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Confidential

<p>Parent on Behalf Student,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Education Agency (“LEA”)</p> <p>Case # 2022-0071</p> <p>Date Issued: August 29, 2022</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION ¹</p> <p>Hearing Date: July 26, 2022</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ This “Corrected” HOD is issued to make typographical and/or grammatical changes and/or to remove personally identifiable information; no substantive changes have been made. The HOD issuance date, August 29, 2022, remains unchanged, as does the applicable appeal date. Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The due process hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing (“Student”) resides with Student’s parent (“Petitioner”) in the District of Columbia, and the District of Columbia Public Schools (“DCPS”) is Student’s current local educational agency (“LEA”). Student is currently age ² and attends a DCPS school (“School A”) where Student was enrolled on or about February 11, 2022.

Prior to enrolling in School A, Student attended a public charter school located in the District of Columbia (“School B”). Student began attending School B at the start of school year (“SY”) 2021-2022. School B is its own LEA and while Student was attending School B, DCPS was not Student’s LEA.

Student is eligible for special education and related services pursuant to IDEA with a disability classification of Other Health Impairment (“OHI”) due to attention deficit hyperactivity disorder (“ADHD”).

Petitioner asserts that Student was determined eligible for special education services in approximately January 2018, and DCPS developed an initial individualized educational program (“IEP”) for Student in January 2018. In December 2020, DCPS conducted a triennial reevaluation of Student. Petitioner alleges that this reevaluation was perfunctory and did not assess and/or address all areas of suspected disability.

On January 19, 2022, Petitioner, through counsel, contacted Student’s previous DCPS school (“School C”) and informed that she disagreed with the December 2020 reevaluation and requested that DCPS fund an independent educational evaluation (“IEE”).

On January 20, 2022, DCPS, School A, responded that Student was no longer a student at School C. On February 7, 2022, Petitioner, through counsel, responded that Student was attending School A for SY 2021-2022, and again requested that DCPS agree to fund an IEE.

On February 10, 2022, DCPS authorized funding for a psychological assessment. On March 16, 2022, DCPS, through counsel, forwarded to Petitioner an authorization for funding of an independent speech/language assessment and an independent assistive technology assessment. Petitioner asserts that despite the authorizations of these assessments, DCPS did not agree to fund an IEE.

On April 20, 2022, Petitioner filed her due process complaint (“DPC”) asserting that DCPS had

² Student’s age and grade are listed in Appendix B.

denied Student a free appropriate public education (“FAPE”). Petitioner alleged, inter alia, that DCPS had neither, without unreasonable delay, agreed to fund the requested IEE or filed for a due process hearing to defend its December 2020 reevaluation. Petitioner also asserted that the December 2020 reevaluation was inappropriate and did not assess Student in all areas of suspected disability. Lastly, Petitioner asserted the DCPS had failed to provide Petitioner Student’s educational records following repeated requests.

Relief Sought:

Petitioner seeks an order directing DCPS to immediately provide Student’s education records and to fund an IEE to include, but not limited to, assessments in all areas of suspected disability funded at current market rates. Petitioner also seeks an order directing DCPS, within ten days of receipt of the reports from the IEE, to convene an IEP meeting to review all components of the IEE, including teacher input, parent input, analysis of existing data, class work, the Student’s education records, reports from the assessments; and any other relevant material which constitutes part of the IEE, and after reviewing all of the components of the IEE, the team determine the Student’s continued eligibility for special education services and develop an IEP that reflects the findings and conclusions of the IEE. Finally, Petitioner seeks an order for compensatory education assessment to be conducted and a meeting to review the compensatory education assessment and incorporate the results of the assessment into the Student’s IEP.

DCPS’ Response to the Complaint:

Respondent filed a timely response to the DPC on April 29, 2022. In its response, DCPS stated inter alia the following:

On December 8, 2020, the multidisciplinary team (“MDT”) convened to review Student’s existing data and determine if any additional assessments were necessary to determine Student’s eligibility for special education. The team reviewed previous assessment reports, formal and informal test data, teacher observations, report cards, and considered the parent’s input. The team determined no additional testing was warranted. Petitioner did not request DCPS conduct additional testing. The team agreed that Student continued to be eligible for special education services with a disability classification of OHI. The reevaluation was appropriate.

