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OSSE  
Office of Dispute Resolution  
December 23, 2023

**Confidential**

<p>Parent on Behalf of Student, <sup>1</sup></p>  <p>Petitioner,</p>  <p>v.</p>  <p>District of Columbia Public Schools (Local Education Agency “LEA”)</p> <p>Respondent.</p>  <p>Case # 2023-0188</p> <p>Date Issued: December 23, 2023</p>	<p>HEARING OFFICER’S DETERMINATION</p>  <p>Hearing Dates: December 8, 2023 December 13, 2023</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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<sup>1</sup> Personally identifiable information is in the attached Appendices A & B.

## **JURISDICTION:**

The 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 5-A30.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student who is the subject of this due process hearing (“Student”) resides with Student's parent in the District of Columbia, and the District of Columbia Public Schools ("DCPS") is Student's local education agency ("LEA"). On March 24, 2023, DCPS determined Student eligible for special education and related services pursuant to IDEA with a disability classification of Autism. DCPS developed Student’s initial individualized educational program (“IEP”) on April 24, 2023.

Student’s mother (“Petitioner”) filed a due process complaint (“DPC”) on September 29, 2023, alleging, that DCPS denied Student a free appropriate public education (“FAPE”) because DCPS failed to timely identify and evaluate Student’s pursuant to its child find obligations, failed to appropriate evaluate Student and failed to develop an appropriate IEP and resulting educational placement for Student.

## **Relief Sought:**

Petitioner seeks as relief that DCPS be found to have denied Student a FAPE and that DCPS be ordered to fund compensatory education, amend Student's IEP to provide an appropriate full-time therapeutic program or place and fund Student in an appropriate non-public school; amend Student's IEP by increasing behavioral support services (“BSS”) to 240 minutes per month, conduct the following evaluations: occupational therapy (“OT”), speech-language, assistive technology (“AT”) and functional behavior assessment (“FBA”) and develop a behavior intervention plan (“BIP”), and convene and IEP team to review and revise Student’s IEP based on the new evaluation data. Petitioner also requests authorization to seek additional compensatory education after the requested evaluations are completed.

## **LEA Response to the Complaint:**

DCPS filed a response to the complaint on October 10, 2023. In its response, DCPS stated, inter alia, the following:

DCPS did not have reason to believe that Student required special education services to access the curriculum. When Student continued to struggle, DCPS created a 504 plan and safety plan. DCPS took appropriate steps and interventions to respond to Student’s attendance issues, prior to receiving a referral from Petitioner for special education services. Student was referred for special education services by Petitioner on October 14, 2022. Thereafter, DCPS conducted an Analysis of Existing Data (“AED”) and held an AED Meeting on November 18, 2022. Petitioner was present for this meeting, where the following was considered and reviewed: attendance data,

present levels of performance, behavioral data, statements of strengths and areas of concerns from all participants, behavioral data, new annual goals, special education services, schedule compared to special education services, related services, transition component of IEP, and determine if any additional assessments were needed to determine eligibility.

Student underwent an independent comprehensive neuropsychological evaluation (“IEE”) on October 7, October 20, and October 28, 2022. Student was referred by Petitioners to better understand Student’s “emotional challenges, as well as possible academic challenges, that negatively impact Student’s ability to engage productively in school and with peers.” It is noted in the IEE that Student’s attendance became an issue after the pandemic, when Student was in \_\_\_\_ grade. When Student began to attend \_\_\_\_\_ school last year, at School A, Student continued to experience school refusal and distress. School A developed an intervention plan with accommodations to address Student’s attendance issues.

On January 28, 2023, a DCPS psychologist, completed a review of the IEE. Included in this report are Student’s grades from Student’s \_\_\_\_\_ school (“School B”), which show that when Student was available for learning Student was able to access the general education curriculum.

When Student’s absences increased, Student’s grades took a significant hit. To address Student’s absences and school refusal, a 504 plan was developed in December 2022 in addition to a school safety plan. It was specifically noted that Student had missed a substantial amount of school due to social-emotional concerns. As a result, Student had not received formal interventions to remediate areas of deficit. Therefore, Student has not made sufficient progress in math, reading, and written expression.

