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OSSE
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July 07, 2020

Confidential

Parent on Behalf of Student, ¹ Petitioner, vs. District of Columbia Public Schools “DCPS”) Local Educational Agency (“LEA”), Respondent. Case # 2020-0087 Date Issued: July 7, 2020	HEARING OFFICER’S DETERMINATION Hearing Dates: June 12, 2020 June 15, 2020 June 25, 2020 Counsel for Each Party listed in Appendix A <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
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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 E30.

BACKGROUND AND PROCEDURAL HISTORY:

The Student who is the subject of this due process hearing (“Student”) resides with Student's parent (“Petitioner”) in the District of Columbia, and the District of Columbia Public Schools (“DCPS”) is Student's local education agency (“LEA”). Student has been identified as a child with a disability pursuant to IDEA, with a disability classification of intellectual disability (“ID”). Student is a currently age ____ and in grade ____.² Student was enrolled in a DCPS school (“School A”) during school year (“SY”) 2018-2019 and SY 2019-2020.

On June 26, 2019, Petitioner filed a due process complaint against DCPS alleging, inter alia, that DCPS failed to comprehensively evaluate Student. On July 25, 2019, DCPS filed a due process complaint against Petitioner seeking a determination that the May 2019 psychological evaluation and occupational therapy (“OT”) evaluation that DCPS conducted of Student were appropriate. The assigned Independent Hearing Officer (“IHO”) consolidated the cases and issued a Hearing Officer's Determination (“HOD”) on October 4, 2019.

The IHO concluded, among other things, that DCPS’s OT evaluation lacked an assessment of Student’s sensory processing. The IHO granted Petitioner public funding of an independent educational evaluation (“IEE”) to assess Student’s sensory processing functioning. Although the IHO did not find that DCPS had denied Student a free appropriate public education (“FAPE”) by not updating Student’s October 17, 2017, functional behavior assessment (“FBA”), he, nonetheless, directed DCPS to conduct an FBA reassessment and update Student’s behavior intervention plan (“BIP”), which DCPS did at the end of October 2019.

On January 14, 2020, School A convened a multidisciplinary team (“MDT”) meeting to review the IEE. At that meeting, Petitioner requested that DCPS conduct evaluations that were allegedly recommended by the IEE: a “Developmental Optometrist” evaluation, an assistive technology (“AT”) assessment, and a physical therapy (“PT”) evaluation. DCPS allegedly agreed to conduct the AT assessment, but denied the request for the other two evaluations.

On April 13, 2020, Petitioner filed this current due process complaint asserting that DCPS denied Student a FAPE by: (1) failing to conduct a “Developmental Optometrist” evaluation, the AT assessment, and the PT evaluation; (2) failing to develop an appropriate individualized education program (“IEP”) for Student as of the January 14, 2020, MDT because it did not include consideration of data from the IEE and the requested evaluations; 3) failing to appropriately update Student’s FBA and BIP, and (4) failing to provide Petitioner all Student’s requested educational records.

² The Student's current age and grade are indicated in Appendix B.

Relief Sought:

Petitioner seeks as relief the following:

- DCPS conduct or fund the following evaluations or assessments: (a) assessment of Student's ocular motor functioning and/or visual convergence insufficiency, (b) an FBA and develop a corresponding BIP, (c) PT, and (d) AT.
- DCPS convene an IEP meeting and update Student's IEP appropriately and in accordance with the evaluations mentioned above and add/include: appropriate sensory strategies, appropriate behavioral support services, appropriate classroom aids and services, an increase in occupational therapy services to 240 minutes per month, and adaptive supports.
- DCPS fund Student's placement in an alternate school if the evaluations and/or data indicate that an alternate placement is warranted.
- DCPS provide Student reasonable compensatory education in the form of tutoring, occupational therapy, oculomotor therapy, behavioral support services, and/or physical therapy.

LEA Response to the Complaint:

The LEA filed a response to Petitioner's complaint on April 27, 2020. The LEA denies that there has been any failure to provide Student with a FAPE, and stated, inter alia, in its response, the following:

The October 14, 2019, HOD dealt with the issue of Student's evaluations up to the date of the HOD. Student has a history of cognitive, academic, and adaptive challenges. In April of 2018, Petitioner removed Student and relocated to Pennsylvania without informing DCPS. Student did not re-enter DCPS until August 2018 but did not begin attending School A until late October 2018. Despite the burden of moving from DCPS to Pennsylvania on Student's education, DCPS has tracked, developed, and addressed Student's educational needs from 2016 through 2019. In addition, DCPS has welcomed Petitioner to participate and considered his concerns regarding Student's participation in DCPS.

Each IEP that DCPS has developed for Student has been reasonably calculated to address Student's unique needs. The Student's least restrictive environment (LRE) was assessed, and the IEP team consistently acknowledged Student requires services to be performed substantially outside of the general education classroom.

Student's most recent IEP was developed on September 5, 2019. The IEP team determined Student would be serviced outside of the general education classroom 73% of the time, and would benefit from classroom aids and services such as small group instruction and modified common core curriculum. These accommodations were implemented in consideration of Student's most recent holistic performance and behavioral habits.

The September 5, 2019, IEP provided for Student to receive 26.5 hours per week of specialized instruction outside of general education, 240 minutes per month of speech-language pathology, 120 minutes per month of behavioral support services, 120 minutes per month of occupational therapy and an additional 60 minutes per month of occupational therapy and behavioral support consultation services. Extended school year (“ESY”) services and special education transportation were also added to the IEP.

Resolution Meeting and Pre-Hearing Conference and Order:

The parties held a resolution meeting and did not mutually agree to proceed directly to a hearing. The 45-day period began on May 13, 2020, and ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on June 27, 2020.

The parties added a third hearing date, June 25, 2020, and DCPS filed an unopposed motion to continue the hearing and extend the HOD due date. The undersigned Hearing Officer (“Hearing Officer”) granted the motion extending the HOD due date to July 7, 2020.