Student was enrolled at a public charter school for SY 2021-2022. On January 26, 2022, the school issued a prior written notice (“PWN”) proposing to complete a comprehensive psychological assessment and functional behavior assessment (“FBA”).

On January 19, 2022, Petitioner through counsel requested DCPS fund an independent educational evaluation (“IEE”) for Student based on her disagreement with DCPS’s evaluation of Student. DCPS counsel responded via email that DCPS did not conduct assessments for which Petitioner would be entitled to an IEE and should Student enroll in DCPS the school team would convene an Analysis of Existing Data (“AED”) meeting to discuss reevaluation of Student. In the interim, DCPS would consider the request for IEEs.

On February 10, 2022, DCPS received a request from Petitioner through counsel for access to Student’s education records. On February 10, 2022, DCPS responded that Student was not rolled

at School A and School A could not access Student's education records. Once the enrollment process was completed and School A could access the records, the records would be provided.

On or about February 17, 2022, Student enrolled at School A. On March 16, 2022, the MDT convened a meeting to review the IEP and discuss Student's progress. During the meeting Petitioner through counsel requested IEEs for Student. DCPS agreed to fund IEEs for comprehensive psychological and speech language pathology assessments. The team agreed to conduct assistive technology and FBA. The team agreed to conduct an occupational therapy screener and reconvene to determine the need for an occupational therapy assessment.

DCPS forwarded the authorization letter for the comprehensive psychological and speech language pathology assessments after the meeting. On March 16, 2022, DCPS sent Petitioner consent to evaluate. To date, DCPS has not received signed consent to conduct the assessments.

DCPS will conduct the assistive technology and functional behavior assessments upon receipt of signed consent and convene a meeting to review the assessments and revise the IEP as appropriate. DCPS will convene a meeting to review the independent comprehensive psychological and speech language pathology assessments upon receipt and revise the IEP as appropriate.

On April 7, 2022, DCPS provided copies of Student's education records to Petitioner's counsel via email. DCPS did not fail to provide Petitioner access to Student's education records.

Resolution, and Pre-Hearing Conference and Order:

The parties participated in a resolution meeting on May 13, 2022. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on May 21, 2022, and ended [and the Hearing Officer's Determination ("HOD") was initially due] on July 4, 2022. The parties requested and were granted multiple continuances and corresponding extensions of the HOD due date. As a result, the HOD is now due on August 29, 2022.

The undersigned independent hearing officer ("IHO") conducted a pre-hearing conference on May 31, 2022, and issued a pre-hearing order ("PHO") on June 13, 2022, and an updated PHO on June 30, 2022, outlining, inter alia, the issues to be adjudicated.

The issues adjudicated are: ³

1. Did DCPS deny Student a FAPE by failing and refusing to agree to fund an IEE as requested by Petitioner ?
2. Did DCPS deny Student a FAPE by failing to and refusing to conduct an appropriate re-

³ On July 15, 2022, Petitioner counsel submitted a document regarding issue #3 that was listed in the PHO. That issue addressed the alleged failure by DCPS to develop an appropriate IEP for the Student. At the outset of the hearing Petitioner's counsel attempted to withdraw this issue without prejudice. DCPS counsel objected and asked that the matter be dismissed with prejudice due to the lateness of Petitioner's request. The IHO denied Petitioner's request to withdraw without prejudice.

evaluation of Student in December 2020 which examined and assessed all areas of suspected disability? ⁴

3. Did DCPS deny Student a FAPE by failing (in violation of IDEA and D.C. Code and Rules and Regulations) to provide Petitioner a complete copy of Student's educational records when requested to do so by Petitioner and prior to several meetings of Student's MDT/IEP team? ⁵

DUE PROCESS HEARING:

The due process hearing was convened on July 26, 2021. Due to the COVID-19 emergency, and at the parties' request, the hearing was conducted and recorded via video teleconference on the Microsoft Teams platform. The parties submitted written closing arguments, the last of which was submitted on August 25, 2022.