On April 28, 2023, an IEP meeting was conducted for Student, including Petitioner. Petitioner signed the IEP, indicating that she had the opportunity to provide input in the development of the IEP. Petitioner also requested a meeting in June to review the IEP and discuss Student possibly attending another DCPS school. Following the review of all data, DCPS proposed to obtain consent for the initial provision of services and to develop an initial IEP for Student. DCPS maintains that the IEP developed on April 24, 2023, was appropriate given the data and information DCPS possessed.

During the end of school year (“SY”) 2022-2023, Petitioner expressed interest in enrolling Student in another DCPS school (“School C”). Petitioner engaged in enrolling Student at School C and considered whether to keep Student at School A or send Student to School C.

During SY 2023-2024, as School A gained more knowledge and data, Student’s IEP was amended in September 2023. The IEP was amended to reflect an increase in services hours from 6 hours to 10 hours and an increase in BSS from 90 minutes to 120 minutes per month; two additional math goals were also added. At the present, DCPS is awaiting Petitioner’s decision regarding her placement decision for Student.

As the additional evaluations that Petitioner alleges should have been completed, at no time were these evaluations requested by Petitioner or raised as areas of concern during eligibility. After DCPS received a referral for services from Petitioner, DCPS immediately conducted an AED,

which guided the IEP team’s decision regarding what evaluations were necessary to develop an appropriate IEP for Student, if eligible for services. DCPS maintains that it comprehensively evaluated Student when it considered Student’s initial IEP/eligibility during SY 2022-2023.

Once Student was referred for services, DCPS took the required steps to timely create an appropriate IEP to enable Student to access curriculum. DCPS maintains that the IEP created on April 24, 2023, was appropriate given the data and information DCPS had and DCPS continues to monitor and amend Student’s IEP according to Student’s needs.

**Resolution Meeting and Pre-Hearing Conference:**

Petitioner and DCPS participated in a resolution meeting on October 18, 2023. The parties did not mutually agree to shorten the 30-day resolution period. The due process complaint (“DPC”) was filed on September 29, 2023. The 45-day period begins on October 30, 2023, and ended [and the Hearing Officer’s Determination (“HOD”) was due on December 13, 2023. DCPS Counsel filed an unopposed motion to continue and extend the HOD due date to accommodate the requested and agreed upon hearing dates. The HOD is now due on December 23, 2023.

The undersigned IHO conducted a pre-hearing conference on October 30, 2023, and issued a pre-hearing order (“PHO”) on November 6, 2023, outlining, inter alia, the issues to be adjudicated.

**ISSUES:**<sup>2</sup>

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to timely evaluate Student and find Student eligible for special education services pursuant to its child find obligation from September 2021 to April 24, 2023?
2. Did DCPS deny Student a FAPE by failing to timely and comprehensively evaluate Student as of January 28, 2023, by failing to administer the following evaluations as of January 28, 2023: an occupational therapy (“OT”) speech-language evaluation (“SLP”), assistive technology assessment (“AT”), functional behavior assessment (“FBA) and develop a behavior intervention plan (“BIP”)?
3. Did DCPS deny Student a FAPE by failing to provide Student an appropriate IEP/location of services/placement on April 24, 2023, and/or during SY 2023-2024, because the IEP lacked (a) sufficient specialized instruction, (b) sufficient behavioral support services and interventions, (c) sufficient goals, and (d) sufficient evaluative data?

**DUE PROCESS HEARING:**

The Due Process Hearing was convened on December 8, 2023, and December 13, 2023. The hearing was conducted via video teleconference.

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<sup>2</sup> The Hearing Officer restated the issue at the hearing, and the parties agreed that this was the issue to be adjudicated.

