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OSSE  
Office of Dispute Resolution  
December 04, 2021

**Confidential**

Parent on Behalf Student, <sup>1</sup>  v.  District of Columbia Public Schools (“DCPS”) Local Education Agency (“LEA”)  Case # 2021-0148  Date Issued: December 4, 2021	HEARING OFFICER’S DETERMINATION   Hearing Date: November 29, 2021   Counsel for Each Party listed in Appendix A   <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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<sup>1</sup> Personal 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 local educational agency (“LEA”). Student is currently age \_\_\_\_<sup>2</sup> and attends a DCPS school (“School A”). Student is eligible for special education and related services pursuant to IDEA with a disability classification of Multiple Disabilities (“MD”) including specific learning disability (“SLD”) and Other Health Impairment (“OHI”). (Petitioner’s Exhibit 6-1)

On April 2, 2021 while Student was attending Student’s previous DCPS school (“School B”), DCPS conducted a triennial psychological reevaluation of Student. On April 7, 2021, DCPS reviewed the evaluation and developed an individualized education program (“IEP”) for Student.

On July 7, 2021, through counsel, Petitioner informed DCPS that Petitioner disagreed with DCPS’s reevaluation of Student and requested an independent educational evaluation (“IEE”). On July 28, 2021, DCPS acknowledged receipt of Petitioner’s IEE request.

On August 17, 2021, Petitioner’s Counsel inquired of DCPS the status of the IEE request. On August 17, 2021, DCPS’s counsel responded that DCPS was considering the request. On September 20, 2021, Petitioner filed this due process complaint alleging, inter alia, that DCPS failed, without unnecessary delay, to provide Petitioner the requested IEE or file a due process complaint to defend its reevaluation of Student. Petitioner also alleged that DCPS failed to provide Petitioner Student’s educational records.

## **Relief Sought:**

Petitioner seeks and 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

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<sup>2</sup> Student’s age and grade are listed in Appendix B.

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 complaint on October 5, 2021. In its response, DCPS stated, *inter alia*, the following:

DCPS proposed a triennial psychological evaluation assessment in February 2021. As a result of the evaluation procedure, DCPS determined student continued to qualify as a student with a disability (MD – SLD and OHI), in April 2021. The determination was based on all necessary IDEA compliant data and information. An IEP review meeting was convened also in April 2021 including Student's transition plan and PLOPs on the IEP. In June 2021, DCPS proposed the finalized IEP and Petitioner agreed. DCPS received the IEE request in July 2021, with DCPS considering defending its evaluation. Petitioner sought independent evaluation authorization for assessments and evaluation that DCPS had not conducted. DCPS continued to review the request without unnecessary delay.

### **Resolution, and Pre-Hearing Conference and Order:**

The parties participated in a resolution meeting on October 8, 2021, and did not resolve the complaint. The parties did not agree to shorten the resolution period and the 75-day timeline (and for the Hearing Officer's Determination to be issued) concludes on December 4, 2021.

The undersigned hearing officer ("Hearing Officer") conducted a pre-hearing conference on October 13, 2021, and issued a pre-hearing order ("PHO") on October 26, 2021, and an updated PHO on November 8, 2021, outlining, *inter alia*, the issues to be adjudicated.

### **The issues adjudicated are:<sup>3</sup>**

1. Whether DCPS denied Student a free appropriate public education ("FAPE") by, without unnecessary delay, either agreeing to fund an independent educational evaluation requested by Petitioner or filing a due process complaint to defend its evaluation.
2. Whether DCPS denied Student a FAPE by failing to provide a complete copy of Student's educational records when requested to do so by Petitioner.

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<sup>3</sup> On November 22, 2021, Petitioner filed a notice of withdrawal of issue #2 and issue #3 as listed in the PHO: (2) Whether DCPS denied Student a FAPE by failing to and refusing to conduct an appropriate re-evaluation of Student in April 2021 which examined and assessed all areas of suspected disability; and (3) Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP because the IEP was developed on an inappropriate reevaluation. The Hearing Office allowed Petitioner to withdraw the two issues without prejudice over DCPS's objection.