Petitioner's Motion to Produce Records:

On July 15, 2022, Petitioner filed a Motion for Compel DCPS to Produce Educational Records. On July 21, 2022, DCPS Counsel filed an opposition to the motion. Based upon representations made by Petitioner's counsel on the record, the only educational record that Petitioner was seeking was the Special Education Data System ("SEDS") document index for Student, that Petitioner's counsel asserted would contain a comprehensive list of the special education documents available to be requested by Petitioner. The IHO denied the motion on the record concluding that the third issue to be adjudicated addressed Petitioner's request for that document and the issue would not be decided as a pre-hearing matter.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the following as evidence and are the sources of the findings of fact: (1) the testimony of the witnesses, and (2) the documents submitted in the parties' disclosures (Parent's Exhibits 1 through 23 and DCPS's disclosed documents that are listed as Respondent's 1 through 21) that were admitted into the record and are listed in Appendix A. Witnesses' identifying information is in Appendix B.⁶

SUMMARY OF DECISION:

In this case, Petitioner held the burden of production and the burden of persuasion on all issues adjudicated. Based on the evidence adduced, the IHO concluded that DCPS did not fail to

⁴ Petitioner alleged DCPS did not assess Student in all areas of suspected disability, including but not limited to: ADHD, social/emotional behavioral, gross and fine motor, sensory processing, speech/language, occupational therapy, and assistive technology.

⁵ Petitioner acknowledged on the record that DCPS had provided Petitioner access to Student's educational records and asserted that the sole document that had not been provided was a document that Petitioner's counsel titled the SEDS document index.

⁶ The IHO found the witnesses credible unless otherwise noted in the Conclusions of Law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the Conclusions of Law. Petitioner's counsel presented one witness: Petitioner. DCPS presented one witness: a Resolution Specialist.

provide the requested IEE without unnecessary delay or timely request a due process hearing after Petitioner requested an IEE. The IHO concluded that Petitioner did not sustain the burden of persuasion regarding the alleged inappropriateness of DCPS's December 2020 reevaluation. Petitioner sustained the burden of persuasion regarding DCPS's failure to provide Petitioner Student's educational records, specifically, the list of documents for Student available through SEDS. However, the IHO determined that DCPS's failure to do so was a procedural violation and did not amount to a denial of a FAPE. The IHO directed DCPS to provide Petitioner that list.

FINDINGS OF FACT:

1. Student resides with Student's parent, Petitioner, in the District of Columbia, and DCPS is Student's current LEA. Student attends, School A, a DCPS school, where Student was in enrolled on or about February 11, 2022. (Petitioner's testimony, Respondent's Exhibit 13)
2. Student is eligible for special education and related services pursuant to IDEA with a disability classification of OHI due to ADHD. (Petitioner's Exhibits 6-1)
3. In April 2017 a psychoeducational and psychological evaluation was conducted of Student by the District of Columbia Department of Behavioral Health ("DBH"). The evaluation assessed Student's cognitive, academic, and social/emotional functioning. Student's cognitive functioning was in the average range. Student academic functioning varied from low average in reading and written expression to average in math. The evaluation confirmed Student's ADHD diagnosis and noted some emotional concerns and as well and diagnosing Student with the following: Adjustment Disorder with Mixed Disturbance of Emotions and Conduct. DBH also conducted a psychiatric evaluation in April 2017. (Petitioner's Exhibits 11, 12)
4. During SY 2017-2018, SY-2018-2019 and SY 2019-2020 Student attended a public charter school located in the District of Columbia (School D"). School D developed an IEP for Student dated January 3, 2020. In this IEP Student had a disability classification of multiple disabilities ("MD") including specific learning disability ("SLD") and OHI. (Petitioner's Exhibits 8, 9, 10)
5. During SY 2020-2021 Student attended School C, a DCPS school. While Student attended School C, DCPS conducted a triennial reevaluation that included an AED dated January 8, 2021. Based on the information contained in the AED that included classroom-based assessments, IEP progress reports and teacher input, DCPS determined that Student continued to be eligible for special education with an OHI disability classification. (Respondent's Exhibits 4, 7, Respondent's Exhibits 5, 7)
6. While attending School C during the pandemic, Student and was not computer literate and did not do well with virtual instruction. Petitioner participated in an IEP meeting at School C in which DCPS stated it would provide Student services based on the IEP developed at School D. Petitioner did not ask for any formal assessments to be conducted, but she considered the data that available to School C to be limited due to the virtual instruction that Student was receiving. (Petitioner's testimony)