The Hearing Officer convened a pre-hearing conference (“PHC”) on May 5, 2020. The Hearing Officer issued a pre-hearing order (“PHO”) on May 14, 2020, outlining, inter alia, the issues to be adjudicated.

ISSUES ADJUDICATED:

The Hearing Officer determined, and the parties agreed at the start of the hearing, that the following are the only issues to be adjudicated:

1. Whether DCPS denied Student a FAPE by failing to conduct the following evaluations following Petitioner’s January 14, 2020, request, specifically and only: (a) an assessment of Student’s ocular motor functioning by a Developmental Optometrist, and/or (b) an AT assessment, and/or (c) a PT evaluation.³
2. Whether DCPS denied Student a FAPE by failing to conduct a comprehensive FBA and/or an updated FBA, after the January 14, 2020, IEP meeting, so that an appropriate BIP could be created.⁴

³ Petitioner alleged: Student’s language, communication, cognitive, and academic deficits have warranted an AT evaluation, recommended by previous evaluators, to ascertain Student’s ability to use AT devices to supplement learning. School A agreed to request an AT evaluation; however, to date, one has not been conducted or provided Student. Additionally, as part of Petitioner’s evaluation requests during the January 14, 2020, meeting, Petitioner requested that Student receive a PT evaluation due to the lack of coordination, strength, and other physical skills and deficits noted by the OT evaluator. However, the school denied the request because, as stated, Student can walk up stairs.

⁴ Petitioner alleged: Neither Student’s FBA nor BIP addresses all of the problematic behaviors that Student presents and does not take into consideration parent’s concerns and recommendations in Student’s OT evaluation to add sensory processing measures or Student’s behaviors that resulted in the HOD’s directive for a new FBA. Despite this, Student’s BIP was never updated. At the January 14, 2020, meeting Student’s teacher shared Student’s other

3. Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP, on January 14, 2020, that is tailored to meet Student's needs because the IEP (a) did not include recommendations from the recent OT evaluation, and/or (b) was not based on evaluations that assess Student in all areas of suspected disability, specifically and only: a PT evaluation and an AT assessment.⁵
4. Whether DCPS denied Student a FAPE by failing to provide Petitioner access to Student's educational records: specifically and only: behavioral trackers, incident reports, progress reports, academic data, and standardized assessments.

DUE PROCESS HEARING:

The Due Process Hearing was convened on June 12, 2020, and June 15, 2020, and June 25, 2020. Due to the COVID-19 emergency, the hearing was conducted via video-teleconference. The parties submitted written closing arguments following the hearing. For expediency, during the hearing, the parties simultaneously presented their respective cases in this for Petitioner's due process complaint and in the case brought by DCPS (2020-0092). However, the cases are decided in separate HODs.

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 47 and Respondent's Exhibits 1 through 38) that were admitted into the record and are listed in Appendix 2.⁶ The witnesses testifying on behalf of each party are listed in Appendix B.⁷

problematic behaviors. Petitioner then requested that Student's FBA and BIP be updated to reflect and address the problematic behaviors. While the school agreed to update the FBA and BIP, they have yet to do so.

⁵ Petitioner alleged: Student's IEP also does not provide the appropriate classroom aids and services, behavioral service supports, appropriate functional goals as recommended in the OT evaluation, or any adaptive supports despite evaluations showing that Student functions in the extremely low to low range of adaptive functioning. Additionally, Student's OT evaluation also noted the need for adaptive services to be added to Student's IEP.

⁶ Any item disclosed and not admitted, or admitted for limited purposes, was noted on the record and is noted in Appendix A.

⁷ Petitioner presented four witnesses: Petitioner and three others who testified as experts: (1) the Independent Occupational Therapist who evaluated Student, (2) Petitioner's Educational Advocate who is employed by the law firm representing Petitioner, (3) a Psychologist who is employed by the law firm representing Petitioner, all of whom testified as expert witnesses, and (4) Petitioner. Respondent presented five witnesses: (1) a DCPS Psychologist, (2) a DCPS Occupational Therapist, (3) a School A's Social Worker, (4) Student's Special Education Teacher, and (5) School A's Director of Specialized Instruction, all of whom testified as expert witnesses. 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.

SUMMARY OF DECISION:

Petitioner held the burden of production on all issues. Petitioner had the burden of persuasion on issues #1, #2, and #4. Petitioner sustained the burden of persuasion by a preponderance of the evidence on issue #1 as to the AT assessment and evaluation of Student's ocular motor functioning, but not as to the PT evaluation. Petitioner made a prima facie case on issue #3 before the burden of persuasion fell to Respondent on that issue. Respondent sustained the burden of persuasion on issue #3. Petitioner did not sustain the burden of persuasion on issues #2 and #4. The Hearing Officer directed DCPS to conduct evaluations in a time certain and to update Student's IEP appropriately. In addition, the Hearing Officer granted Petitioner compensatory education for the failure to conduct the evaluations but did not specifically grant Petitioner's request to reserve any compensatory education.

FINDINGS OF FACT:⁸

1. Student resides with Student's parent, Petitioner, in the District of Columbia, and DCPS is Student's LEA. Student has been identified as a child with a disability pursuant to IDEA, with a disability classification of ID. (Respondent's Exhibit 32-1)
2. DCPS developed Student's initial IEP on March 23, 2017, and DCPS completed an annual review of the IEP on March 16, 2018. Petitioner then moved to Pennsylvania and enrolled Student in a Pennsylvania school. Student obtained a Pennsylvania IEP on May 24, 2018. Petitioner thereafter, returned to the District of Columbia and enrolled Student with DCPS for SY 2018-2019. Student began attending School A after the first few days at the start of SY 2018-2019. School A amended Student's IEP on October 4, 2018, and convened an annual IEP review meeting on March 14, 2019, and updated Student's IEP. (Petitioner's Exhibit 32-9, 32-10, 32-11, 32-12, 32-13, Respondent's Exhibit 5)
3. On May 14, 2019, a DCPS psychologist conducted a triennial psychological reevaluation of Student with an evaluation report dated May 17, 2019. A DCPS occupational therapist conducted an OT evaluation of Student with a report dated May 13, 2019. (Petitioner's Exhibit 32-14, 32-15, 32-16, Respondent's Exhibits 3, 4)
4. The primary focus of the evaluation conducted by the DCPS psychologist in Student's May 2019 psychological evaluation, was Student's academic and behavioral concerns and that Student was not making adequate progress. Student performed significantly below same-aged peers in reading and math. Student's ID disability classification was not in question; thus, the psychologist conducted updated academic testing and social/emotional information, conducted a classroom observation. During her evaluation, she observed that Student was easily frustrated and overwhelmed by the demands to transition to non-