## **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 59 and Respondent's Exhibits 1 through 31) that were admitted into the record and are listed in Appendix 2.<sup>3</sup> The witnesses testifying on behalf of each party are listed in Appendix B.<sup>4</sup>

## **SUMMARY OF DECISION:**

Petitioner held the persuasion on issues #1 and #2. Respondent held the burden of persuasion on issue #1 after Petitioner presented a prima facie case on that issue.<sup>5</sup> Based on the evidence adduced, the Hearing Officer concluded that Petitioner sustained the burden of persuasion by a preponderance of the evidence on issue #1, but not as to issue #2. Respondent did not sustain the burden of persuasion by a preponderance of the evidence on issue #3. The IHO directed DCPS to amend Student's current IEP to provide for special education placement in a therapeutic day school and that DCPS place Student in such a program and conduct a review of Student's progress after the end SY 2023-2024 to determine if Student continues to require such a restrictive placement. The IHO also directed DCPS to conduct the evaluations Petitioner requested.

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<sup>3</sup> Any item disclosed and not admitted or admitted for limited purposes was noted on the record and in Appendix A.

<sup>4</sup> Petitioner presented four witnesses: (1) Student's parent, Petitioner, and three other witnesses who testified as experts: (2) an independent Occupational Therapist (3) Petitioner's Educational Advocate, and (4) a Psychologist with the law firm representing Petitioner. Respondent presented three witnesses designated as expert witnesses: (1) a DCPS School A Social Worker, (2) a DCPS Social Worker, and (3) a Psychologist. 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.

<sup>5</sup> DC Code § 38-2571.03 (6) provides:

(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.

## **FINDINGS OF FACT:<sup>6</sup>**

1. Student is age \_\_\_\_\_ and resides with Student's parents in the District of Columbia. DCPS is Student's LEA. Student is in \_\_\_\_\_ grade for SY 2023-2024 and eligible for specialized instruction under the autism or autism spectrum disorder ("ASD") classification. Student currently attends a DCPS School (School A) where Student has been enrolled since SY 2022-2023. (Stipulation)
2. Student was found eligible for special education on March 24, 2023, while attending School A, with Student's first IEP being created on April 24, 2023. (Stipulation)
3. Student previously attended School B, a DCPS \_\_\_\_\_ school, from SY 2019-2020 to SY 2021-2022. DCPS is the LEA for both School A and School B. (Stipulation)
4. During Student's \_\_\_\_\_ grade year at School B, SY 2019-2020, Student scored at a 5th grade reading level on the reading inventory prior to the COVID-19 shut down. Student's final report card a final grade of no less than "B" in all classes and with few class absences for the year. (Petitioner's Exhibit 7-3, 7-5)
5. In \_\_\_\_\_ grade, SY 2020-2021, Student's grades declined some. Student's grades in Spanish and math, fell below average, but Student's achieved the grade "B" for most other classes and earned passing final grades in Spanish and math for the year. Student's reading inventory score at the end of \_\_\_\_\_ grade dropped from fifth grade to third grade level. (Petitioner's Exhibit 7-4, 7-5)
6. In April 2021 and June 2021, Student was hospitalized due to suicidal ideations and medication overdose. Student was diagnosed with major depressive disorder and anxiety disorder. (Petitioner's Exhibits 42, 43)
7. While Student was in \_\_\_\_\_ grade at School B, SY 2021-2022, a safety plan was created due to bullying concerns that required: "Hallways to be monitored, safe adults and safe spaces determined, monitoring by staff at lunch and recess, aggressor to avoid contact (face to face and online), [Student] had access to flash pass, students who violate contact have consequence, parents to monitor at home and report any incidents within 24 hrs." (Stipulation)
8. Student's SY 2021-2022 \_\_\_\_\_ grade end of year ("EOY") report card reflects that Student failed four out five classes, only passing math. Student had a total of 75 absences for the school year with 66 of those unexcused due to school refusal. Student's reading inventory scores end of \_\_\_\_\_ grade was again at 5<sup>th</sup> grade level. Student was consistently reading below grade level throughout \_\_\_\_\_ school.

