

JURISDICTION:

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

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing (“Student”) is a currently age ____² and enrolled at a non-public special education separate day school (“School A”) for school year (“SY”) 2019-2020, as a result of a Hearing Officer Determination (HOD) issued on July 27, 2019.

Student’s maternal grandmother (“Petitioner”), who resides in Maryland, holds educational decision-making rights for Student and shares legal custody of Student with the Student’s biological mother, who resides in the District of Columbia.

On May 22, 2019, Petitioner filed a due process complaint against DCPS. The resulting July 27, 2019, HOD required DCPS to amend Student’s individualized educational program (“IEP”) to proscribe a least restrictive environment (“LRE”) as a “full-time” therapeutic day school, fund an independent occupational therapy (“OT”) evaluation, and provide Student with funding for compensatory education. DCPS placed Student at School A for SY 2019-2020.

A multidisciplinary team (“MDT”) convened at School A on September 19, 2019, for a 30-day review for Student’s progress. At that meeting, Student’s teacher shared that Student often refused to complete written assignments and hated writing, which was often a trigger for Student’s negative behaviors.

Petitioner provided DCPS the independent OT evaluation, which DCPS reviewed at an IEP team meeting at School A on October 16, 2019. At that meeting, Petitioner requested that assistive technology (“AT”) be added to Student’s program as she claimed was recommended by the OT evaluation. Petitioner also requested that Student be provided a dedicated aide.

On April 7, 2020, Petitioner filed the current due process complaint alleging DCPS failed to provide Student a free appropriate public education (“FAPE”) because it allegedly failed to timely revise Student’s IEP to include the dedicated aide OT services and assistive technology.

Petitioner also alleged that DCPS failed to provide Student with compensatory education that the Hearing Officer reserved in the July 27, 2019, HOD (Case 2019-0135) for delays in providing Student the OT evaluation and OT services

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

Relief Sought:

Petitioner seeks as relief the following:

- DCPS immediately amend Student's IEP to reflect the need for AT, including a laptop computer, editing software, and training for Student to use those features.
- DCPS provide Student compensatory education for delays in making AT available and also delays in conducting an OT evaluation and providing Student OT services.

LEA Response to the Complaint:

The LEA, DCPS, filed a response to the complaint on April 17, 2020. The LEA denies that there has been any failure to provide Student with a FAPE, and stated, inter alia, the following in its response:

At the October 16, 2019, MDT meeting, the School A team agreed to explore the use of technology in Student's classroom and informed Petitioner that Student had access to a laptop in the classroom. As such, it was no need to include the computer on the IEP.

DCPS denies it failed to provide Student a dedicated aide on the amended IEP following the October 16, 2019, MDT meeting. On October 28, 2019, the school team determined that a dedicated aide was not warranted. However, the team determined it would revisit the subject if data supported a need for a dedicated aide.

On November 18, 2019, DCPS collected additional data and determined that a dedicated aide was warranted. Although DCPS did not provide Petitioner the finalized amended IEP until February 2020, the dedicated aide was approved from November 20, 2019, to May 5, 2020. Additionally, the dedicated aide began working with Student on or about December 1, 2019.

On October 16, 2019, the school team reviewed the independent OT evaluation and determined the Student was eligible for OT services, and the IEP was amended to include OT goals and 60 minutes per week of OT services.

DCPS denies it allegedly failed to provide compensatory education. Student was made eligible for OT services on October 16, 2019. Petitioner, for the first time, addressed compensatory education in this due process complaint. During the April 17, 2020, resolution session meeting, Petitioner, for the first time, proposed the number hours she was seeking as compensatory education. DCPS could not provide compensatory education hours until Petitioner provided the number of hours she was seeking. As such, this issue should be dismissed because it is not ripe.

Resolution Meeting and Pre-Hearing Conference and Order:

The parties held a resolution meeting on April 17, 2020. The complaint was not resolved, and the parties did not mutually agree to proceed directly to hearing. The 45-day period began

on May 7, 2020, and ends [and the Hearing Officer's Determination ("HOD") is due] on June 21, 2020.

The Hearing Officer convened a pre-hearing conference ("PHC") on May 8, 2020, and issued a pre-hearing order ("PHO") on May 13, 2020, outlining, inter alia, the issues to be adjudicated.

ISSUES ADJUDICATED:³

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 provide Student an appropriate and timely amended IEP following the October 16, 2019, MDT meeting because the amended IEP did not include a dedicated aide and/or OT goals and services.⁴
2. Whether DCPS denied Student a FAPE by failing to provide Student with compensatory education for denials of FAPE found in the July 27, 2019, HOD (Case # 2019-0135), specifically, delays in conducting a comprehensive and timely OT evaluation and/or providing OT services.⁵

³ During the PHC, Petitioner's counsel stated that Petitioner was withdrawing the third issue listed in the due process complaint related to the alleged lack of access to educational records. Respondent's counsel did not object to the withdrawal of this issue. Therefore, that issue is considered withdrawn and was not adjudicated.

⁴ Petitioner contends that DCPS failed to provide Student with an appropriate amended IEP and/or provide it in a timely manner. Specifically, DCPS failed to amend the IEP to provide for assistive technology as recommended for the student in [REDACTED] occupational therapy evaluation and/or to timely amend the IEP to provide for a dedicated aide to the student, as well as, OT services and goals. When the team met in September 2019, they already had the occupational therapy evaluation that strongly recommended assistive technology be added to the student's program. When they reviewed the OT evaluation in October 2019, Petitioner expressly requested that AT be added to Student's program as recommended. DCPS failed to amend Student's IEP to include AT. DCPS also delayed in amending the IEP to provide for the dedicated aide that the team agreed, via email after the October 16, 2019, meeting, was warranted and that Petitioner requested. DCPS delayed adding the OT services and goals agreed to in October 2019. DCPS did not finalize the IEP until February 27, 2020. Student has been denied a FAPE as a result of the failure to develop an appropriate IEP for Student during SY 2018-2019.