⁸ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. A document is noted by the exhibit number. A second number following the exhibit number is the page number in that 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.

preferred tasks and became angry, fall on the floor, kick or hit and destroy belongings. She did not consider Student's behavior unusual for a student with ID classification. (Witness 4's testimony)

5. On June 26, 2019, Petitioner filed a due process complaint against DCPS alleging, inter alia, that DCPS failed to comprehensively evaluate Student and failed to develop an appropriate IEP. On July 25, 2019, DCPS filed a due process complaint against Petitioner seeking a determination that its May 2019 psychological and OT evaluations were appropriate. The IHO consolidated the cases and issued an HOD issued on October 4, 2019. (Petitioner's Exhibit 32-1, 32-2)
6. On August 29, 2019, the DCPS psychologist supplemented her May 17, 2019, evaluation report with data from a psychological evaluation conducted of Student by the Pennsylvania school district. (Respondent's Exhibit 21)
7. On September 5, 2019, Student's IEP team met at School A to review and revise Student's IEP following receipt of Student's education records from Pennsylvania, including the August 23, 2018, evaluation report. The school psychologist reviewed the evaluation report with the team. The IEP team then revised Student's IEP, including Student's present levels of performance (PLOPs) and annual goals. The September 5, 2019, revised IEP provided for Student to receive 26.5 hours per week of specialized instruction outside of general education, 240 minutes per month of speech-language pathology, 120 minutes per month of behavioral support services, 120 minutes per month of OT and an additional 60 minutes per month of OT and behavioral support consultation services. Extended school year ("ESY") services and special education transportation were also added to the IEP. (Petitioner's Exhibit 32-32, Respondent's Exhibits 24, 25)
8. In the October 4, 2019, HOD, the IHO granted Petitioner public funding of an IEE to assess Student's sensory processing, because Student's IEP contained a sensory processing goal, yet DCPS's OT evaluation had not assessed Student's sensory processing. Although the IHO did not find that DCPS had denied Student a FAPE by not updating Student's October 17, 2017, FBA, the IHO, nonetheless, directed DCPS to conduct an FBA reassessment and update Student's BIP. The IHO also directed DCPS to update Student's September 5, 2019, IEP to include some of the data from the Pennsylvania evaluation that had been omitted from the IEP. (Petitioner's Exhibit 32-22, 32-23, 32-24, 32-26, 32-27, 32-34, 32-40, 32-41)
9. On October 17, 2019, DCPS conducted an FBA in which the School A social worker interviewed the teacher aide in Student's classroom. The aide described Student's problematic behavior of becoming defiant and oppositional when engaged in an activity that Student does not like or when an activity Student enjoys is disrupted. Student problematic behavior was described as occurring with minimal frequency, and Student had had one tantrum in the classroom by the time of the interview. The FBA identified the purpose of Student's behavior, the antecedents, and consequences, and the interventions to address the behavior. (Respondent's Exhibit 26-A)

10. There are at least two levels of FBAs that are generally conducted by social workers in DCPS. An FBA-1 is primarily guided by a student's teacher, regarding classroom concerns. In conducting an FBA-2, the social worker would gather information from the parent and others and conduct a classroom observation. In October 2019, the School A social worker conducted an FBA-1. Student's classroom teacher had left School A in fall 2019, a new teacher arrived. So the information in the FBA-1 was from the teacher's assistant, who was aware of Student's behaviors from the previous school year. Student had had only one behavioral incident before the social worker conducted the FBA-1. Student had made improvements in several areas since then, including improvement in tantrum behaviors and using self-soothing techniques. (Witness 5's testimony)
11. On October 27, 2019, School A completed and updated Level 1 BIP that addressed Student's behavior of displaying tantrums. The BIP included three replacement behavior for Student and the strategies to be used by Student's teacher to spur Student to display the replacement behavior when Student's engaged in problematic behaviors. Student's behavior data was to be reviewed in 60 days. (Respondent's Exhibit 26-C)
12. At School A, Student is in a self-contained classroom with 7 students, a special education teacher, and a teacher's aide. Student is provided personalized instruction with all subjects broken down and taught at a slower pace. Student's classroom teacher acknowledges that Student's cognitive ability is relatively low, and Student grasps concepts but has difficulty with retention. Student is currently operating four or more grade levels below Student's actual grade. Student's classroom teacher uses a mixture of both actual grade-level content with material that is on Student's current academic level. (Witness 7's testimony)
13. When Student's new classroom teacher arrived in fall 2019, Student began to display increased behavior difficulties. The teacher believes Student was filling the teacher out when he first arrived. There were times when Student would be frustrated, trying to keep up with the instruction in the classroom. When that happened, the classroom teacher worked with Student independently to review the instructional material. There were times when Student would be overwhelmed and would tantrum. Student would throw pencils, kick the locker and door to the classroom, and refuse to do work. There were a few times Student absconded from the class, but after 5 to 10 minutes Student would settle down and return to the classroom. Student sometimes had conflicts with peers, but that was more when Student was having a tantrum, asking the other Student's "what are you looking at." Student was particularly frustrated when required to write and when presented with many words at one time. Student was frustrated when doing writing assignments alone, but with help, Student was far less frustrated. Student also had difficulty copying from the board at times. Student's classroom teacher used the strategies in Student's BIP-1 to address Student's behavior issues, and those strategies were effective. (Witness 7's testimony)
14. DCPS convened a multidisciplinary team ("MDT") meeting on October 29, 2019, to review the FBA and comply with the October 4, 2019, HOD directives. However,