### **Petitioner's Motion to Summary Judgment and Motion to Produce Records:**

Petitioner filed a Motion for Summary Judgment on issue #1 and a Motion for DCPS to Provide Education Records, specifically a single document which Petitioner at the time of the motion termed the SEDS index. DCPS Counsel filed oppositions to both motions. on November 4, 2021, the Hearing Officer heard oral arguments on the motions from both parties on the record, and thereafter issued written orders denying both motions.

### **DUE PROCESS HEARING:**

The due process hearing was convened on November 29, 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.

### **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer 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 49 and DCPS's disclosed documents that are listed as Respondent's 1 through 54) that were admitted into the record and are listed in Appendix A. Witnesses' identifying information is in Appendix B.<sup>4</sup>

### **SUMMARY OF DECISION:**

Petitioner held the burden of persuasion on the issues adjudicated. Based on the evidence adduced, the Hearing Officer concludes that DCPS failed to provide independent evaluation without unnecessary delay or timely request a due process hearing after Petitioner requested an independent educational evaluation.

However, the Hearing Officer determined that DCPS's failure was a procedural violation, and it is premature to determine if DCPS's delay denied Student a FAPE. Because DCPS has already granted Parents authorization to obtain the requested evaluations, the Hearing Officer dismissed Petitioner's claim without prejudice.

Based on the evidence adduced, the Hearing Officer concludes Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issue #2 and the Hearing Officer dismissed that claim with prejudice.

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<sup>4</sup> The Hearing Officer 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 presented two witnesses: Petitioner and an Independent Educational Consultant who testified as expert witnesses. DCPS presented two witnesses, a Compliance Manager and Special Educator who testified as an expert witness.

## **FINDINGS OF FACT:<sup>5</sup>**

1. Student resides with Student's parent, Petitioner, in the District of Columbia, and DCPS is Student's LEA. Student is currently attends School A, a DCPS school. Student is eligible for special education and related services pursuant to IDEA with a disability classification of MD including SLD and OHI. (Petitioner's Exhibit 6-1)
2. On April 2, 2021, while Student was attending School B, Student's previous DCPS school, DCPS conducted a triennial psychological reevaluation of Student. (Witness 3's testimony, Petitioner's Exhibits 6)
3. On April 7, 2021, DCPS reviewed the psychological reevaluation and developed an IEP for Student. (Witness 3's testimony, Petitioner's Exhibit 8)
4. On July 7, 2021, Petitioner's Counsel on behalf of Petitioner emailed a letter to the Principal and Special Education Manager ("SEM") at School B informing DCPS that Petitioner disagreed with DCPS's reevaluation of Student and requested an IEE. (Petitioner's Exhibit 5)
5. On July 7, 2021, Petitioner's Counsel also emailed a letter to School B's Principal and SEM requesting copies of Student's educational records. The letter stated, inter alia, the following:

"I represent [Petitioner] concerning the special education needs of [Student]. [Student] is currently a student at School B. Please forward to my attention a complete copy of [Student's} education records. These records should include, but not be limited to: report cards, special education progress reports, standardized testing, classroom assessments, disciplinary records, attendance records, requests for evaluations, reports from evaluations/assessments, IEPs, prior written notices, eligibility/non-eligibility determinations, analysis of data forms, encounter tracker forms for related services, questionnaires, correspondence, e mail, SEDS parent contact log, SEDS Document Index, and any other documents of any other type concerning [Student] that are maintained in any files in the custody of D.C. Public Schools. A copy of a records release signed by Ms. Student is attached for your records." (Petitioner's Exhibit 1)

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<sup>5</sup> The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. Documents cited are noted by the exhibit number. If there is a second number following the exhibit number, it denotes the page of the exhibit (or the page number of the entire disclosure document) from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

