evidence that the District failed to implement this modification for [REDACTED] during the 2008-2009 school year. Because the IEP team provided the modifications mandated by [REDACTED] IEP, there can be no denial of FAPE resulting from a failure to implement.

33. **I FURTHER CONCLUDE** that the due process hearing request further alleges that [REDACTED] was denied FAPE as the result of the District's refusal to assign [REDACTED] to a different classroom during the 2008-2009 school year. (LHO Exh. 1). I conclude that [REDACTED] was not requesting a change in [REDACTED] special education services, but instead a change in the teacher providing said services. It is clearly established,

however, that the District retains its right to choose the staff it uses to implement the IEP. Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580, 259 F.Supp.2d 880, 885 (D.Minn. 2003); Hacienda La Puente Unified Sch. District, 48 IDELR 237 (CA SEA 2007). Moreover, the record as a whole leaves absolutely no doubt that Ms. Ball is qualified to provide educational services to ■■■. In addition to being appropriately certified, Ms. Ball also received a competent rating on a statewide evaluation, ADEPT. As it relates more specifically to ■■■ Ms. Ball, who has a Master's Degree in Special Education with a focus in autism, has over ten years experience educating students with autism. In addition, Ms. Ball is a Board Certified Associate Behavioral Analyst who also has training in TEACCH and PECS teaching methodologies. (D. Exh. 14). Ms. Ball also testified to a variety of trainings that she herself conducted on autism, as well as those she continues to attend to continue to educate herself in her chosen field.

34. **I FURTHER CONCLUDE** that Ms. Ball's classroom is a safe environment in which to educate ■■■ and that there is no evidence to establish that Ms. Ball engaged in any type of behavior that could be considered abusive. ■■■ acknowledged that she had no first-hand knowledge to support her allegations. In subsequent testimony, Parent alluded that she was advised of improprieties in the classroom, yet failed to provide any specific information regarding these allegations or informant nor did elicit testimony regarding same.

35. **I FURTHER CONCLUDE** that the District presented credible evidence substantiating the safety of Ms. Ball's classroom. As it relates to placement of another student with prior behavioral issues in Ms. Ball's classroom, Ms. Warner and Amy Morgan provided information confirming that the inclusion of this particular student

did not impose any significant safety risks for [REDACTED]. Both testified to the implementation of physical and structural strategies and additional support personnel following a transition period re-integrating him with other students during the 2007-2008 school year. Ms. Ball, Ms. Warner, and Ms. Morgan all also testified that the other student's behavior was governed by a BIP and that his behavior improved dramatically. Ms. Ball further testified that the other student had zero restraints during the 2008-2009 school year. While this Hearing Officer is cognizant of Parent's concern, there is no evidence that the inclusion of this particular student in the same classroom as [REDACTED] significantly impedes [REDACTED] education or poses a safety risk to [REDACTED].

36. **I FURTHER CONCLUDE** that the District also presented specific information regarding [REDACTED] safety as it relates to Ms. Ball. In addition to being a frequent observer in the classroom, Ms. Warner testified that she responded to and actively investigated [REDACTED] concerns about Ms. Ball, but found no basis for the complaints. Ms. Logue thoroughly investigated [REDACTED] allegation that Ms. Ball had inappropriately disciplined [REDACTED] on May 6, 2009, but instead determined that Ms. Ball had responded reasonably and appropriately. Ms. Logue expanded the investigation further to determine if, outside of May 6, 2009, there was any other reason to be concerned with Ms. Ball's interactions with [REDACTED], but found nothing to substantiate [REDACTED] concerns. Julie Warner and Amy Morgan also provided information regarding the time and effort that Ms. Ball devoted to [REDACTED] education, including direct instruction. In addition, the District presented further testimony by Jen Godwin and Amy Morgan to further corroborate that Ms. Ball's interactions with students, including [REDACTED] were above reproach. While it is apparent that [REDACTED] and Ms. Ball differed in

the level of independence each thought ■ could achieve, there is no evidence that Ms. Ball's expectations for ■ achievement placed him at increased risk for danger or injury, as alleged by Parent. It is in instances such as these that Parent and this Hearing Office must recall that, absent a statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task. Hartmann by Hartmann v. Loudoun County Bd. of Educ., 118 F.3d 996, 1000 (4th Cir. 1997).