Petitioner and his representatives did not show for the meeting. (Witness 8's testimony, Respondent's Exhibits 26-A, 26-B)

15. As a result of the IEE authorized by the October 4, 2019, HOD, Petitioner had an independent evaluator conduct an OT evaluation. She evaluated Student at School A on November 18 and 26, 2019, for 3 hours over the two days. She finalized the evaluation at the beginning of December 2019. The evaluator did not observe Student in the classroom or directly consult with Student's teachers or service providers. The evaluator assessed Student's current sensory, motor, visual-motor integration, and visual perception functioning to determine Student's need for occupational therapy intervention. The evaluator conducted observations of Student's sensory processing, consulted with Student's parent, interviewed Student, reviewed records, and conducted the following assessments: Bruininks-Oseretsky Test of Motor Proficiency 2nd Edition ("BOT2"), Developmental Test of Visual Perception 3rd Edition ("DTVP-3"), WOLD Sentence Copying Test, Sensory Profile 2 School Companion, Sensory Processing 3 Dimensions Assessment ("SP3D"). (Witness 1's testimony, Petitioner's Exhibit 1-1, 1-3)
16. The evaluator concluded that Student has below-average fine manual control and manual coordination and Student's visual-motor integration below age expectations. Student can perform written copying tasks, but struggles with sequencing, finding the proper place when copying, and with legibility. Student's overall writing mechanics (alignment, spacing, sizing, speed, ease) are below expectations and contribute to illegibility. She suggested that Student be explicitly taught keyboarding and that Student was a candidate for an assistive technology evaluation to determine if a laptop or desktop computer, word processing programs, or another writing/reading software or hardware are required for Student to access the general education curriculum successfully. (Witness 1's testimony, Petitioner's Exhibit 1-9, 1-13)
17. The evaluator determined that Student has average skills in some areas of visual perception and deficits in others, but overall, Student's visual perception skills are in the below-average range. The evaluator noted that Student struggled with multi-step directions, sequencing information, and developing ideas, which she termed "executive function" skills. She concluded that Student's balance is adequate for the school environment. She also noted that Student can become quickly excitable in multi-sensory stimulating activities or environments, which can cause over-arousal and difficulty with self-regulation. She stated that this will require coaching and teaching of self-regulation awareness, language, and techniques. Student's over-responsivity to sensory input can require consistent movement breaks, and breaks from over-stimulating environments and activities. The evaluator noted that Student may not always be able to "feel" ■■■ body within ■■■ environment, so will benefit from adaptive equipment such as seat cushions, fidgets, and multi-sensory learning strategies. She recommended as a result of her findings that Student receive school-based occupational therapy of 60 minutes per week as part of an IEP. (Witness 1's testimony, Petitioner's Exhibit 1-14, 1-15)
18. The evaluator gave a plethora of recommendations, including that Student's BIP, in consultation with an occupational therapist, be updated to include sensory strategies to

support self-regulation and behavior management. She recommended that the Classroom Aides and Services section of Student's IEP include a quiet place for Student to transition, alternative locations for lunch and physical education, teachers being trained on pre-emptive behaviors, a spacer for copying tasks, a visual blocker, and all multi-step directions given to Student clearly and slowly. She also recommended that the team consider adding functional goals related to keyboarding through a deliberate measurable program to develop skills supplementing written communication/assignments and support long term use of assistive technology, explore ideas for visual perception treatment activities. (Witness 1's testimony, Petitioner's Exhibit 1-14)

19. In a section the evaluator termed "Follow up" in her evaluation report, the evaluator stated the following: "a. [Student] should be seen by a Developmental Optometrist (not an Ophthalmologist or regular Optometrist) to ascertain convergence insufficiency. b. [Student] may benefit from an Assistive Technology Evaluation to determine if various hardware and/or software would improve reading and written communication. c. Enroll [Student] in children's martial arts, yoga, or other community-based class or sports to help [Student] with improving strength endurance, balance, self-regulation, and perhaps some areas of executive functioning." The evaluator stated that she regularly refers children for an evaluation by a developmental optometrist who charges \$400 for the evaluation. (Witness 1's testimony, Petitioner's Exhibit 1-17)
20. Student's new classroom teacher made efforts to build rapport with Student before the winter break. Student's behavior improved when Student returned from winter break. Student began to respond to requests for non-preferred tasks without tantrums. (Witness 7's testimony)
21. On January 14, 2020, School A convened an MDT meeting to review the IEE. Petitioner and his attorney and educational advocate participated in the meeting. The DCPS occupational therapist reviewed the IEE during the meeting. Petitioner, through his representatives, asked that School A to conduct an AT evaluation and a PT evaluation. School A agreed to make a referral for an AT evaluation, but declined the request as to the PT evaluation. School A refused to conduct such an evaluation, stating that Student's ability to walk upstairs excluded such an evaluation. (Witness 2's testimony, Petitioner's Exhibit 8)
22. During the January 14, 2020, meeting Petitioner's representatives also requested that DCPS conduct a "Developmental Optometrist" evaluation. DCPS denied the request, concluding that the requested evaluation was a medical evaluation and a request for another IEE. DCPS stated that it would file a due process complaint to defend the inappropriateness of the request, and on February 3, 2020, issued a prior written notice ("PWN") to that effect. DCPS does not have an optometrist on staff. (Witness 8's testimony, Petitioner's Exhibit 7, Respondent's Exhibit 35)
23. The DCPS therapist disagreed with some of the recommendations the IEE, including the need for assessment of Student ocular motor functioning. The DCPS therapist had observed that Student can track, and she noticed no ocular motor deficits, which she

claimed would result in Student displaying clumsiness and experiencing dizziness, which had not been noted. The OT therapist noted that Student had passed both a hearing and vision screening, which means that Student can see objects from a distance. If any student does not pass a vision screening, then DCPS will not proceed with an OT evaluation until the Student's vision deficits are addressed. (Witness 6's testimony)

