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OSSE
Office of Dispute Resolution
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Confidential

<p>District of Columbia Public Schools (“DCPS”) Local Educational Agency (“LEA”)</p> <p>Petitioner,</p> <p>v.</p> <p>Parent ¹</p> <p>Respondent.</p> <p>Case # 2023-0202</p> <p>Date Issued: January 20, 2024</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: December 19, 2023 January 10, 2024</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 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”). Student is age _____ and in grade _____.² Student has been found eligible to receive special education services with a disability classification of autism spectrum disorder (“ASD”) or autism. Student currently attends a DCPS school (“School A”).

A comprehensive occupational therapy (“OT”) reevaluation was conducted by a DCPS occupational therapist on December 9, 2022. The evaluation was completed and provided to Student’s parent (“Petitioner” or “Parent”) on December 9, 2022, by email.

School A held a meeting to review the OT reevaluation and update Student’s individualized educational program (“IEP”) on April 27, 2023, with the multidisciplinary team (“MDT”) including Student’s mother, her attorney, and her educational advocate.

In an email sent August 4, 2023, Student’s parent (“Parent”), through counsel, expressed her disagreement with the December 9, 2022, OT evaluation because she believed it was not appropriate or comprehensive for several reasons, including no standardized fine motor skills testing, and no standardized visual perceptual testing. Parent, through counsel, requested an independent educational evaluation (“IEE”) at public expense.

On September 1, 2023, DCPS filed a due process complaint (“DPC”) to defend its OT reevaluation (Case # 2023-0173). On September 8, 2023, Parent filed a response to DCPS’s DPC. Parent’s response also included counter claims. At the direction of the undersigned impartial hearing officer (“IHO”), Parent filed as a separate due process complaint on October 12, 2023, (Case # 2023-0202) against DCPS to pursue the claims raised in Parent’s response. requested that the two cases be consolidated. The IHO denied Parent’s request that the two cases be consolidated, but agreed to hear the two cases one after another on the same dates.

Relief Sought:

Petitioner seeks a finding that Student has been denied a FAPE based on the above, and that the Hearing Officer order DCPS to conduct an appropriate and sufficiently comprehensive assistive technology evaluation, provide compensatory education due to DCPS' failure to timely conduct the required OT re-evaluation and AT evaluation.

² The student’s current age and grade are indicated in Appendix B.

DCPS's Response to Petitioner's DPC:

DCPS filed a response to the complaint on October 23, 2023. In its response, DCPS stated, inter alia, the following:

DCPS asserted that any claims prior to October 12, 2021, are barred by the applicable statute of limitations.

On April 23, 2018, Early Stages completed an OT assessment. A comprehensive OT re-evaluation was conducted by DCPS on December 9, 2022. The evaluation included review of records, teacher interview, clinical observations, analysis of work samples/handwriting and standardized/formal assessments including SPM-2, BRIEF-2 and TVMS-3.

The evaluation was provided to Parent on December 9, 2022, by email. After several attempts by School A to schedule a meeting to review the OT evaluation and update Student's IEP, if necessary, a meeting was held on April 27, 2023, with the multidisciplinary team ("MDT") at School A Parent, and her attorney and educational advocate. Per the June 13, 2023, prior written notice ("PWN"), the team initially proposed to Student's OT hours to consult services. The legal advocate team requested that Student continue to receive direct services. The IEP team said to ensure that Student is in the least restrictive environment ("LRE"), that Student's teacher and occupational therapist would consult and collaborate to provide OT accommodations.

The IEP team moved forward to provide the student OT within the general education classroom. Later, in an emails sent on August 4, 2023, and August 22, 2023, Parent, through counsel, expressed her disagreement with the December 9, 2022, OT evaluation because she believed it was not appropriate or comprehensive for several reasons, including, but not limited to the following: despite historical and reported fine motor concerns, the evaluation did not include standardized fine motor skills testing, and due to Student's challenges such as visual motor integration and reversals, standardized visual perceptual testing should have been administered, but was not. Parent, through counsel, requested an IEE at public expense because she did not feel like it was a comprehensive evaluation and additional tests should have been offered. DCPS filed a DPC against the parent to obtain an order from the IHO that the DCPS OT evaluation is appropriate, and the parent is not entitled to an IEE at public expense.