37. **I FURTHER CONCLUDE** that there is no question, based on the record before this Hearing Officer, that during the 2008-2009 school year, ■ made meaningful, non-trivial progress in an appropriate program and was receiving more than "some" educational benefit. This Hearing Officer acknowledges that the data maintained by the classroom teacher is limited and incomplete. However, one measure of progress that Ms. Ball utilized was with regard to ■ IEP goals and objectives, as to which he clearly showed some progress. See Greenwich Bd. Of Educ., 47 IDELR 26 (SEA CT. 2007) (where hearing officer rejected request to have district pay for 17-year-old student with autism to attend an out-of-district residential school, concluding that the district offered FAPE in the LRE and noting that, while parents argued that the student's scores on standardized achievement tests showed he did not make any progress, the district measured the student's progress with regard to his IEP goals and objectives: "[e]ven though [the student] gained additional academic skills and made progress in his IEPs, his grade or age equivalent scores would not necessarily increase"). I further conclude that while the classroom teacher lacked the data to clearly explain why she chose specific identifiers (i.e. slowing progressing, progressing, mastered) for various objectives in identified reporting periods, the information contained in the comments

sections of the Progress Reports is useful to establish that ■ was making gains on his IEP goals and objectives. (P. Exh. 10). To the extent that Parent attempted to rebut progress information included on the 2008-2009 progress reports by submitting ESY progress reports with the same goals and objectives, this Hearing Officer cannot overlook that ■ did not receive instructional services for over six weeks before returning to school for ESY. (P. Exh. 11). In addition, I have determined that there is sufficient and credible evidence from other sources and various District personnel, including Ms. Julie Warner, Ms. Vicki Ball, Ms. Lori Heuchtker, and Ms. Janice McGuirt to establish that ■ made more than de minimus progress during the 2008-2009 school year. Among ■ gains, he 1) increased the length of time on tasks to up to thirty minutes with reduced prompts and assistance; 2) increased his ability to work independently on assembly tasks from two-part assembly to three-part assembly; 3) demonstrated increased ability to participate in age-appropriate socialization activities and games; 4) increased his sentence strips to 3-4 words; 5) utilizes a visual schedule with verbal prompts, as opposed to physical prompts; 6) is able to identify his name, letters, and numbers; 7) increased his independence in the area of daily self help skills through a plethora of new skills, such as the ability to wipe himself after a bowel movement, open his own bottles, assist with his own clothing needs, assist with his own personal items (i.e. bookbag), and the ability to follow multi-step picture recipes independently. (P. Exh. 5, D. Exh. 16).

38. **I FURTHER CONCLUDE** that a review of ■ present levels at the beginning of the 2008-2009 school year and those at the conclusion evidence further educational progress in the areas identified in ■ annual goals. (P. Exh. 5, D. Exh.

15). Moreover, those present levels are based on standardized measurement tools, such as the ABLLS, Expressive & Receptive One Word Picture Tests, Brigance Diagnostic Inventory of Basic Skills, and the Ohio Employability/Life Skills Assessment.

39. **I FURTHER CONCLUDE** that an ABLLS assessment was administered in May 2009 that further demonstrates █████ progress from the previous school year. The ABLLS establishes that █████ made considerable progress in the areas of Visual Performance, Vocal Imitation, Requests, Labeling, Intraverbals, Spontaneous Vocalizations, Gross Motor, and Fine Motor Skills. In addition, █████ showed additional progress in the areas of Motor Imitation, Receptive Language, Play and Leisure, Social Interaction, Group Instruction, Classroom Routines, Eating, Spelling, Grooming, Dressing, Math and Toileting. (P. Exh. 15).

40. **I FURTHER CONCLUDE** that taken in its entirety, the evidence presented during the hearing establishes that █████ received an educational benefit from the instruction provided by the District during the 2008-2009 school year.

41. **I FURTHER CONCLUDE** that it is the conclusion of the Hearing Officer, based on the record as a whole, that █████ has not shouldered her burden of proving a procedural or substantive denial of FAPE as it relates to the 2008-2009 school year.