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<sup>6</sup> The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

(Petitioner’s Exhibits 7-5, 34)

9. From August to October of 2022, Student’s parents emailed the School A staff informing School A Student’s medical diagnoses and seeking assistance for Student’s emotional concerns and guidance as to how best address Student’s in school success. (Petitioner’s Exhibits 45, 46, 47, 48)
10. On October 28, 2022, Student’s mother sent an email to the School A principal initiating the IEP process. (Petitioner’s Exhibit 49)
11. School A convened an analysis of existing data (“AED”) meeting at which an independent neuropsychological evaluation (“IEE”) was provided to and reviewed by a DCPS psychologist. (Petitioner’s Exhibit 12)
12. In a prior written notice (“PWN”) dated November 19, 2022, it was reported that the multidisciplinary team (“MDT”) met on November 18, 2022, to discuss and analyze the existing data for Student. Student’s parents requested that the team review and consider Student’s medical conditions (social anxiety and depression) and suspected learning disability (reading disorder and processing disorder) for special education services. (Stipulation)
13. On December 9, 2022, School A created a 504 plan for Student. This plan provided for frequent breaks, alternate work assignments, separate or alternate work locations, check-ins, preferential seating, extended time on testing, and 120 minutes per month of direct Behavioral Support Services. (Petitioner’s Exhibit 38)
14. On December 13, 2022, Student was administered the IEE that assessed Student’s cognitive, academic achievement and social-emotional functioning. The evaluator assessed Student’ cognitive functioning with the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V). Student’s cognitive functioning was considered Low Average due to low processing speed. Student’s WISC-V scores were as follows:

<b>Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V)</b>			
<b>Subscale</b>	<b>Scaled Score</b>	<b>Percentile</b>	<b>Description</b>
Verbal Comprehension Index	98	45	Average
Visual Spatial Index	94	34	Average
Fluid Reasoning Index	91	27	Average
Working Memory Index	88	21	Low Average
Processing Speed Index	72	3	Very Low
<b>Full Scale IQ Score</b>	87	19	Low Average

(Petitioner’s Exhibit 5)

15. The evaluator assessed Student’s academic achievement with the Woodcock Johnson Tests of Achievement - Fourth Edition (WJ-IV). Generally, Student’s academic achievement was below grade level. Student scored closer to grade level in the math subtests, but extremely low in math calculation. Student’s WJ-IV scores were as follows:

**ACADEMIC ACHIEVEMENT**

Reading Tests	Standard Score	Grade Equivalent	Percentile	Description
<b>Woodcock Johnson Tests of Achievement, Fourth Edition (WJ-IV)</b>				
Letter-Word Identification	93	7.0	32	Average
Word Attack	118	>17.9	89	High Average
Passage Comprehension	86	5.5	18	Low Average
Sentence Reading Fluency	119	>17.9	89	High Average
Oral Reading	90	5.7	26	Average
<b>Gray Oral Reading Tests, Fifth Edition (GORT-5)</b>				
Reading Rate	6	3.7	9	Below Average
Reading Accuracy	7	4.2	16	Below Average
Reading Fluency	6	4.0	9	Below Average
Reading Comprehension	6	3.2	9	Below Average
<b>Test of Word Reading Efficiency, Second Edition (TOWRE-2)</b>				
Sight Word Efficiency	98	8.8	45	Average
Phonemic Decoding Efficiency	95	7.0	37	Average
<b>Nelson Denny Reading Test</b>				
Reading Rate	—	—	57	Average
Comprehension	—	4.1	11	Below Average
<b>Jordan Left Right Reversal Test, Third Edition</b>				
Errors	—	—	13	Borderline
<b>Test of Reading Comprehension, Fourth Edition (TORC-4)</b>				
Contextual Fluency	9	7.3	37	Average

Mathematics Tests	Standard Score	Grade Equivalent	Percentile	Description
<b>Woodcock Johnson Tests of Achievement, Fourth Edition (WJ-IV)</b>				
Applied Problems	93	8.2	31	Average
Calculation	61	2.9	0.5	Extremely Low
Math Facts Fluency	102	9.9	55	Average

(Petitioner’s Exhibit 5)

16. The evaluator in this report diagnosed Student with autism, social anxiety disorder, major depressive disorder, unspecified trauma and stress related disorder, and reading disorder. (Petitioner’s Exhibit 5)