All students with disabilities are eligible for assistive technology without evaluation and unrelated to finding a student eligible for special education. Student's IEP team appropriately considered assistive technology in the special considerations section of the IEP. Student also has assistive technology discussed in Other Classroom Aids and Services and listed as a classroom/testing accommodation. DCPS moves that all claims in the DPC be dismissed, and all relief requested be denied.

Resolution Meeting and Pre-Hearing Conference:

The parties participated in a resolution meeting on October 24, 2023. The parties did not reach a resolution and did not elect to waive the remainder of the resolution period. The due process

complaint (“DPC”) was filed on October 12, 2023. The 45-day period begins on November 12, 2023, and ended [and the Hearing Officer’s Determination (“HOD”) was originally due on December 26, 2023. Parent did not complete her case on December 19, 2023, and requested a continuance, which was granted. The hearing was continued to and concluded on January 10, 2024. The HOD is now due January 20, 2024.

The undersigned Hearing Officer (“Hearing Officer”) convened a pre-hearing conference (“PHC”) on November 1 2023, and issued a pre-hearing order (“PHO”) on December 2, 2023, outlining, inter alia, the issues to be adjudicated.

ISSUES: ³

The issues adjudicated:

1. Did DCPS deny Student a free appropriate public education (“FAPE”) by failing to timely conduct an occupational therapy evaluation at the time of Student’s triennial reevaluation in May 2021? ⁴
2. Did DCPS deny Student a FAPE by failing to conduct an appropriate and sufficiently comprehensive assistive technology (“AT”) evaluation?

DUE PROCESS HEARING:

The Due Process Hearing was convened on December 19, 2023, and on January 10, 2024. The hearing was conducted via video teleconference on the Microsoft Teams platform.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in each party’s disclosures (DCPS Petitioner’s Exhibits 1 through 12 and Parent Respondent’s Exhibits 11 through 23) that were admitted into the record and are listed in Appendix 2.⁵ The witnesses testifying on behalf of each party are listed in Appendix B.⁶

³ The Hearing Officer restated the issues at the outset of the hearing, and the parties agreed to the issues adjudicated. At the second day of hearing, January 10, 2024, Petitioner’s counsel withdrew Issue #1.

⁴ Petitioner asserted that she knew of DCPS’ failure to conduct a OT triennial reevaluation as of Student’s 6/22/2022 IEP team meeting following her counsel’s 6/21/2022 receipt of records which lacked a 2021 OT evaluation. Petitioner asserted that she has two years from 6/22/2022 to file a DPC regarding that alleged violation. Petitioner requested that the IHO define the beginning of the statute of limitations period regarding Issue #1 of her 10/12/2023 DPC as beginning to toll on 06/22/2022.

⁵ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁶ Petitioner, Parent, presented three witnesses: (1) an Independent Special Educator, who testified as an expert, (2) Student’s parent (“Petitioner”) and (3) an independent Occupational Therapist who testified an expert. DCPS

FINDINGS OF FACT: ⁷

1. Student resides with Student's parent (“Parent or “Petitioner”) in the District of Columbia, and DCPS is Student's LEA. Student has been found eligible to receive special education services with a disability classification of ASD or autism. Student currently attends School A, a DCPS school.
2. On April 23, 2018, Early Stages conducted an OT reassessment when Student was age _____. The evaluation report was dated May 11, 2018. The reassessment included the following components:
 - Record Review: Developmental Evaluation (CNMC) – 12/23/16 & 4/25/17
 - Initial Occupational Therapy Assessment –10/20/17
 - ASQ – 9/14/17 & 4/07/18
 - Family Interview – 4/23/18
 - Interviews with Parent (Student did not have teachers at the time to interview)
 - Clinical Observations and Clinical Assessment
 - Analysis of Work Samples
 - Standardized/Non-Standardized Testing
 - Peabody Developmental Motor Scales – 2nd Ed (PDMS-2) ⁸(Parent’s Exhibit 1-2)

3. Student’s Fine motor skills were evaluated using the PDMS-2. Student had the follows scores:

Subtests	*Standard Score	Description
Grasping	7	Below Average
Visual-Motor Integration	6	Below Average
Fine Motor Quotient	79	Poor

PDMS-2

presented seven witnesses, some of whom were qualified as experts: (1) Student’s former Occupational Therapist who evaluated Student, and (2) Student’s current Occupational Therapist, (3) Student’s former Special Education Teacher during SY 2021-2022, (4) Student’s former Special Education Teacher during SY 2022-2023, (5) Student’s current Special Education Teacher, (6) DCPS Assistive Technology Manager, and (7) School A Special Education Coordinator. 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.