C. Proposed 2009-2010 IEP

42. **I FURTHER CONCLUDE** that The District proposed an IEP for the 2009-2010 school year on May 22, 2009. Following receipt of its evaluation results and █████ due process request, the IEP team met again on August 13, 2009 to modify the proposed IEP. The issue now before this Hearing Officer is whether the

August 13, 2009 2009-2010 IEP is reasonably calculated to enable [REDACTED] to receive educational benefit. (D. Exh. 16).

43. **I FURTHER CONCLUDE** that the August 13, 2009 IEP includes measurable goals and objectives in the area of functional academics, social and communication skill acquisition, daily living skills, and vocational skills. I find that these goals and objectives include focus on the acquisition of skills that the various experts, including Tamara Kasper and Dr. Buford, stressed were important for [REDACTED] to continue to learn (i.e. functional living skills). I also find that the August 13, 2009 IEP, as drafted, takes into consideration [REDACTED] need to develop independence as he approaches graduation from a public school setting. Moreover, the IEP as drafted provides [REDACTED] educational services in the LRE, as required by the IDEA.

44. **I FURTHER CONCLUDE** that based on the speech-language and occupational therapy evaluations, the August 13, 2009 IEP includes the appropriate amount and type of speech-language and occupational therapy services.

45. **I FURTHER CONCLUDE** that this Hearing Officer acknowledges that Parent presented the testimony and report of Dr. Alicia Hall of the Developmental Disorders Clinic opining that [REDACTED] goals and objectives were inappropriate and too advanced for a child with severe autism. (P. Exh. 13). I find, however, that Dr. Hall, while an expert in the area of autism, admitted that she was not familiar with the rules and regulations governing special education services in South Carolina. Dr. Hall's opinion that an IEP should be developed in accordance with a child's medical diagnosis runs contrary to the IDEA's requirement that special education services be provided based on the individual needs of a student.

46. **I FURTHER CONCLUDE** that in reaching that the August 13, 2009 proposed IEP is reasonably calculated to provide [REDACTED] educational benefit, I have also considered the appropriateness of the August 13, 2009 BIP proposed by the District. (D. Exh. 9). This Hearing Officer acknowledges that both Dr. Rhonda Buford and Jen Godwin provided expert testimony regarding the appropriateness of the behavior intervention plan proposed by the District.

47. **I FURTHER CONCLUDE** that Jen Godwin testified that, in addition to staff observations, the District collected data over eight non-consecutive days and across contexts and settings. In addition, the District conducted an interview with the Parent and requested she also collect data on [REDACTED] behaviors in the home setting. Jen Godwin, Behavior Specialist, and Julie Warner, Program Specialist, analyzed the data to determine that [REDACTED] spitting behaviors served four functions: to escape from demands; provide direct attention from others; provide sensory stimulation; and allow [REDACTED] to gain access to help from adults. Using this information, Ms. Godwin and Ms. Warner, in conjunction with the IEP team, prepared a BIP designed to teach [REDACTED] appropriate replacement behaviors that would serve the same function as spitting. As part of the BIP, the team addressed prevention strategies, instruction strategies, and a crisis plan.

48. **I FURTHER CONCLUDE** that Dr. Buford's testimony was based upon a functional behavioral assessment she conducted for [REDACTED] on June 5, 2009 in her clinic in Piedmont, SC. (P. Exh. 14). This Hearing Officer finds it notable that Dr. Buford testified that she was employed by the Parent and that the report was for her use. She further acknowledged that her report does not include any information from the District

or its personnel, although such information may have been of assistance. Moreover, Dr. Buford's opinions regarding the appropriateness of the BIP proposed by the District centered on the BIP discussed on May 22, 2009, not the August 13, 2009 BIP proposed by the District for the 2009-2010 school year. Jen Godwin confirmed that, based on the recommendation of [REDACTED] occupational therapist, the August 13, 2009 BIP was modified to clarify that access to sensory activities should be frequent, but short in duration, thus remedying Dr. Buford's chief concern with the District's May 22, 2009 proposed BIP.

49. **I FURTHER CONCLUDE** that based on the expert testimony of Jen Godwin, I conclude that the August 13, 2009 BIP proposed by the IEP team is appropriate and designed to address [REDACTED] behavioral needs.