17. The evaluation report noted that Student had missed a substantial amount of school due to social-emotional concerns. (Stipulation)
18. The psychologist reported in the IEE that school and work avoidance is a manifestation of the student's Autism and mental health diagnoses. (Petitioner's Exhibit 5)
19. Based upon Student's social-emotional concerns and school avoidance behaviors, the evaluator concluded that Student needed a therapeutic day treatment program to establish a pattern of regular school attendance and then transition to a full-time school program for students with high functioning autism where Student would receive classroom-based interventions regarding social, coping and executive function skills. The evaluator noted that without intensive intervention, Student is at high risk for self-harm, truancy, and maladaptive behaviors. (Petitioner's Exhibit 5-26)
20. On January 28, 2023, a DCPS Psychologist completed a review of the IEE. (Stipulation).
21. The DCPS school psychologist interviewed Student's mother, three teachers, and the social worker. The interviews with Student's history and English teachers both cited limited knowledge of skills due to lack of attendance and participation. Student's math teacher noted Student's weakness in skills, but ability to complete work when walked through a problem-solving process. The School A social worker acknowledged that Student avoids work Student's considers difficult. (Petitioner's Exhibit 5)
22. On February 9, 2023, the school created an evaluation summary report upon completion of the initial evaluation or reevaluation process and the determination of eligibility process. This report summarized findings from the IEE and Student's academic standardized testing in math, reading, and written expression. (Stipulation)
23. On March 24, 2023, a PWN was issued for the determination of eligibility which found that Student was eligible for special education and related services. (Petitioner's Exhibit 13)
24. Through further discussion, it was determined that Student did not meet the criteria for specific learning disability but met the criteria for emotional disturbance and autism. The team decided that based on the findings, the characteristics of Autism took precedence. (Stipulation)
25. On April 24, 2023, Student's initial IEP was developed. It provided for 6 hours of specialized instruction inside the general education setting and 90 minutes per month of behavioral support services outside the general education setting. The IEP programs for math, reading, written expression, and social emotional behavioral functioning. (Petitioner's Exhibit 9)
26. During the creation of Student's April 2023 IEP, School A suggested to Student's parents that they were not able to provide Student the amount of emotional support

Students required, and that Student might be better served in a more restrictive environment. (Parent's testimony)

27. School A suggested that Student perhaps could enroll at a new DCPS school, School C, due to its overall small student population. However, this transfer did not come to fruition. (Parent's testimony)
28. Student's SY 2022-2023 \_\_\_\_\_ grade EOY report card reflects that Student failed all core academic classes and had 108 unexcused absences and 12 excused absences for the year. (Petitioner's Exhibit 35)
29. During SY 2023-2024 Student's school attendance has improved drastically compared to SY 2022-2023, when Student had significant absences, and spent a lot of time outside of class and in the social worker's office on the days Student did attend school. (Witness 4's testimony)
30. On September 27, 2023, Petitioner and her representative participated in an IEP amendment meeting with School A at which they requested a 27.5 hour, therapeutic placement/location, along with 240 minutes per month of behavioral support services considering the findings in the IEE. (Mother's testimony, Witness 2's testimony)
31. Student's IEP was amended to reflect an increase in services hours from 6 hours to 10 hours and an increase in BSS from 90 minutes to 120 minutes per month, two additional math goals were also added. Student's class schedule was changed as result, so that Student would be in some self-contained special education classes. However, Student feels he/she had no voice in changing the classes to accommodate her/his disability and behavior support. Student was upset and taken aback by the changes and refused to make in any changes in classes or behavior groups. Consequently, School A has reverted to the class schedule Student had prior to the September 27, 2023, meeting. (Witness 4'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 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. West*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case, Petitioner will proceed on the first on the day of the hearing and has the burden of production. Once Petitioner presents a prima facie case, Respondent has the burden of persuasion on the issue to be adjudicated. The burden of persuasion shall be met by a preponderance of the evidence. <sup>7</sup> The burden of persuasion shall be met by a preponderance of the evidence. The normal standard is a 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:** Did DCPS deny Student a FAPE by failing to timely evaluate Student and find Student eligible for special education services pursuant to its child find obligation from September 2021 to April 24, 2023