6. A reply email was sent responding to Petitioner's Counsel's email to School B's SEM that stated that the SEM would be out of her office from July 7, 2021, to July 17, 2021, and she would have limited access to emails, but would respond to all messages within 48 hours of her return. (Petitioner's Exhibit 1-4)
7. A reply email was sent responding to Petitioner's Counsel's email to School B's Principal that stated that the Principal would be out of his office until July 12, 2021, and he would have limited access to emails, but would respond to the email upon his return on July 12, 2021. (Petitioner's Exhibit 1-5)
8. On July 28, 2021, School B's SEM sent Petitioner's Counsel an email acknowledging the receipt of Petitioner's IEE request. (Petitioner's Exhibit 5-3)
9. On August 17, 2021, Petitioner's Counsel sent an email to School B's SEM inquiring about the IEE request and stating that it had been 41 days since she first sent the request. (Petitioner's Exhibit 5-5)
10. On August 17, 2021, DCPS's Counsel responded with an email to Petitioner's Counsel that DCPS was considering Petitioner's request. (Petitioner's Exhibit 5-6)
11. Student began attending School A at the start of school year 2021-2022 in late August 2021. Student struggles in reading and math and has a hard time completing academic work without assistance. Petitioner is concerned about Student's academic performance and engaged her counsel to assist her in addressing Student's education needs. Petitioner, through her counsel, requested an IEE and did not receive a response to the request prior to filing her due process complaint. (Petitioner's testimony)
12. On September 20, 2021, Petitioner filed the due process complaint alleging, inter alia, that DCPS failed, without unnecessary delay, to provide Petitioner the requested IEE or file a due process complaint to defend its revaluation of Student. (Due Process Complaint)
13. On October 7, 2021, in response to Petitioner's request for an IEE, DCPS provided Petitioner written authorization to obtain the following assessments with DCPS funding:

<b>Assessment Type</b>	<b>Maximum Hourly Cost:</b>	<b>Maximum Total Cost</b>
Comprehensive Psychological Evaluation (to include assessment regarding ADHD and executive functioning)	N/A	\$2,500.00
Assistive Technology Evaluation	N/A	\$1,550.00

Speech-Language Evaluation	N/A	\$875.40
Occupational Therapy Evaluation	N/A	\$782.28
Functional Behavioral Assessment	N/A	\$1,200.00

DCPS also provided a copy of the DCPS Parent's Guide that included a list of vendors from which Petitioner could choose to administer the independent assessments. (Witness 2's testimony, Respondent's Exhibit 6)

14. Petitioner engaged the services of an education consultant to review Student's education records and testify on her behalf. The consultant opined that given Student's level of academic delays and the academic expectations Student will be required to meet at School A, the need for a more comprehensive evaluation of Student is urgent. This witness also opined that the time between the initial IEE request on July 7, 2021, and DCPS' response to the request on October 7, 2021, in his opinion was an unreasonable delay. (Witness 1's testimony)
15. On October 4, 2021, DCPS provided Petitioner's Counsel Student's education records. Petitioner was also provided the student history and communications log from Special Education Data System ("SEDS"). DCPS did not provide Petitioner's Counsel a document known as a SEDS index. During the hearing Petitioner's Counsel stated that the document she was seeking was actually termed the SEDS student history. (Witness 2's testimony, Respondent's Exhibits 3, 4, 7, Petitioner's Exhibit 3, 4)

## 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 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 issues #1 and #2.<sup>6</sup> 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).

**Issue 1:** Whether DCPS denied Student FAPE by, without unnecessary delay, either agreeing to fund an independent educational evaluation requested by Petitioner or filing a due process complaint to defend its evaluation.

**Conclusion:** The Hearing Officer concludes that DCPS failed to provide 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

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<sup>6</sup> 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.



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).

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 in this case demonstrates that DCPS conducted a psychological reevaluation and reviewed the evaluation in a team meeting and developed Student’s IEP on April 7, 2021.

The evidence demonstrates that Petitioner, through counsel, requested the IEE from the Principal and SEM at School B on July 7, 2021. The Principal’s return email stated that he would respond to the email on July 12, 2021. The SEM’s return email stated that she would respond to messages within 48 hours of her return. However, she did not respond and acknowledge the IEE request until July 28, 2021. In response to another inquiry by Petitioner’s Counsel on August 17, 2021, DCPS responded that it was considering the request. Petitioner heard nothing from DCPS regarding the request prior to Petitioner filing her due

process complaint on September 20, 2021, more than 30 days after DCPS stated that it was considering the request, and more than 60 days after Petitioner made the initial request.