50. **I FURTHER CONCLUDE** that although [REDACTED] requested a determination that [REDACTED] required 1:1 supervision at all times both inside and outside the classroom, I find that the adult supervision and 1:1 services outlined in the August 13, 2009 IEP are appropriate to meet [REDACTED] individual needs in the least restrictive environment. See A.C. and M.C., on behalf of M.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 173 (2nd Cir. 2009)(discussion of whether IEP that included 1:1 was substantively deficient because it promoted "learned helplessness" over independence). Moreover, to the extent that Parent requests the provision of "appropriate [REDACTED] and OT therapies during the school year," I find that the August 13, 2009 IEP includes speech and occupational therapies in an appropriate amount and form that will allow [REDACTED] to receive an educational benefit.

51. **I FURTHER CONCLUDE** that [REDACTED] specifically requests a determination that [REDACTED] should be removed from Ms. Ball's classroom. As outlined more

specifically in this Decision, I find that Ms. Ball is qualified and certified to provide educational services to [REDACTED] pursuant to the August 13, 2009 IEP. While this Hearing Officer recognizes that [REDACTED] objects to [REDACTED] assignment to that class, such assignment does not prevent [REDACTED] from receiving FAPE. Although communication between Parent and Ms. Ball has been admittedly strained throughout the pendency of this and other proceedings, District personnel, including Ms. Ball, indicated a desire and willingness to have [REDACTED] to return to school immediately.

52. I FURTHER CONCLUDE that at present, the District is serving [REDACTED] in a class co-taught by Ms. Ball and Ms. Long, a teacher who Parent has indicated she likes very much and presumably trusts.

53. I FURTHER CONCLUDE that [REDACTED] has not met her burden of establishing that the August 13, 2009 proposed IEP fails to provide [REDACTED] FAPE. I further conclude that, based on the record as a whole, the evidence establishes that the proposed IEP is designed to provide [REDACTED] FAPE in the least restrictive environment.

D. Appropriateness of Proposed Home-Based Placement

54. I FURTHER CONCLUDE that [REDACTED] has requested a change in placement to a home-based program. In order to prevail on this proposed placement, the Parents must prove that the proposed placement is appropriate under the IDEA. Carter v. Florence Co., 950 F.2d 156, 164 (4th Cir. 1991), *aff'd*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993). As the Fourth Circuit has said, "the private education services obtained by the parents [must be] appropriate to the child's needs." A.B. Ex Rel. D.B. v. Lawson, 354 F.3d 315, 320 (4th Cir. 2004) (citing Burlington, 471 U.S. at 370); Gagliardo v. Arlington Central Sch. Dist., 489 F.3d 105, 115 (2d Cir.

2007)(“[U]nilateral placement is only appropriate . . . if it provides education instruction specifically designed to meet unique needs of a handicapped child.”)

55. **I FURTHER CONCLUDE** that the Parent has offered insufficient proof to establish that the proposed home program is appropriate. Parent testified that the only educational service presently being provided to Student is speech therapy. There is evidence from Parent and her expert, Dr. Rhonda Buford, Executive Director of Behavior Consulting Services (BCS), Piedmont, South Carolina, that BCS may be in a position to provide a home educational program; however, such a program does not exist at present, and Parent's evidence was substantially lacking in providing any description of the potential home program. The only evidence presented regarding the home program essentially was a listing of available services that could be provided by BCS and the price per year or month for those services. See Parent Exh. 14. Such evidence does not establish that the home instruction envisioned is specifically designed to meet the unique needs of the Student.

56. **I FURTHER CONCLUDE** that the proposed home program is overly restrictive. Although the least restrictive environment requirement per se has not been held to apply to parental placements, the restrictive nature of the parental placement, particularly when it is in the parent's home, is a factor in determining whether the placement is appropriate under the IDEA. M.S. and Simchick, 553 F.3d at 327. Deficits in socialization is a primary concern with autistic children. A social skills program and social interaction opportunities, particularly for a 17 year old autistic student, would be very difficult to provide in a home program. Parent has offered no

evidence regarding the home program which addresses this important aspect of Student's education.

57. **I FURTHER CONCLUDE** that accordingly, Parent has not offered sufficient evidence or otherwise demonstrated that the proposed program is appropriate or proper under the act.