7. At the start of SY 2021-2022, Student attended School B, a public charter school in the District of Columbia which is its own LEA. School B developed an IEP for Student dated January 7, 2022. Petitioner and Student participated in the meeting to develop Student's IEP. The IEP prescribed 10 hours per week of specialized instruction inside general education, 10 hours per week of specialized instruction outside general education and the following monthly related services: 120 minutes of behavioral support services and 120 minutes of speech language pathology. (Petitioner's Exhibit 6-1, 6-15)
8. On January 26, 2022, School B issued a PWN that it intended to conduct a complete comprehensive psychological evaluation and an FBA. (Respondent's Exhibit 3)
9. On January 19, 2022, Petitioner's counsel sent an email requesting DCPS funding for an IEE. DCPS provided Petitioner authorization for public funding of an independent psychological evaluation. (Petitioner's Exhibit 1-1 through 1-8, 1-10, Respondent's Exhibit 14)
10. On February 10, DCPS provided authorization for the following additional independent assessments: speech language evaluation and assistive technology evaluation. (Petitioner's Exhibit 1-13 through 1-17, Respondent's Exhibit 14)
11. On February 10, 2022, Petitioner's counsel acknowledged the funding letter DCPS had provided for an independent psychological assessment. The letter stated that that was a minimum of what was included in the IEE request, and she requested in addition the following assessments: speech language, ADHD assessment, occupational therapy ("OT"), psychiatric and assistive technology. (Petitioner's Exhibit 1-9)
12. On February 10, 2022, Petitioner's counsel requested Student's educational records. (Petitioner's Exhibit 2-1 through 2-6)
13. DCPS provided educational records in response to the records request. On July 5, 2022, Petitioner's counsel sent DCPS an email acknowledging receipt of the educational records requested and stating that some records had not yet been provided. (Petitioner's Exhibit 2-7)
14. After enrolling at School A, during second semester of SY 2021-2022, Student had excessive absences at School A and a result, made no progress relative to Student's IEP goals. (Petitioner's Exhibit 16-1 through 16-8). 18, 20-1 through 20-3)
15. Student became ill shortly after enrolling in School A and had to leave school as result. Student did not return to School A for the remainder of SY 2021-2002 due to illness. Petitioner was not aware of that DCPS has authorized independent assessments as early as February 10, 2022, and to date none of the independent assessments that have been authorized have been initiated or completed. (Petitioner's testimony)
16. On June 16, 2022, DCPS provided Petitioner authorization for the following independent assessments: comprehensive psychological evaluation, speech language evaluation, assistive technology evaluation and OT evaluation. (Witness 2's testimony, Petitioner's Exhibit 1-18,1-19, Respondent's Exhibit 15)

17. On July 13, 2022, Petitioner's counsel sent DCPS an email specifically requesting the SEDS history index and final records for SY 2021-2022. (Petitioner's Exhibit 2-12)

18. DCPS can access a list of documents that are contained in SEDS for any student and that list can be assessed using a tab marked "documents" within SEDS that will generate the list of documents. (Witness 2's testimony.)

CONCLUSIONS OF LAW:

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

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means 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 SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, (2005). The PHO stated that Petitioner held the burden of persuasion on all issues adjudicated.⁷ The normal standard is the preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

⁷ Pursuant to DC Code § 38-2571.03 (6):

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that: (i) Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence. (ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.
(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

Issue 1: Did DCPS deny Student a FAPE by failing and refusing to agree to fund an IEE as requested by Petitioner ?