Petitioner presented expert testimony to bolster her claim of delay in DCPS responding to the IEE request by pointing to the urgency that Student be reevaluated given Student's academic deficits the academics demands Student would probably face at School A. Although Petitioner's expert witness also described other components of a reevaluation in addition to formal assessments that DCPS authorized, such as teacher and parent input and classroom data, there was insufficient evidence to support Petitioner's claim of a continuing violation that DCPS's authorization of independent assessments was not a granting of the IEE that is required pursuant to 34 C.F.R. § 300.502.

Although DCPS may have considered conducting its own evaluation, DCPS still did not grant authorization for any assessments until October 4, 2021, weeks after Petitioner's due process complaint had been filed. The authorizations for the IEEs were provided nearly three months after Petitioner's initial request.

DCPS' witnesses testified that it was considering conducting its own reevaluation of Student; however, there was an insufficient explanation as to why DCPS did not grant the IEE request or promptly file a due process complaint to defend its evaluation. Although DCPS stated on August 17, 2021, it was considering Petitioner's request, there was no other communication to Petitioner about the request. By September 20, 2021, when Petitioner filed her due process complaint, it was more than reasonable for Petitioner to conclude that the parties had reached an impasse as to the IEE request.

The Hearing Officer concludes that DCPS's delay with no further communication to Petitioner after the August 17, 2021, email and waiting until Petitioner's complaint was filed, amounted to unnecessary delay. See *Horne ex rel. R.P. v. Potomac Preparatory P.C.S.*, 209 F. Supp. 3d 146 (D.D.C. 2016) (finding the agency's delay in issuing an IEE or suing parents to be inappropriate because the parties were at an impasse and that agency did not take action. DCPS's unnecessary delay in either granting Parents' IEE request or filing a due process complaint to defend its evaluation was at least a procedural violation.

As pointed out in *Hill v. District of Columbia*, a 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). Although *Hill* states that "A delay of more than 2-3 months is likely fatal to the [school] district's case," It goes on to state: "... the exact length will depend on the circumstances rather than being a bright-line test."

It has not yet been determined whether the delay in DCPS granting Petitioner's request for IEE will result in Student's education being different from that already prescribed under the IEP

DCPS has developed. Once the authorized publicly funded assessments have been completed and provided to DCPS and reviewed by a team along with any other available data, it can then be determined if the Student's education is different, and if so, what remedy is appropriate.

Although the Hearing Officer has determined that DCPS committed a procedural violation in its unnecessary delay in granting Petitioner's request for the IEE, there is insufficient evidence from which the Hearing Officer can yet conclude that DCPS's delay resulted in a denial of a FAPE.

The Hearing Officer concludes that adjudication of Petitioner's claim regarding a denial of a FAPE in this regard is premature. Consequently, in the order below, the Hearing Officer dismisses without prejudice Petitioner's claim of a denial of FAPE with regard to the procedural violation determined herein regarding DCPS' unnecessary delay in granting Petitioner IEE request, and allows Petitioner to seek redress.

**Issue 2:** Whether DCPS denied Student a FAPE by failing to provide a complete copy of Student's educational records when requested to do so by Petitioner.

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

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 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 any document known as a SEDS index. During the hearing Petitioner's Counsel stated that the document she was seeking was actually termed the SEDS student history. However, the evidence demonstrates, as noted in DCPS' disclosures, that DCPS provided Petitioner's Counsel the SEDS student history and SEDS communications log.

Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that there are any of Student's education records that have not already been provided to Petitioner. There is 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:<sup>7</sup>**

1. Petitioner's claim with regard to education records adjudicated herein is dismissed with prejudice.
2. Petitioner's claim of a denial of FAPE with regard to DCPS's procedural violation determined herein of unnecessary delay in granting Petitioner's IEE request is hereby dismissed without prejudice.
3. Petitioner is allowed to seek redress for the procedural violation noted above once the authorized publicly funded assessments have been completed and provided to DCPS and reviewed by a team along with any other available data and it is demonstrated that Student's education is different based on the IEE.
4. Within ten (10) business days of its receipt of the last of independent assessment reports that DCPS authorized Petitioner to obtain through public funding, DCPS shall convene a multidisciplinary team ("MDT") meeting to review and consider the results and recommendations of the independent assessment reports, review and revise Student's IEP and discuss compensatory education as appropriate.

**APPEAL PROCESS:**

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<sup>7</sup> 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.

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*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: December 4, 2021**

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