24. Student can navigate the school building environment and its four flights of stairs to get to Student's classroom, and Student participates without problems in recess and physical education ("PE"). The DCPS occupational therapy, based on her observation of Student in activities at School A, believes Student has no physical deficits that indicate that Student needs at PT or an AT evaluation. She asserts that Student had been adequately assessed in the area of OT. The DCPS criteria before referring a student for an AT evaluation are generally cognitive limitations, physical limitations, and communication delays. School A issued Student a tablet for distance learning. (Witness 6's testimony)
25. During the January 14, 2020, meeting Petitioner's advocate also asked that Student's OT services be increased to 240 minutes per month. The DCPS occupational therapist also disagreed with the IEE evaluator's recommended level of OT services. She considered the current level of services to be sufficient to address Student's needs, and that many of the recommendations in the IEE could be implemented in the classroom without adding them to Student's IEP. School A did not agree to the requested increase in OT services. (Witness 6's testimony)
26. Student's classroom also teacher participated in the meeting the January 14, 2020, meeting at which he discussed Student's behavior when the teacher first arrived. Petitioner considered the described behaviors as new and disturbing, including breaking pencils, kicking desks, and walking out of class for 15 to 20 minutes, two to three times per week. Petitioner's advocate requested that the behaviors be added to Student's FBA/BIP and that Student's sensory needs also be added to the BIP. School A did not agree to review the FBA. Student's classroom teacher did not believe that Student's FBA or BIP needed updating. (Witness 2's testimony, Witness 7's testimony, Petitioner's Exhibit 8)
27. During the January 14, 2020, meeting Petitioner's advocate also asked for educational records, specifically service trackers, progress reports, and report cards. School A stated that when it scheduled an IEP meeting would send Petitioner a draft IEP. (Petitioner's Exhibit 8)
28. On February 7, 2020, DCPS filed a due process complaint against Petitioner. That complaint was dismissed without prejudice on March 24, 2020, and with a finding that event though there was no evidence that Respondent ever received and responded to the due process complaint, DCPS acted without delay to defend its evaluation of Student. (Case # 2020-0035)
29. On February 26, 2020, DCPS conducted a 60-day review of Student's behavior updated Student's BIP to include more recent data of Student's behavior since the October 2019,

BIP was developed. The BIP noted that Student was benefitting from some of the strategies being used to address behaviors by the teacher providing redirection. The IEP noted Student was able to avoid engaging in negative behaviors 3 out of 5 times and was able to use self-coping strategies. Student's most recent BIP includes the teacher's comments that he provided to the School A social worker in January 2020. (Witness 7's testimony, Petitioner's Exhibit 18)

30. Student has made progress during SY 2019-2020 school year in social-emotional and behavioral development through individual and group for social skill interpersonal skill development. The School A social worker believes Student's needs were being addressed with the level of services behavior support services at 120 minutes per month. Student is not aggressive with other students and begun to have boundaries and can think through situations before acting. Student has positive interactions with students and staff. Although Student gets upset, Student uses coping skills and responds to redirection rather than escalating. Some of the strategies are captured in Student's IEP goals that do not require inclusion in a BIP. (Witness 5, testimony, Respondent's Exhibits 26-B, 26-C, 31)
31. On February 21, 2020, Petitioner attorney sent an email to School A requesting additional data on Student's behavior that was to be collected after the January 14, 2020, meeting. She asked for updated data regarding Student's academic performance, such as report cards, IEP progress reports, and standardized assessment data. She also asked for an update as to whether the FBA/BIP had been updated. On March 3, 2020, School A sent Petitioner's counsel approximately fifteen documents in response to the document request. (Petitioner's Exhibit 35)
32. School A provided Petitioner's attorney Student's educational records, including iReady data for math, Student's performance summaries for reading, progress reports for the first and second term of SY 2019-2020, and city-wide standardized testing for SY 2018-2019. There was no standardized testing during SY 2019-2020. School A provided Petitioner's attorney all the data and records for Student that were requested. (Witness 2's testimony, Witness 8's testimony)
33. On May 12, 2020, DCPS convened an annual review meeting to review and update Student's IEP. Petitioner did not attend; however, Petitioner's attorney participated by telephone. The resulting IEP noted that Student did not require assistive technology. (Respondent's Exhibit 32)
34. At the May 12, 2020, meeting Petitioner's advocate asked about the status of AT evaluation, and DCPS stated they were not going to conduct the AT evaluation. The advocate also asked had IEP been updated to increase OT services to 240 minutes per month. School A stated that the level of services would remain as is. The advocate claimed that she did not get all the records requested, specifically data to ascertain if the new IEP goals were attainable, PLOPs, and baselines to substantiate the goals. (Witness 2's testimony, Petitioner's Exhibit 6)