⁷ The evidence (documentary and/or testimony) that is the source of the Findings of Fact (“FOF”) is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit 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.

⁸ The instrument measures gross and fine motor skills from birth through 5 years of age. Two of the six subtests assess fine motor development, specifically Grasping (the ability to hold an object with finger control) and Visual-Motor Integration (the ability to coordinate the eyes and hands to complete a task). Scores from these subtests yield a Fine Motor Quotient (Composite Score) of overall fine motor skills.

*Subtest Standard Score Average: 8-12

** Fine Motor Quotient Average: 90 - 110

(DCPS Exhibit 1-4)

4. The reassessment contained the following validity statement:
The assessment methods utilized were valid for assessing Student's neuromotor and musculoskeletal status, fine motor skills, and the ability to generally process sensory information. The selected test was also valid based on Student's age, and administered, scored, and interpreted consistent with the test instructions. Student did not show signs of eye strain, discomfort or difficulty seeing during testing, yet Student failed the vision screening while wearing newly prescribed glasses. Since this evaluator did not observe a clear functional impact of the screening results, it appears that the PDMS results are an accurate representation of Student's abilities.

(DCPS Exhibit 1-5)

5. The reassessment noted that Student had the following strengths:
1. Muscle tone, ROM, strength, and postural control are within functional/normal limits
 2. Demonstrates a right-hand preference for crayon use (non-fisted grasp)
 3. Demonstrates functional grasping patterns (modified pincer, tripod) to handle small manipulatives
 4. Effective bimanual skills for basic object stabilization
 5. Developing basic self-help skills with adult support

(DCPS Exhibit 1-5)

6. The reassessment noted the following growth areas for Student: Developing fine motor skills to effectively use classroom materials (containers, scissors, drawing/art supplies, etc.) (DCPS Exhibit 1-5)

7. The reassessment noted the following impact on Student's Learning and Participation: Student presented with mildly delayed fine motor skills affecting Student's ability to coordinate both hands for cutting, opening containers, and guiding a writing instrument. As a result, Student's current level of performance may hinder Student's ability to fully access and participate in learning opportunities in the school environment. (DCPS Exhibit 1-5)

8. The reassessment noted the following recommendations for Student's educational staff:

Introduce short, thick crayons and position Student's hand to hold the crayon between the pads of 2 or 3 fingers keeping the other fingers tucked into his/her palm. Be sure that the space between the thumb and index finger remains open like a square. Encourage tracing, imitating, and copying pre-writing forms during artwork using varied materials (crayon, chalk, finger paint, sand, painting with brushes or craft sticks). Pre-writing forms include straight lines, a circle, cross and a square. Guide Student to place 3-4 fingers in the loops of scissors keeping the fingers bent and close together. Practice endurance and instrument control by cutting across an index card or 5" x 7" piece of construction paper progressing

to cutting on a bold 5” line. It’s best to learn to cut using thick textures before trying thinner paper. (DCPS Exhibit 1-5)

9. On November 3, 2021, School A developed an IEP for Student that the following services: 2.5 hours of specialized instruction in general education and the following related services: 60 minutes per month of behavior support services (“BSS”) inside general education and the following all outside general education: 60 minutes per month of BSS, 180 minutes per month of speech-language pathology (“SLP”) and 120 minutes per month of OT. (DCPS Exhibit 4A)
10. On June 22, 2022, School A convened an annual IEP review meeting. The IEP team amended Student’s IEP to increase Student’s specialized instruction to 7 hours per week in general education and 8 hours per week outside general education. The related services remained the same. (DCPS Exhibit 4B)
11. School A issued a PWN following the June 22, 2022, meeting that noted the changes to Student’s specialized instruction and noted the following regarding OT:

Parent’s attorney also proposed that the student receive an OT reevaluation, but the IEP team asserted that the best time to re-evaluate Student for OT would be the incoming fall, as Student would test best in person and with a familiar person.
(Parent’s Exhibit 4-1)