Conclusion: The IHO concludes that DCPS did not fail to provide an independent educational evaluation without unnecessary delay or timely request a due process hearing after Petitioner requested the independent evaluation.

34 C.F.R. § 300.303(a) makes it clear that "A local education agency ("LEA") *shall ensure* that a reevaluation of each child with a disability is conducted...if the child's parents or teacher requests a reevaluation." and that the reevaluation must be conducted at least once every three years.

Students are also entitled to a reevaluation of their disability upon a parental request, provided that no reevaluation occurs "more frequently than once a year," though a requested reevaluation must occur "at least once every 3 years." 34 C.F.R. § 300.303(a)(2); see *Cartwright v. Dist. of Columbia*, 267 F. Supp. 2d 83, 87 (D.D.C. 2003) ("DCPS' failure to comply with [the parent's] request clearly violates the language of [34 C.F.R. § 300.303].").

Pursuant to 34 C.F.R. § 300.304 (c), a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

Generally, when a child has been evaluated for special education eligibility, and the appropriateness of the agency's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental, and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1-3); 34 C.F.R. §300.304(b)(1-3), (c)(4, 6).

Pursuant to § 300.305 (a) As part of an initial evaluation (if appropriate) and as part of any reevaluation, the IEP Team and other qualified professionals, as appropriate, must— (1) Review existing evaluation data on the child, including— (i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom- based observations; and (iii) Observations by teachers and related services providers; and (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine— (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child; (ii) The present levels of academic achievement and related developmental needs of the child; (iii)(A) Whether the child needs special education and related services; or (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and (iv) Whether any additions or modifications to the special education and related services; and (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant

functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2007).

Requests for evaluations/reevaluations are to be conducted in a timely manner. *Herbin v. Dist. of Columbia*, 362 F. Supp 2d. 254, 259, 261 (D.C.C. 2005).

An independent evaluation is one "conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. § 300.502(a)(3)(i).

The IDEA regulations provide parents with a limited right to obtain an independent educational evaluation at public expense. The limited right arises only after the agency has procured an evaluation with which the parent "disagrees." 34 C.F.R. § 300.502(b)(1).

The regulations limit the parent to one independent evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees. *Id.* Once the parent expresses her disagreement, she may request an independent reevaluation at public expense, which the agency must either provide or file a due process complaint to establish that its evaluation is "appropriate." See 34 CFR § 300.502(b)(2). If the agency's evaluation is found to be appropriate, the parent may still obtain an independent evaluation at her own expense. 34 C.F.R. § 300.502(b)(3). See *South Kingstown School Committee v. Joanna S.*, 2014 WL 197859 (D.R.I. 2014).

Whether a school's actions under 34 C.F.R. § 300.502 constitute an "unnecessary delay" is an inquiry that must be addressed on a case-by-case basis. *J.P. ex rel., E.P. v. Ripon Unified School Dist.*, 2009 WL 1034993 (E.D. Cal. 2009) (citation omitted). The facts of each case are therefore critical.

The IDEA and its implementing regulations provide no additional guidance on what constitutes an "unnecessary delay." Though vague, this Court has interpreted the statute and regulations as requiring "prompt resolution of disputes involving the educational placement of learning-disabled children." *Herbin ex rel. Herbin v. Dist. of Columbia*, 362 F. Supp. 2d 254, 259-60 (D.D.C. 2005). But while such an undue delay constitutes a procedural violation of the IDEA, it does not "inexorably lead a court to find a child was denied FAPE." *Smith v. Dist. of Columbia*, No. 08-2216, 2010 U.S. Dist. LEXIS 125754, 2010 WL 4861757 (D.D.C. Nov. 30, 2010). Rather, the procedural violation must have affected the child's substantive rights. *Id.* "A delay does not affect substantive rights if the student's education would not have been different had there been no delay." *D.R. ex rel. Robinson v. Gov't of Dist. of Columbia*, 637 F. Supp. 2d 11, 18 (D.D.C. 2009). On the other hand, "[a] delay of more than 2-3 months is likely fatal to the [school] district's case, although the exact length will depend on the circumstances rather than

being a bright-line test." Perry A. Zirkel, Independent Educational Evaluation Reimbursement Under the IDEA: An Update, 306 Educ. L. Rep. 32, 35 (2014). citing *Hill v. District of Columbia*, No. 14-cv-1893 (GMH), at *42 (D.D.C. Aug. 26, 2016)