35. Student's IEP that was implemented prior to the May 12, 2020, IEP meeting was appropriate to meet Student's needs. (Witness 7's testimony, Respondent's Exhibit 31)
36. On May 27, 2020, the advocate sent School A a dissent letter in response to the draft IEP that DCPS prepared for the May 12, 2020. Although the advocate has never observed Student in a classroom or taught Student or performed a formal evaluation of Student, she nonetheless believed that the IEP was deficient for reasons including the absence of additional OT services and all the accommodations recommended by the IEE. (Witness 2's testimony, Petitioner's Exhibit 33)
37. During distance learning in April and May 2020, Student was one of the most active of the students in Student's class. However, in-person teaching was more effective in helping Student to make progress. Student's academic performance declined slightly because Student did not initially have an electronic device when distance learning started, and Student's participation in distance learning declined after the May 12, 2020, IEP meeting. Had there not been a break due to COVID, Student would have made much more progress. (Witness 7's testimony)
38. Petitioner's two educational advocates proposed a compensatory education plan that included a request that compensatory education be reserved as to alleged failure to evaluate. For the allegation regarding OT services, Petitioner requested that Student be provided 8 to 10 hours of OT, 20 to 30 hours of Applied Behavior Analysis ("ABA") therapy. Petitioner requested counseling for the alleged ineffective BIP since November 2019. (Witness 2's testimony, Witness 3's testimony, Petitioner's Exhibit 44)

CONCLUSIONS OF LAW:

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

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved;
- and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioner held the burden of

production on all issues. Petitioner had the burden of persuasion on issues #1, #2, and #4. Petitioner made a prima facie case on issue #3 before the burden of persuasion fell to Respondent on that issue. The normal standard is the preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether DCPS denied Student a FAPE by failing to conduct the following evaluations following Petitioner's January 14, 2020, request, specifically and only: (a) an assessment of Student's ocular motor functioning by a Developmental Optometrist, and/or (b) an AT assessment, and/or (c) a PT 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 assessment of Student's ocular motor functioning by a Developmental Optometrist, and an AT assessment following Petitioner's January 14, 2020, request. Petitioner did not sustain the burden of persuasion by a preponderance as to a PT evaluation.

34 C.F.R. § 300.303 provides:

- (a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with Sec. Sec. 300.304 through 300.311--
 - (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or (2) If the child's parent or teacher requests a reevaluation.
- (b) Limitation. A reevaluation conducted under paragraph (a) of this section--
 - (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and
 - (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

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

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

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

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

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

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

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

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

Petitioner alleges that Student's language, communication, cognitive, and academic deficits warrant an AT evaluation to ascertain Student's ability to use AT devices to supplement learning. Petitioner alleged that School A agreed to request an AT evaluation; however, it has not been conducted to date.

Additionally, as part of Petitioner's evaluation requests during the January 14, 2020, MDT meeting, Petitioner asserts that he requested that Student receive a PT evaluation due to deficits

noted by the OT evaluator in the IEE. However, School A denied the request. Petitioner also asserts that, to date, Student has not had an assessment of ocular motor functioning by a Developmental Optometrist, also recommended in the IEE.

The evidence demonstrates that the IEE that Petitioner had conducted and that DCPS reviewed suggested that Student have an ocular motor assessment and an AT assessment for Student's possible use of keyboard devices to assist with Student's writing difficulties. Student's special education teacher credibly testified that Student has difficulty copying information from the board and difficulty with writing assignments that leads Student to engage in disruptive behaviors. DCPS's primary resistance to conducting an assessment of Student's ocular motor functioning is that it considers such an assessment a medical evaluation, and DCPS does not have an optometrist on staff.

DCPS's occupational therapist testified that Student's eye tracking was sufficient and that Student does not show signs of clumsiness or dizziness that are typically associated with eye convergence issues. Although the DCPS therapist had observed Student in the classroom and the IEE evaluator had not, the IEE evaluator's recommendation was supported by Student's classroom teacher's testimony that Student has difficulty copying from the board. DCPS's assertion that it does not conduct medical evaluations is not a sufficient basis for its refusal to assess Student's ocular motor functioning. DCPS is required to assess a student in all areas, including academic performance, health, vision, hearing, social and emotional status, and general intelligence. There is no exception to that requirement based on a school district's personnel choices. Consequently, the Hearing Officer concludes that DCPS's refusal to assess Student's ocular motor functioning after Petitioner made the request, supported by recommendations in the IEE, and the classroom teacher's comments, was a procedural inadequacy that impeded Student's right to a FAPE.

Similarly, the IEE recommended an AT evaluation, which Petitioner also requested at the January 14, 2020, MDT meeting. The evidence demonstrates that School A initially agreed to conduct the AT evaluation at the MDT meeting but later reneged on that agreement. The recommendation made in the IEE for this assessment to determine if Student would benefit from the use of devices and/or software to assist in writing was also supported by Student's classroom teacher's testimony that Student has difficulty with writing assignments and this difficulty often leads to Student's disruptive behaviors. This factor, along with Petitioner's request, and DCPS's initial agreement, was a sufficient basis for School A to have promptly conducted the AT assessment following the January 14, 2020, MDT meeting. The Hearing Officer concludes that DCPS's failure to conduct the assessment was a procedural inadequacy that impeded Student's right to a FAPE.

However, under IDEA, "it is not necessary that every requested test is administered. . . ." *Jackson v. Dist. of Columbia*, CV 19-197 (DAR), 2020 WL 3318034, at *17 (D.D.C. June 2, 2020), *report and recommendation adopted*, CV 19-197 (TJK), 2020 WL 3298538, at *1 (D.D.C. June 18, 2020).

Unlike the two assessments discussed above, a PT evaluation was not explicitly mentioned in the IEE recommendations. Although the IEE mentioned some deficits that related to Student's

physical development, the IEE recommended that Petitioner “enroll Student in children's martial arts, yoga, or other community-based class or sports to help with improving Student's strength endurance, balance, self-regulation, and perhaps some areas of executive functioning.” Additionally, there was evidence from the DCPS witnesses that Student can navigate the school building environment and its four flights of stairs to get to Student's classroom, and Student participates in recess and P.E. without problems.

Based on the fact that the IEE did not recommend a PT evaluation and there is significant evidence that Student could easily navigate in the school environment, the Hearing Officer concludes that DCPS' refusal to conduct the PT evaluation after Petitioner's request was reasonable and appropriate and did not impede Student's right to a FAPE.