12. On October 31, 2022, School A convened an IEP review meeting. Student’s parent participated in the meeting along with her attorney and educational advocate. The resulting IEP maintained Student’s specialized instruction and related services at the same level as Student’s previous IEP. (DCPS Exhibit 5)
13. The meeting notes from the October 31, 2022, IEP meeting reflect the following discussion regarding OT:

Student’s occupational therapist (“OT provider”) reviewed OT goals. Reviewed that Student is receiving 120 minutes / month to address visual motor skills for writing name & copying from near and far point. OT provider proceeded to review present levels, while sharing specific examples from sessions. Reverse letters J & Z. Student can copy one letter per visual fixation, Student copies one letter & then looks at the board, then goes back and forth. Presents with a low arousal level during sessions, benefits from more time to complete activities. Benefits from additional wait time. Indications that Student may have challenges with executive functioning. Advocate asked how Student is doing with lines on paper. Special education teacher responded with observations from the classroom and from her sessions, sharing that it is no longer an issue. Advocate asked if the team has writing samples & teacher stepped out of the meeting to retrieve writing samples. Parent’s attorney asked about “frequent” vs. “sometimes” with reversals & clarification on how often that occurs. OT provider shared observations from her sessions, indicating that it happens often. Teacher shared that specific reversals are no longer present (b vs d), but that she does still observe reversals for letter OT provider shared that the letter J is often

backwards. Parent echoed this, sharing that when Student writes Student's name, it is often backwards. Teacher shared that visual word formation area is not fully developed & that this is common to observe prior to the end of _____grade. Teacher shared that there should be a dwindling down of letter reversals & that this has been observed from Student. The team expressed they will continue to work on this. Advocate asked to update Student's baseline to include the letters that are still reversals. OT provider shared that she plans to update goals following evaluation and that goals will be updated based on the results of evaluation.

(DCPS Exhibit 5A-2)

14. On November 16, 2022, School A issued a PWN noting that Student's IEP had been updated and noting the following about OT:

Student will be reevaluated by the School occupational therapist to see if Student is eligible to continue receiving occupational therapy services. The educational attorney also requested that Student receive more specialized instruction hours. The data that the educational attorney presented to request more hours was the beginning of year data collected from September 13, 2022, to September 16, 2022, which was the third week of SY 2022-2023. However, as the school team increased Student's hours from 5 hours per week to 15 hours per week on June 22, 2022, during the end of SY 2022-2023, the team determined that there was not sufficient data to warrant Student receiving more hours.

(DCPS Exhibit 5B-1)

15. DCPS conducted an OT reevaluation on December 9, 2022. The evaluation was conducted by the occupational therapist ("evaluator") who was at School A at the time of the evaluation and providing Student OT services prescribed by Student IEP. The evaluation report notes that Student was referred for comprehensive occupational therapy re-evaluation by the IEP team to determine if Student continues to qualify for OT services and that Student's 2018 Early Stages evaluation did not provide an accurate representation of Student's current skills and/or occupational therapy needs. (Witness 1's testimony, DCPS Exhibit 9)
16. The evaluation included a review of records, teacher interview, clinical observations, analysis of work samples/handwriting and standardized formal assessments including the Sensory Processing Measure, 2nd Edition (SPM-2),⁹ the Behavior Rating Inventory of Executive Function, 2nd Edition (BRIEF-2),¹⁰ and , the Test of Visual-Motor Skills, 3rd

⁹ The SPM-2 is a subjective questionnaire appropriate for students K through age 6 that evaluates the frequency of a child's responses to various sensory experiences. Sensory Processing is the ability to organize and interpret information from the environment to produce an appropriate response and interact within the environment. The SPM-2 measures sensory processing in 7 areas and yields an overall score of a child's sensory processing ability.