**Conclusion:** Petitioner sustained the burden of persuasion by a preponderance of the evidence on this issue.

Under the IDEA, states, as well as the District of Columbia, that receive federal educational assistance must establish policies and procedures to ensure that a FAPE is made available to disabled children. *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir. 2005). Under the Act's child-find requirement, the District must "ensure that '[a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated.'" *Scott v. District 18 of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (quoting *Reid*); 20 U.S.C. § 1412(a)(3). "As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process." *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011). The District must conduct initial evaluations to determine the student's eligibility for special education services "within 120 days

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<sup>7</sup> DC Code § 38-2571.03 (6) provides:

(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.

from the date that the student was referred [to DCPS] for an evaluation or assessment." Id. (quoting former D.C. Code § 38-2561.02(a)). Once the eligibility determination has been made, the District must conduct a meeting to develop an IEP within 30 days. 34 CFR § 300.323(c)(1); G.G. ex rel. *Gersten v. District of Columbia*, 924 F.Supp.2d 273, 279(D.D.C.2013).

The U.S. Department of Education's long-standing position is that a parent's request for an eligibility evaluation does not automatically precipitate the obligation of the LEA to conduct the evaluation. Rather, an LEA must conduct an evaluation without undue delay only if the LEA suspects that the child has a disability and is in need of special education and related services. See *Letter to Anonymous*, 21 IDELR 998 (OSEP 1994). The LEA's duty to conduct an initial evaluation is triggered when the LEA has reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. See *Board of Education of Fayette County v. L.M.*, 45 IDELR 95 (E.D.Ky. 2006). "A suspicion connotes a relatively low threshold." Id. A state or LEA "shall be deemed to have knowledge that a child is a child with a disability if [among other things] . . . the behavior or performance of the child demonstrates the need for such services." *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001) (citing 20 U.S.C. § 1415(k)(8)(B)(ii)).

The evidence demonstrates that during Student's \_\_\_\_ grade year at School B, SY 2019-2020, although Student had no less than "B" in all classes and with few class absences, Student was reading one grade level below Student grade at the time. In \_\_\_\_\_ grade, SY 2020-2021, Student's grades declined some, but Student's achieved the grade "B" for most other classes and earned passing final grades in Spanish and math for the year. Nonetheless, Student's reading inventory score at the end of \_\_\_\_\_ grade dropped from fifth grade to third grade level.

In April 2021 and June 2021, Student was hospitalized due to suicidal ideations and medication overdose and was diagnosed with major depressive disorder and anxiety disorder. Then the following school year, SY 2021-2022, DCPS created a safety plan due to bullying concerns. That school year, Student's \_\_\_\_\_ grade year, Student had a total of 75 absences for the school year with 66 of those unexcused due to school refusal. Student's reading inventory scores at the end of \_\_\_\_\_ grade was again at 5<sup>th</sup> grade level. The evidence reflects that Student was consistently reading below grade level throughout \_\_\_\_\_ school.

Petitioner asserts that as early as September 2021 DCPS should have suspected Student was child with a disability in need of specialized instruction and evaluated. Student's mother was the only witness who testified that was personally familiar with Student's in school and out of school behavior during SY 2021-2022. Although Petitioner asserts that as early as September 2021 DCPS should have evaluated Student, based upon Student's academic performance in SY 2019-2020, and SY 2020-2021, the evidence does not support a finding that DCPS was on notice of a suspected disability warranting special education that early in the school year.

However, Student's SY 2021-2022 \_\_\_\_\_grade end of year ("EOY") report card reflects that Student failed four out five classes, only passing math. Student had a total of 75 absences for the school year with 66 of those unexcused due to school refusal. These factors, coupled with DCPS' presumed knowledge of Student's hospitalizations, and in school bullying that

necessitated a safety plan, demonstrate that by the end of SY 2021-2022, DCPS had sufficient notice to DCPS that Student should have been evaluated for special education. Had DCPS initiated an evaluation at that point, presumably Student would have been found eligible and had an IEP at latest by end of the first half of SY 2022-2023.

The evidence demonstrates that as early as August 2022, Student's parents emailed the School A staff informing School A Student's medical diagnoses and seeking assistance for Student's emotional concerns and guidance as to best address Student's in school success. This was further notice to DCPS to act. Although DCPS conducted an AED meeting in November 2022 because of Petitioner's request, Student's initial IEP was not developed until April 24, 2023. Student missed out on four months of services that likely would have made a significant difference in how Student is functioning both academically and emotional now.