58. **I FURTHER CONCLUDE** that the proposed home placement is not appropriate for [REDACTED] and that the District has offered a FAPE despite [REDACTED] concerns about the classroom environment and Ms. Ball serving as [REDACTED] teacher, the Hearing Officer recognizes that [REDACTED] resistance or unwillingness to return [REDACTED] to Ms. Ball's class poses barriers to [REDACTED] success in the public school setting. Of course, [REDACTED] is free to educate [REDACTED] outside the public school system; however, that decision may not be in the best interests of all concerned. Based on information presented at the hearing, Ms. Kimberly Long, a certified special education teacher, is presently co-teaching with Ms. Ball in a special setting classroom to which [REDACTED] is assigned. [REDACTED] has indicated, based on her experience last summer with Ms. Long during the ESY program, that she has a positive relationship with Ms. Long. Also at the hearing, Ms. Logue indicated that the District is prepared to continue the co-teaching arrangement using both Ms. Long and Ms. Ball during a reasonable transition period should [REDACTED] be returned to school. While not mandating such a transition period in this Decision, nor specifying the period of time for transition, it is the Hearing Officer's recommendation and request that the co-teaching arrangement continue for a reasonable period so that [REDACTED] will consider returning [REDACTED] to his program at Nation Ford High School.

FURTHER REQUESTS FOR REMEDY

59. I FURTHER CONCLUDE that Parent presented a request in the hearing for the reimbursement of costs associated with those experts she retained in this matter, specifically evaluations of Dr. Buford and Dr. Hall. As an initial matter, a parent may not recover costs associated with a due process hearing unless he or she is the prevailing party. Even if [REDACTED] had prevailed in this matter, which I conclude she has not, prevailing parties are unable to recover the costs of experts or consultants retained for use in a due process hearing. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S.Ct. 2455, 548 U.S. 291 (2006). To the extent that [REDACTED] is requesting reimbursement for these evaluations pursuant to 34 C.F.R. 300.502(b)(1), that provision is only applicable once the District conducts its own evaluation, the results of which the parent disagrees. Moreover, a parent is required to provide notice of this request prior to obtaining an independent educational evaluation at public expense. As it relates to Dr. Buford's assessment, [REDACTED] failed to provide notice that she was seeking an IEE at public expense. As it relates to Dr. Hall, there is no psychological evaluation conducted by the District for [REDACTED] to disagree with. Moreover, she failed to request an IEE prior to obtaining the evaluation. As a result, [REDACTED] is unable to recover for the consultants and evaluations that she obtained for use in this proceeding.

IV. DECISION

Based on the above Findings of Fact and Conclusions of Law, the Decision of this LHO is as follows:

NOW THEREFORE, IT IS DECIDED that the relief sought by the Parent be and hereby is denied as provided herein.

IT IS FURTHER DECIDED that the Parent has not met the burden of proof by the greater weight or preponderance of the evidence.

IT IS FURTHER DECIDED that the District did not commit a procedural or substantive violation of IDEA during the 2008-2009 school year that resulted in a denial of FAPE to ■■■.

IT IS FURTHER DECIDED that the proposed IEP for ■■■ in the 2009-2010 school year is reasonably calculated to enable ■■■ to receive educational benefit and, therefore, is appropriate.

IT IS FURTHER DECIDED that, based on the evidence presented, the proposed home program for ■■■ is not appropriate or proper under the IDEA.

IT IS FURTHER DECIDED that the Findings of Fact and Conclusions of Law sections be and hereby are incorporated herein verbatim as the Decision of the LHO.

IT IS FURTHER DECIDED that this LHO has made an independent decision based solely on the evidence and testimony presented at the hearing.

IT IS FURTHER DECIDED that the parties are hereby advised that they can appeal this ruling if they so desire which shall be made within ten (10) calendar days of receipt of this written Decision. Any appeals should be addressed to the South Carolina Department of Education, c/o Director, Office of Exceptional Children, 1429 Senate Street, Rutledge Building, 808, Columbia, South Carolina 29201.

IT IS FURTHER DECIDED that this Decision is binding on all parties, and any actions directed by this LHO must be initiated immediately unless an appeal is filed.

IT IS FURTHER DECIDED that the District must transmit the LHO's written Findings of Fact and Decision after deleting personally identifiable information to the South Carolina Department of Education's Office of Exceptional Children.

AND IT IS SO DECIDED.



Carl A. Ellsworth
Local Due Process Hearing Officer

October 12, 2009
Columbia, South Carolina