¹⁰ The BRIEF-2 is a set of questionnaires for parents, teachers, and now older students (ages 11-18), designed to evaluate executive function from multiple perspectives.

edition (TVMS-3).¹¹ On November 9, 2023, the evaluator conducted an informal review of Student's handwriting administering the Shore Handwriting Screening for Early Handwriting Development on November 9, 2022. The evaluator collected another handwriting sample during Student's occupational therapy session on December 6, 2022. (DCPS Exhibit 9)

17. The evaluation report included a description of Student's behavior during the standardized testing:

Testing Behavior: Student was tested in the occupational and speech therapy room which is a familiar environment. The environment was free of distractions. The table and chair were the appropriate size for Student. Student completed the TVMS-3 and a handwriting screening across one day. Student was polite and participated in all parts of the assessment. Notably, Student was observed to become frustrated due to difficulty recalling the letters of the alphabet during the handwriting screening. Student wrote the uppercase letters but did not write the lowercase letters due to fatigue and frustration. Student then asked to return to class. Overall, Student put forth Student's best effort during testing. It should not go unnoticed that during testing, Student was observed to squint during visual motor tasks as Student did not have access to his/her glasses. Student was tested in the occupational and speech therapy room which is a familiar environment. The environment was free of distractions. The table and chair were the appropriate size for Student. Student completed the TVMS-3 and a handwriting screening across one day. Student was polite and participated in all parts of the assessment. Notably, Student was observed to become frustrated due to difficulty recalling the letters of the alphabet during the handwriting screening. Student wrote the uppercase letters but did not write the lowercase letters due to fatigue and frustration. Student then asked to return to class. Overall, Student put forth Student's best effort during testing. It should not go unnoticed that during testing, Student was observed to squint during visual motor tasks as Student did not have access to his/her glasses. (DCPS Exhibit 9)

18. The evaluation report included the following validity statement:

The evaluation procedures performed included standardized assessment tools, observations, interviews, and a review of Student's records. All testing was performed in English, Student's native language. Testing was administered by a licensed occupational therapist. Notably, Student is prescribed glasses for astigmatism. However, Student did not have access to glasses during the evaluation process. This may have implications on Student's performance with handwriting and the Test of Visual Motor Skills, 3rd Edition. However, the results of the Sensory Processing Measure, 2nd edition and Behavior Rating

¹¹ The TVMS-3 is an accurate assessment of visual-motor skills that may be administered to individuals or small groups. These skills (eye-hand coordination and, specifically, copying) are utilized in common academic and everyday activities. The TVMS-3 is untimed and requires the examinee to copy 2 practice designs and 39 target designs that remain in sight; it is not a memory-based copying task. The designs are presented in developmental order of increasing difficulty and complexity.

Inventory of Executive Function, 2nd Edition are felt to be a true representation of Student's skills and/or classroom performance. (DCPS Exhibit 9)

19. The evaluation included clinical observations of Student and analysis of the following areas: Student's neuromotor/muscular skills, postural control, muscle strength, range of motion, motor planning, fine motor skills, bilateral coordination skills, ocular motor skills, visual motor integration (VMI) skills, visual perceptual skills, handwriting, sensory process, and activity of daily living. (DCPS Exhibit 9)
20. The evaluation report also included a statement about equipment and assistive technology considerations. The statement notes that Student has access to an iPad and headphones in the classroom to complete lessons and that Student may benefit from the use of assistive technology to support Student's delays in reading and writing. (DCPS Exhibit 9)
21. The evaluation report has a summary of the evaluator's findings, a statement regarding the impacts on Student's learning and participation, and lastly a list of recommendations for Student's educators and for Student's home. The evaluation report notes that it will be reviewed by the MDT to determine Student's need for OT as a related service within the educational curriculum. (DCPS Exhibit 9)
22. On April 27, 2023, School A convened a meeting to review the OT reevaluation and update Student's IEP. Student's mother, attorney, and educational advocate participated in the meeting. (DCPS Exhibit 6)
23. Student's April 27, 2023, IEP states the following under the heading "Consideration of Special Factors:

"Communication: Consideration: [Student presents with varied speech and language needs. [Student's] speech clarity is reduced and [Student's] receptive and expressive language development is delayed. [Student] speaks English exclusively. [Student] will benefit from frequent opportunities for structured and unstructured communication with teachers and peers."