The IHO concludes, therefore, that DCPS denied Student a FAPE by not initiating the evaluation process pursuant to its child find obligation by the end of SY 2021-2022.

**ISSUE 2:** Did DCPS deny Student a FAPE by failing to timely and comprehensively evaluate Student as of January 28, 2023, by failing to administer the following evaluations as of January 28, 2023: an OT, SLP, AT, FBA and develop a BIP?

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

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.

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.

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 5A

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. 5A

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).

Regarding OT, AT, SLP and FBA evaluations, the evidence demonstrates that none of the areas of concern that these evaluations would address were raised as issues for Student at the time that DCPS initiated evaluations. Nor were these evaluations raised or requested by Petitioner or anyone who participated in the AED meeting, Student's eligibility meeting or IEP meeting. Petitioner did not request these evaluations until she filed her DPC. Although Petitioner had an OT expert testify, her testimony regarding the items in Student's initial evaluation that in her opinion warranted an OT evaluation and an AT assessment were unconvincing. She had never seen or evaluated Student and had not communicated with the evaluator who evaluated Student.

Likewise, the testimony from Petitioners other two witnesses was unconvincing regarding these evaluations. Their contact with Student was limited to brief video interviews. There was no testimony from a speech-language professional that supported the need for a SLP evaluation. Although Petitioner asserts that DCPS should have conducted a FBA, the evidence reflects that Student's primary concerning behavior of school avoidance has significantly improved during SY 2023-2024,

Consequently, the IHO concludes that Petitioner did not sustain the burden of persuasion on this issue. Nonetheless, because Petitioner has in essence made the initial request for this evaluation in her DPC, the IHO directs DCPS to conduct the evaluations.

**ISSUE 3:** Did DCPS deny Student a FAPE by failing to provide Student an appropriate IEP/location of services/placement on April 24, 2023, and/or during SY 2023-2024, because the IEP lacked (a) sufficient specialized instruction, (b) sufficient behavioral support services and interventions, (c) sufficient goals, and (d) sufficient evaluative data?

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

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

“The IEP is the “centerpiece” of the IDEA’s system for delivering education to disabled children,” *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must “focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time to enable the student to receive educational benefits.”

The second, substantive, prong of the *Rowley* inquiry is whether the IEP DCPS developed was reasonably calculated to enable Student to make progress appropriate in light of Student’s individual circumstances.

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the “educational benefits” requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Andrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

The key inquiry regarding an IEP’s substantive adequacy is whether, taking account of what the school knew or reasonably should have known of a student’s needs at the time, the IEP offered was reasonably calculated to enable the specific student’s progress....“Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. 988.

Removing a child with disabilities "from the regular education environment" occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

“The IDEA requires that children with disabilities receive education in the regular classroom whenever possible” *Z.B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018) citing *Andrew F.*, supra, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202)

In developing an IEP, the Supreme Court has explained that IDEA's mandate to place a disabled student in their least restrictive environment must be balanced with the requirement that an IEP be "reasonably calculated to enable a child to make progress appropriate in light of [their] circumstances." *Endrew F.*, 137 S. Ct. at 999, 1101.

Petitioner alleges that DCPS failed to provide Student an appropriate IEP/location of services/placement on April 24, 2023, and/or during SY 2023-2024, because the IEP lacked sufficient specialized instruction, sufficient behavioral support services, sufficient goals, and sufficient evaluative data?

As discussed in issue #2 above, the additional evaluations that Petitioner alleged DCPS should have conducted were not requested or warranted at the time that DCPS conducted its initial evaluation of Student. Nor were the evaluations requested prior the filing of Petitioner's DPC. There was insufficient evidence to support a finding that Student's April 24, 2023, IEP and resulting placement was not based on sufficient evaluative data.