ISSUE 2: Whether DCPS denied Student a FAPE by failing to conduct a comprehensive FBA and/or an updated FBA, after the January 14, 2020, IEP meeting, so that an appropriate BIP could be created.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to conduct a comprehensive FBA and/or an updated FBA, after the January 14, 2020, IEP meeting, so that an appropriate BIP could be created.

34 C.F.R. §300. 324 (a) (2) provides: The IEP Team must— (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

However, IDEA does not mandate that an FBA be conducted and/or a BIP be developed except in the provisions related to disciplinary actions pursuant to 34 C.F.R. 300.530 et. seq. Those provisions do not apply to this case. Nonetheless, in the instant case, DCPS conducted an FBA and developed a BIP to address Student's behaviors.

Functional Behavior Assessment or "FBA" refers to a systematic set of strategies used to determine the underlying function or purpose of a behavior so that an effective behavior management plan can be developed. See *Banks v. St. James Par. Sch. Bd.*, No. 2:65-CV-16173, 2017 WL 2554472 (E.D.La. Jan. 30, 2017) See, also, Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46540, 46643 (August 14, 2006). (If a child's behavior or physical status is of concern, evaluations addressing these areas must be conducted.) An LEA's failure to complete an FBA and develop a Behavior Intervention Plan, when warranted, will constitute a denial of a FAPE. See, e.g., *Long v. District of Columbia*, 780 F.Supp.2d 49, 61 (D.D.C.2011).

While an FBA is the "primary way" for an LEA to "consider the use of positive behavioral interventions and supports," it is not the only way. *Simms v. Dist. of Columbia*, No. 17-CV-970 (JDB/GMH), 2018 WL 4761625, at *14 (D.D.C. July 26, 2018), report and recommendation adopted, No. CV 17970 (JDB)(GMH), 2018 WL 5044245 (D.D.C. Sept. 28, 2018)

Petitioner alleges that neither Student's FBA nor BIP addresses all of the problematic behaviors that Student displays and does not take into consideration parent's concerns and the IEE's recommendation to add sensory processing measures. Petitioner also alleges that the prior HOD mandated sensory issues in Student's BIP. The IHO granted Petitioner public funding of the IEE because Student's IEP contained a sensory processing goal and DCPS's OT evaluation had not assessed Student's sensory processing. Contrary to Petitioner's assertion, the IHO said nothing about sensory processing being in Student's BIP. The IHO directed DCPS to conduct an FBA reassessment and update Student's BIP even though he did not find that DCPS had denied Student a FAPE by not updating Student's October 17, 2017, FBA. As directed, DCPS conducted an FBA in October 2019 and developed a new BIP.

The evidence demonstrates that at the January 14, 2020, MDT meeting Student's classroom teacher shared Student's problematic behaviors. However, Student's engaged in those more problematic behaviors when the new classroom teacher arrived. Before his arrival, Student's tantrums had subsided. After the new classroom teacher developed a rapport with Student, the behaviors again subsided. Nonetheless, School A amended Student's BIP in February to include comments from the new classroom teacher. The problematic behaviors that Student displayed were already mentioned in the FBA and BIP, and there was an insufficient basis for School A to have conducted a new FBA following the January 14, 2020, MDT meeting.

The IEE evaluator made numerous recommendations. As to Student's sensory issues, she noted that Student can become quickly excitable in multi-sensory stimulating activities, which can cause over-arousal and difficulty with self-regulation. She stated that this will require coaching and teaching of self-regulation awareness, language, and techniques. Student's over-responsivity to sensory input can require consistent movement breaks, and breaks from over-stimulating environments and activities. She recommended that Student's BIP be updated in consultation with Student's occupational therapist to include sensory strategies.

However, the DCPS occupational therapist who provides Student's ongoing OT services did not agree that Student's BIP needed to include sensory strategies. Also, she credibly testified that many of the recommendations in the IEE could be implemented in the classroom without adding them to Student's IEP. Nonetheless, on February 26, 2020, DCPS conducted a 60-day review of Student's behavior updated Student's BIP to include more recent data of Student's behavior since the October 2019, BIP was developed. The BIP noted that Student was benefitting from some of the strategies being used to address behaviors by the teacher providing redirection. The classroom teacher noted in his testimony that he allows Student breaks when needed. Neither the DCPS occupational therapist nor Student's classroom teacher supported the need for sensory strategies, or the other recommendations mentioned above by Petitioner, to be added to Student's BIP. There was sufficient evidence presented that School A not conducting a new FBA or adding sensory strategies to Student's BIP was reasonable and appropriate and did not impede Student's right to a FAPE.

ISSUE 3: Whether DCPS denied Student a FAPE by failing to provide Student an appropriate IEP, on January 14, 2020, that is tailored to meet Student's needs because the IEP (a) did not include recommendations from the recent OT evaluation, and/or (b) was not based on

evaluations that assess Student in all areas of suspected disability, specifically and only: a PT evaluation and an AT assessment.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence on this issue. DCPS did not deny Student a FAPE by failing to provide Student an appropriate IEP, on January 14, 2020, that is tailored to meet Student's needs because the IEP (a) did not include recommendations from the recent OT evaluation, and/or (b) was not based on evaluations that assess Student in all areas of suspected disability, specifically and only: a PT evaluation and an AT assessment.

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 *Endrew 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. *Endrew 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 *Endrew F.*, supra, 137 S. Ct. 988.

Petitioner alleges that following the January 14, 2020, MDT meeting, School A should have amended Student's IEP to include all recommendations from the recent IEE and the PT evaluation and the AT assessment Petitioner requested at that meeting.

The evidence demonstrates that Student's IEP was developed on September 5, 2019. That IEP included OT goals and services. The October 4, 2020, HOD directed that DCPS fund the IEE and revise Student's IEP to include data from Student's Pennsylvania evaluation. Petitioner has not asserted that DCPS failed to amend Student's IEP as the HOD directed. Otherwise, there was no mandate that DCPS amend Student's IEP following the January 14, 2020, MDT meeting.