Assistive Technology: Consideration: Assistive technology is available to the student as needed to support their access to the curriculum. This may include no-tech (pencil grip, adaptive paper, overlays, adaptive scissors), low tech (timers, calculators), and high tech (e-readers, text to speech, word processors). Computers, tablets and smart boards are readily available for access." (DCPS Exhibit 6-3)

24. Student's April 27, 2023, IEP cites in several places Student's use of assistive technology. The "Motor Skills and Physical Development" section cites Student's December 2022 OT reevaluation and includes the recommendation that "Student may continue to benefit from access to assistive technology to support completion of written work, such as word prediction software, speech-to text, Google Read and Write, Natural Reader, or SnapType." The same recommendation language is cited

in the “Classroom Aids and Services” section of the IEP. The “Classroom Accommodations” and “Statewide or Alternative Assessment Accommodations” sections of the IEP states that Student may use, among other things, “Speech-to-Text or External Assistive Technology for Constructed Responses on ELA/Literacy Assessments.” (DCPS Exhibit 6-19, 6-21, 6-23)

25. An IEP team should consider a student's need for assistive technology at each IEP meeting to determine the supports a student should be provided. There is no standard protocol in the field of assistive technology to determine a student’s assistive technology needs. DCPS’s process is for an IEP team to consider a student’s areas of concern and find the supports that are appropriate to address those needs. The team should analyze the data and determine if the supports are effective. The IEP team should then consider the specific assistive technology that would benefit a student and conduct trials of specific devices and/or software and report the result of those trials to the IEP team for the team to incorporate the results in the IEP goals or other areas of a student’s IEP as appropriate. (Witness 8’s testimony)
26. Assistive technology generally includes the following categories: (1) "No-tech" which refers to the use of strategies and examples of these in Student's IEP include the use of such items as a pencil grip, adaptive paper, and adaptive scissors; (2) "Low-tech" supports which includes devices such as (timers, calculators) and (3) "High-tech" supports such as e-readers, text to speech, word processors) and (4) general technology supports, including computers, tablets, and smart boards. It appears that the Student's IEP team considered the no-tech and "low-tech" supports listed in Student's IEP and found that they were effective, and that the Student was making progress and accessing the curriculum. (Witness 8's testimony)
27. High-tech devices, such as word prediction, are already listed in Student's IEP. Therefore, the next step in the assistive technology assessment process is for Student's IEP team to trial Student's use of those devices to determine their effectiveness in addressing Student's needs and see if Student's performance improves by collecting data and documenting the results of the trials. Then Student's IEP team should go back through the revision of Student's IEP and incorporate the results of those trials. (Witness 8'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 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). In this case, Petitioner held burden of persuasion on the issue adjudicated.

ISSUE 1: Did DCPS deny Student a free appropriate public education (“FAPE”) by failing to timely conduct an occupational therapy evaluation at the time of Student’s triennial reevaluation in May 2021?

Conclusion: At the outset of the second day of the hearing, Petitioner withdrew this issue. Because Petitioner held the burden of persuasion on this issue and there was no evidence presented by Petitioner, and Petitioner sought to withdraw the issue after the hearing had begun, the IHO allowed the withdrawal, but with prejudice.

ISSUE 2: Did DCPS deny Student a FAPE by failing to conduct an appropriate and sufficiently comprehensive assistive technology (“AT”) evaluation?

Conclusion: Petitioner sustained the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to conduct an appropriate comprehensive assistive technology evaluation.

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."

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 § 3006.7(a).

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 5A § 3006.7(f).

Petitioner asserts that DCPS has denied Student a FAPE because DCPS has not conducted an evaluation of Student in area of assistive technology. The evidence demonstrates that Student's most recent OT evaluation recommended Student's use of assistive technology, and those recommendations were incorporated into Student's IEP and are listed in multiple places in Student's IEP.

Petitioner credibly testified that in her work with Student, Student's writing is laborious, and Student quickly shuts down when required to produce any work in writing. Petitioner presented two expert witnesses who testified that Student warranted an assistive technology assessment based upon Student's deficits in writing. They testified that although Student's OT evaluation recommended the use of specific technologies, and Student's IEP states Student would benefit from assistive technology and even lists assistive technology devices that Student should use, there has been no assessment of Student on the use of these devices and Student has not been provided the devices or any training on their use.

On the other hand, DCPS asserts that Student has access to assistive technology, including devices listed in the Student's IEP, as does all other students. DCPS presented several witnesses who participated in the development of Student's IEPs, some who taught Student, and two who provided Student OT services, including one who evaluated Student and made the recommendations for assistive technology contained in Student's IEP. Each of these witnesses credibly testified that Student has made and continues to make progress. In the area of writing, they testified that although Student's writing was not legible at first, it is now legible and that otherwise, considering Student's disability, Student is making the progress that can generally be expected. They testified that Student is accessing the curriculum and uses the general technology in the classroom alongside Student's peers.