The evidence demonstrates that Student was not enrolled in DCPS and DCPS was not Student's LEA when Petitioner made her first request for an IEE. The evidence reflects that Student enrolled in DCPS on or about February 11, 2022. Petitioner's request for an IEE did not indicate any specific assessments were being requested on any specific areas of concern. DCPS provided authorization for an independent psychological evaluation promptly on February 10, 2022. DCPS then provided Petitioner authorization for both a psychological evaluation and a speech language evaluation. Then Petitioner's counsel requested additional assessment areas in the IEE. DCPS promptly responded by revising and ultimately providing authorizations for DCPS funding for a total of four independent evaluations.

Petitioner asserts that what DCPS has provided does not fulfill the legal requirements of an IEE and the IEE includes actions that are to be completed after assessments such a review by a team of the assessments conducted. Yet the evidence demonstrates that Petitioner has taken no action to obtain any of the assessments that DCPS has already authorized.

The IHO concludes that the authorization for independent assessments that DCPS provided Petitioner in response to her counsel's request were provided promptly without unnecessary delay and that those assessments satisfied the requirements pursuant to 34 C.F.R. 300.502. Although Petitioner cited case law to support her position that DCPS has not provided the requested IEE, the IHO did not find the case law cited to be on point and did not point to facts as here, where the LEA promptly responded to an IEE request by granting authorization for public funding. The other actions that Petitioner asserts are to be taken in an IEE are actions DCPS cannot and will not take, including conducting a review of the assessment data, until Petitioner has taken action to obtain the independent assessments that have already been authorized. Consequently, the IHO concludes that Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

Issue 2: Did DCPS deny Student a FAPE by failing to and refusing to conduct an appropriate reevaluation of Student in December 2020 which examined and assessed all areas of suspected disability?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

34 C.F.R. § 300.303(a) makes it clear that "A local education agency ("LEA") *shall ensure* that a reevaluation of each child with a disability is conducted...if the child's parents or teacher requests a reevaluation." and that the reevaluation must be conducted at least once every three years.

Students are also entitled to a reevaluation of their disability upon a parental request, provided that no reevaluation occurs "more frequently than once a year," though a requested reevaluation must occur "at least once every 3 years." 34 C.F.R. § 300.303(a)(2); see *Cartwright v. Dist. of Columbia*, 267 F. Supp. 2d 83, 87 (D.D.C. 2003) ("DCPS' failure to comply with [the parent's] request clearly violates the language of [34 C.F.R. § 300.303].").

Pursuant to 34 C.F.R. § 300.304 (c), a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

Generally, when a child has been evaluated for special education eligibility, and the appropriateness of the agency's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental, and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1-3); 34 C.F.R. §300.304(b)(1-3), (c)(4, 6).

Pursuant to § 300.305 (a) As part of an initial evaluation (if appropriate) and as part of any reevaluation, the IEP Team and other qualified professionals, as appropriate, must— (1) Review existing evaluation data on the child, including— (i) Evaluations and information provided by the parents of the child; (ii) Current classroom-based, local, or State assessments, and classroom-based observations; and (iii) Observations by teachers and related services providers; and (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine— (i)(A) Whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or (B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child; (ii) The present levels of academic achievement and related developmental needs of the child; (iii)(A) Whether the child needs special education and related services; or (B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5E § 3005.9(b).

All areas "related to the suspected disability" should be assessed, including academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. D.C. Mun. Regs. Title. 5E § 3005.9(g). The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5E § 3005.9(h) (2007).