Petitioner presented witnesses who testified the IEP lacked sufficient specialized instruction, appropriate goals and sufficient behavior support. The evidence demonstrates that with the amount of behavior supports that were contained in Student's initial IEP, Student had begun to attend school regularly and willingly participated in the individual and group therapy and benefited from it. Although DCPS agreed to increase the behavior support services when it amended Student's IEP, there was insufficient evidence that the initial amount of services did not sufficiently meeting Student's social-emotional needs.

The testimony from Petitioner's witnesses regarding Student's IEP goals was likewise insufficient to support a finding that Student's initial IEP lacked sufficient goals. There was no evidence about Student's performance relative to the existing goals, and no indication that any team member who participated in the development of the IEP requested any additional goals or a revision in the goals at the time the initial IEP was developed. Consequently, the IHO does not conclude that the April 24, 2023, was lacking because of inappropriate academic or related services goals.

Petitioner's assertion that the IEP lacked sufficient specialized instruction and Student's resulting educational placement, location of service and least restrictive environment ("LRE") strikes at the heart of what the IHO considers to be lacking. Although it may have been reasonable based on Student's educational performance in \_\_\_\_\_ school, that Student could function successfully in an inclusion setting with specialized instruction being provided in a general education setting, Student's academic performance and school attendance during Student's first year at School A, belied such a conclusion. Student's academic performance and school attendance had been abysmal. Even with the recent increase in the level of specialized instruction in Student's IEP, it appears that Student is dictating in the School A environment what services she will or will not be provided. The evidence demonstrates that School A administrators have reverted to the original hours of specialized instruction and Student's original class schedule to appease Student.



It is noteworthy that when Student was evaluated the evaluator clearly noted that Student's emotionality necessitated a therapeutic day treatment program to establish a pattern of regular school attendance and then transition to a full-time school program for students with high functioning autism where Student would receive classroom-based interventions regarding social, coping and executive function skills. The evaluator noted that without intensive intervention, Student is at high risk for self-harm, truancy, and maladaptive behaviors.

Based upon the evidence presented, the IHO is convinced based upon Student's suicidal ideations and attempts in the past, Student's severe school avoidance during SY 2022-2023, along with Student's academic achievement scores reflecting functioning far below grade level, Student's initial IEP was inappropriate because it lacked an LRE in a therapeutic special education program. Consequently, the IHO concludes that the IEP that DCPS developed for on April 24, 2023, was not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

The IHO in the order below directs DCPS to provide Student such a program. Although Petitioner requested and proposed compensatory education, the IHO is not convinced given that Student has yet to be placed in appropriate program an appropriate award of compensatory education can be determined until Student is appropriately placed.

**ORDER:**

1. DCPS shall, within ten (10) school days of the issuance of the order, amend Student's current IEP to prescribe a placement in a therapeutic day school and amend the appropriate components of Student's IEP to reflect that educational placement.
2. DCPS shall, within 30 calendar days of the issuance of this order place Student in an appropriate school placement to implement Student's amended IEP, contingent upon Petitioner granting DCPS/OSSE any necessary consent.
3. Within thirty calendar days of the start Student's attendance at the new school placement, DCPS shall convene and multidisciplinary team ("MDT") meeting to review Student's progress and make any necessary and appropriate changes to Student's IEP.
4. After the conclusion of SY 2023-2024 and before the start of SY 2024-2025, DCPS shall convene an MDT meeting to determine whether Student continues to require a therapeutic school placement or whether a less restrictive placement is appropriate.
5. DCPS shall within ninety (90) calendar days conduct the following evaluations or assessments: occupational therapy, assistive technology, speech-language, and if the MDT that meets pursuant to paragraph #3 above deems it appropriate, a functional behavior assessment to determine if a behavior intervention plan is warranted.
6. DCPS shall, within sixty (60) calendar days of the issuance of this order, grant Petitioner authorization to obtain an independent educational evaluation for the purposes of the

determining appropriate compensatory education for the denials of FAPE of Student having not been timely evaluated and provided an appropriate IEP and placement. Petitioner is hereby authorized to seek compensatory education based upon the results of the evaluation directly from DCPS, and in a subsequent due process proceeding if necessary.

7. All other relief requested by Petitioner is denied.

### **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 with respect to 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 23, 2023**

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