The most salient testimony came from DCPS's expert witness in assistive technology. Although this witness, unlike the other DCPS witnesses, had not worked directly with or evaluated Student, she had conferred with some of Student's special education team members. She testified as to the categories of assistive technology, including "no-tech," "low-tech," and "high-tech." She credibly testified that no formal evaluation or standard protocol exists to determine a student's assistive technology needs. She also testified about the process used in DCPS to determine a student's assistive technology needs. She testified that the IEP team should consider a student's areas of concern and find the supports that are appropriate to address those needs and should then consider the specific assistive technology that would benefit a student and conduct trials of specific devices and/or software and report the result of those trials to the IEP team for the team to incorporate the results in the IEP goals or other areas of a student's IEP.

This witness noted that Student's IEP includes assistive technology devices, which in her opinion, indicates that Student's IEP team considered the types of assistive technology that would be appropriate for Student to have access to and use and there are "no-tech" and "low-tech" items connected to Student's IEP goals.

Although she noted that there are "high-tech" devices already listed in Student's IEP, she testified that the next step in assessing Student's assistive technology needs that has not yet occurred is for the IEP team to conduct trials of Student's use of specific assistive technology.

This witness testimony at this point was contradictory. On the one hand, she testified that Student's IEP team had already considered all the categories of assistive technology for Student, yet regarding the "high tech" devices that had been recommended in Student's December 2022 evaluation and already incorporated into Student's IEP, the team had not taken the required next step to trial Student's use of any of the devices.

This witness attempted to justify the failure of the team to take that next step due to Student's current grade level. She testified that with the increasing demands as Student moves into the next grade, the high-tech devices, such as word prediction, are already listed in the Student's IEP. Therefore, the next step in the assistive technology assessment process is for Student's IEP team to trial Student's use of those devices to determine their effectiveness in addressing Student's needs and see if the Student's performance improves by collecting data and documenting the results of the trials and incorporating the data in revising Student's IEP.

However, none of DCPS's other witnesses who taught the Student, provided Student OT services and participated in Student's IEP development mentioned the need for a trial of devices or any intention to take the next step in accessing the Student's assistive technology needs. On the contrary, they all testified that Student had not additional assistive technology needs. As a result, the IHO discredits this expert's testimony regarding when the Student's IEP team should have conducted trials with the listed assistive technology devices already in the Student's IEP. The IHO infers, based upon the evidence presented, that absent Petitioner filing this due process complaint, DCPS would have never taken the next step that its expert witness testified is now warranted.

Although there was no testimony that supported a finding that Student had been significantly harmed by DCPS's failure to take this next step in assessing Student's assistive technology needs, it is clear based on Petitioner's testimony of Student's continued writing difficulties and her continued and expressed concern to School A about these difficulties, that School A's failure to conduct trials of the "high-tech" devices recommended and already listed in Student's IEP significantly impeded Petitioner's opportunity to participate in the decision-making process regarding provision of FAPE to Student. Petitioner sustained the burden of persuasion by a preponderance of the evidence on this issue.

ORDER:

1. DCPS shall, within ten (10) business days of the issuance of this order, provide Petitioner authorization to conduct an independent educational evaluation to assist in determining the appropriate assistive technology for Student at a rate not to exceed the current OSSE prescribed rate for an occupational therapy evaluation.
2. DCPS shall, within 30 (thirty) calendar days of its receipt of the evaluation report for IEE authorized in the above directive, convene a multidisciplinary team meeting to review the results of the IEE and consider its results and recommendation(s) and conduct any appropriate and recommended trials of devices and/or software and determine the appropriate assistive technology devices and/or software that Student

will be provided, include in Student's IEP the appropriate notation(s) of the assistive technology selected, and provide that assistive technology to Student for Student's use and any necessary training.

3. The following issue alleged in Petitioner's DPC, listed as Issue #1 in the pre-hearing order, is dismissed with prejudice: "Did DCPS deny Student a free appropriate public education ("FAPE") by failing to timely conduct an occupational therapy evaluation at the time of Student's triennial reevaluation in May 2021?"

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

Coles B. Ruff, Esq.
Impartial Hearing Officer
Date: January 20, 2024

Copies to: Counsel for Petitioner
 Counsel for LEA
 ODR hearing.office@dc.gov }