DCPS conducted an annual review of Student's IEP on May 12, 2020. Although there was evidence presented of the May 12, 2020, meeting and the draft IEP DCPS presented at that meeting, what occurred at that meeting and the draft IEP from that meeting were not at issue in this due process hearing.

The Hearing Officer has already addressed the request PT evaluation issue and concluded that there was no violation in DCPS refusing to conduct that evaluation. However, it is unclear at this juncture whether Student's IEP should be or will be revised as a result of the AT evaluation that the Hearing Officer directs in the order below that DCPS conduct. Therefore, it is premature to conclude that Student's IEP was inappropriate as a result of this evaluation not being conducted.

Petitioner also asserted that as of the January 14, 2020, meeting Student's IEP should have been amended to provide the appropriate classroom aids and services, behavioral service supports, appropriate functional goals, and adaptive supports that are mentioned in the IEE. The IEE evaluator made numerous recommendations, and as stated previously, the DCPS occupational therapist who provides services to Student did not agree with all the recommendations made in that evaluation. She credibly testified that many of the recommendations in the IEE could be implemented in the classroom without adding them to Student's IEP. Student's classroom teacher also testified as to the strategies he uses to address Student's needs in the classroom and that Student's behaviors have improved.

The Hearing Officer notes that other than her recommendations for additional evaluations that have already been discussed, there was nothing from the IEE evaluator's testimony that caused the Hearing Officer to find that her recommendations are due greater weight than those of the DCPS occupational therapist. The IEE evaluator only saw Student in an assessment setting for approximately three hours. She did not observe Student in the classroom, did not speak directly

to any of Student's teachers or direct services providers. Thus the Hearing Officer gives greater weight to the testimony and decisions made by the DCPS occupational therapist.

Consequently, the Hearing Officer cannot conclude based on testimony from the IEE evaluator, or that of Petitioner's educational advocates, neither of whom and observed Student in the classroom, that Student's IEP needed to be amended following the January 14, 2020, MDT meeting to include the other recommendations from the IEE.

ISSUE 4: Whether DCPS denied Student a FAPE by failing to provide Petitioner access to Student's educational records: specifically and only: behavioral trackers, incident reports, progress reports, academic data, and standardized assessments.

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to provide Petitioner access to Student's educational records: specifically and only: behavioral trackers, incident reports, progress reports, academic data, and standardized assessments

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

At the January 14, 2020, MDT meeting Petitioner's representatives requested that School A provide them with Student's educational records. The request included behavioral trackers, incident reports, progress reports, academic data, and standardized assessments. School A's Director of Specialized Instruction credibly testified that School A provided Petitioner's representatives Student's educational records, including iReady data for math, Student's performance summaries for reading, progress reports for the first and second term of SY 2019-2020, and city-wide standardized testing for SY 2018-2019. There was no standardized testing during SY 2019-2020.

There was insufficient evidence that School A responded to Petitioner's request in an untimely manner or that it ever denied Petitioner or her representative access to inspect and review all available education records relating to Student. Petitioner presented no evidence that he or his representatives went to School A and reviewed documents and were denied access or copies of any of Student's educational records.

The records access rights granted to parents under the IDEA do not ensure the discovery or production of any particular category of documents. See generally *Jalloh v. District of Columbia*, 535 F. Supp. 2d 13, 21-22 (D.D.C. 2008) (rejecting claim that LEA failed to provide certain types of school records in response to parent's request): "Counsel misses the point: although Ms. Jalloh and her counsel requested access to records regarding R.H., neither Ms. Jalloh nor her counsel followed up by going to Hamilton where the records were located to achieve that access. Thus, the hearing officer correctly concluded that he could not find that DCPS denied R.H. a

FAPE based solely on the absence of records."

The evidence supports the conclusion that School A provided Petitioner's attorney all the data and records for Student that were requested and that were available to be provided. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.)

Under the theory of compensatory education, "courts and hearing officers may award educational services, to be provided prospectively, to compensate for a past deficient program. The inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

In this case, the Hearing Officer has determined that DCPS denied Student a FAPE by failing to conduct two requested evaluations. Petitioner has asked that the Hearing Officer "reserve" compensatory education until those evaluations are conducted. However, Petitioner has presented no convincing legal authority that was directly on point as to this requested remedy, and the Hearing Officer has not found any binding authority that allows such a reservation of compensatory education.

Based on the evidence presented at the due process hearing, the findings and conclusions above, and relevant equitable considerations, the Hearing Officer concludes that the following relief is appropriate and reasonably tailored to address the specific violations and denials of FAPE herein.

It is clear from the evidence presented that Student struggles with writing activities, and it was recommended that Student would likely benefit from the use of keyboarding training. Consequently, in addition to directing DCPS to conduct those evaluations, the Hearing Officer grants Petitioner's request for 10 hours of independent OT services and directs that this be used for training Student on keyboard use to assist with Student's writing skills.

ORDER: ⁹

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby ORDERED:

1. Within twenty (20) school days of this order's date, DCPS shall conduct an AT assessment of Student and shall conduct an assessment of Student's ocular motor functioning, specifically to address eye convergence.
2. Within ten (10) business days of this order's date, Petitioner shall provide DCPS written consent to conduct the above evaluations.
3. DCPS may, at its sole option, choose to authorize Petitioner to obtain with public funding an independent assessment of Student's ocular motor functioning, specifically to address eye convergence, at an amount not to exceed \$400.00.
4. Within 15 school days of DCPS's completion and receipt of the two assessments mentioned above, DCPS shall convene an MDT meeting to review the assessments and update Student's IEP as appropriate.
5. As compensatory education, DCPS shall authorize Petitioner to obtain 10 hours of independent OT therapy at the DCPS/OSSE prescribed rate, to be used for training Student on keyboard use to assist with Student's writing skills.
6. 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*

Coles B. Ruff, Esq.
Hearing Officer

Date: July 7, 2020

⁹ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

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