The evidence in this case demonstrates that DCPS conducted a triennial reevaluation of Student in December 2020. When that evaluation was conducted Student was engaged in virtual instruction at School C due to the pandemic. There was no evidence presented including testimony, that sufficiently supports a finding that DCPS's reevaluation was inappropriate. Petitioner stated her opinion that there was little data available to School C because Student was engaged in virtual learning due the pandemic. There was no other testimony.

On the other hand, the AED that DCPS presented documents the data that was considered in DCPS's reevaluation of Student including teacher input, classroom-based assessments, and IEP progress reports. Absent any additional testimony that supports Petitioner's assertion, the Hearing Officer concludes that DCPS' reevaluation of Student in December 2020 was appropriate and sufficient to determine Student's continued eligibility for special education services. There were no specific assessments requested and IDEA does not require that any specific assessments be conducted during such an evaluation.

Petitioner asserts that the burden regarding the appropriateness of the reevaluation rests with DCPS. However, DCPS is only required to defend the validity of its evaluation when it has failed to timely respond to a requested IEE pursuant to the 34 CFR 300.502. This was not the case in this matter. Accordingly, the IHO concludes that Petitioner did not sustain the burden of persuasion on this issue.

Issue 3: Did DCPS deny Student a FAPE by failing (in violation of IDEA and D.C. Code and Rules and Regulations) to provide Petitioner a complete copy of Student's educational records when requested to do so by Petitioner and prior to several meetings of the Student's MDT/IEP team?⁸

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence on this issue. However, DCPS's failure to provide the specific remaining items from the SEDS data base did not amount to a denial of a FAPE.

IDEA regulations afford parents and their legal representatives an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the student and the provision of a FAPE to the student. See 34 CFR § 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C.2006). DCPS must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency. See 34 CFR § 300.613(a). Under the IDEA and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g.

The District of Columbia Municipal Regulations ("DCMR") provide that DCPS must honor the records request as soon as possible, but in no case in more than 45 calendar days. 5E DCMR § 2600.6. Failure to timely comply with a parent's request to inspect education records is a procedural violation of the IDEA. See, e.g., *N.P. v. E. Orange Bd. of Educ.*, No. CIV. 06-5130 DRD, 2011 WL 463037 at 7 (D.N.J. Feb. 3, 2011) (procedural violations of the IDEA by failing to timely respond to parent's requests for records.)

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused the child a deprivation of

⁸ Petitioner acknowledged on the record that DCPS had provided Petitioner access to Student's educational records and asserted the sole document that had not been provided was a document that Petitioner's counsel titled the SEDS document index.

educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

The evidence demonstrates that DCPS provided Petitioner's counsel Student's educational records. However, DCPS did not provide to Petitioner's counsel a document sometimes referred to as a SEDS document index.

Based upon the testimony provided by the DCPS witness, a list of documents that are contained in the SEDS database for a student can be accessed using a tab in that system for documents. Petitioner has made a legitimate argument that such a document has been provided by DCPS in other instances.

Based upon this testimony, the IHO concludes that Petitioner's request for such a document that would allow Petitioner to be certain that she had been provided all educational documents available for Student is not an unreasonable request and should and does fall under the IDEA mandates regarding educational records. Therefore, in the order below the IHO directs DCPS to provide Petitioner this list. However, there was insufficient evidence that DCPS significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE to Student or caused Student a deprivation of educational benefits.

ORDER: ⁹

1. Petitioner's claims against DCPS regarding the alleged failure to timely provide an IEE and the alleged inappropriate reevaluation in December 2020 are hereby dismissed with prejudice.
2. The IHO has determined that DCPS's failure to provide Petitioner the requested list of documents for Student maintained in SEDS was a procedural violation and did not amount to a denial of a FAPE.
3. However, the IHO directs DCPS, within ten (10) business days of the issuance of this order to provide Petitioner the list of documents for Student available through SEDS, sometimes referred to as the SEDS document index.
4. All other relief requested by Petitioner is denied.

⁹ Respondent's deadlines for compliance with any of the provisions of this order shall be extended on a day for day basis for any delay in compliance caused by Petitioner.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action concerning the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.

Hearing Officer

Date: August 29, 2022

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