⁵ Petitioner contends that DCPS failed to provide the student with compensatory education for its delays in timely conducting an OT evaluation and addressing the student's needs for such services. In Petitioner's May 22, 2019, due process complaint, the Petitioner contended that DCPS failed to conduct a comprehensive evaluation of the student by failing to conduct an OT evaluation. An OT evaluation was warranted to address visual perception, motor skills, sensory issues, and executive functioning issues such as motor skills, organization, and planning. On July 27, 2019, HOD ordered DCPS to fund an independent OT evaluation and expressly reserved Petitioner's right to seek compensatory education should Student be found eligible for OT services, which Student was on October 16, 2019. As a result, of DCPS failure to conduct a comprehensive and timely evaluation Student has been denied a FAPE.

DUE PROCESS HEARING:

Due to the COVID-19 emergency, the hearing was conducted via video-teleconference on June 4, 2020, and June 8, 2020. The parties made oral closing arguments on June 8, 2020.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the following as evidence and the source of findings of fact: (1) the testimony of the witnesses, and (2) the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 38 and Respondent's Exhibits 1 through 28) that were admitted into the record and are listed in Appendix A. Witnesses' identifying information is in Appendix B.⁶

SUMMARY OF DECISION:

The Hearing Officer concludes, based on the evidence adduced, that Respondent sustained the burden of persuasion by a preponderance of the evidence on issue #1. With regard to issue #2 Petitioner held the burden of persuasion. The Hearing Officer concludes that Petitioner did not sustain the burden of persuasion. The Hearing Officer concludes that the period for which Student should have been provided OT services started on the date that DCPS issued the prior written notice, June 6, 2019, and ended when DCPS amended Student's IEP to include OT services on October 16, 2019. Having found no denial of FAPE to Student, the Hearing Officer dismissed Petitioner due process complaint as to the prior HOD without prejudice for Petitioner to first request additional compensatory education from DCPS and/or to request DCPS conduct an evaluation to determine appropriate additional compensatory education.

FINDINGS OF FACT:⁷

1. Student is a child with a disability pursuant to IDEA with a disability classification of Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD"). Student is a resident of the District of Columbia and resides part-time with Student's biological mother in the District of Columbia and Student's grandmother who

⁶ Petitioner presented three witnesses: (1) An independent Occupational Therapist who testified as an expert witness, (2) Petitioner, and (3) Petitioner's Educational Advocate who is employed by the law firm representing Petitioner, who testified as an expert witness. DCPS presented four witnesses, all of whom testified as expert witnesses: (1) the DCPS Monitoring Specialist for School A, (2) Student's Special Education Teacher at School A, (3) A DCPS Occupational Therapist, and (4) the School A Middle School Team Leader. 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.

⁷ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. FOFs derived from the Administrative Record, are followed by "AR" and the page number from the AR. Other documents cited are noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit (or the page number of the entire disclosure document) from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

lives in Maryland, and holds educational rights for Student and is Petitioner in this matter. (Petitioner's Exhibit 34-4, Respondent's Exhibit 3-1)

2. Student transferred to DCPS from a Maryland School District ("MSD") at the beginning of SY 2017-2018 with an MDS IEP. During Student's time in MSD, Student's disability classification was Emotional Disturbance ("ED") and OHI due to ADHD. Student was eventually placed in a DCPS Behavior Educational Support ("BES") self-contained classroom at a DCPS school. Student was initially successful in that program. Student transferred to a BES program at another DCPS school for SY 2018-2019. Student was not successful there. Student's behavioral difficulties negatively impacted Student's academic performance. An IEP team ultimately determined that Student required a more restrictive setting in a non-public therapeutic day school. (Petitioner's Exhibit 34-4 through 34-9, 34-12, 34-13)
3. DCPS developed an IEP for Student dated May 6, 2019, that provided 25 hours of specialized instruction per week outside of general education and 240 minutes per month of behavioral support services outside of general education. (Petitioner's Exhibit 1)
4. Petitioner filed a due process complaint against DCPS on May 22, 2019, that resulted in a HOD issued on July 27, 2019. In her due process complaint, Petitioner alleged that DCPS denied Student a FAPE when it did not conduct a timely OT evaluation. The Hearing Officer concluded that Petitioner proved that DCPS should have conducted an OT evaluation. The Hearing Officer did not expressly state in the HOD when the OT evaluation should have been conducted. However, the Hearing Officer noted that Student's advocate had asked for the evaluation, and Student's team did not agree that there was an OT concern. The Hearing Officer found that on June 6, 2019, DCPS issued a prior written notice that stated DCPS would not conduct an OT evaluation until after observing Student and interviewing Student's teacher. The Hearing Officer allowed Petitioner to "reserve" compensatory education related to DCPS's failure to conduct an OT evaluation. (Petitioner's Exhibit 34-11)
5. In the July 27, 2019, HOD, the Hearing Officer ordered that DCPS amend Student's IEP to state that Student's least restrictive environment is a full-time therapeutic day school, fund an independent OT evaluation ("IEE") and provide Petitioner letters of authorization for 30 hours of academic tutoring and 30 hours of independent counseling as compensatory education for "the denials of FAPE found [in the HOD.]" (Petitioner's Exhibit 34-23)
6. An Independent Occupational Therapist ("evaluator") conducted the IEE on August 21, 2019. The evaluator assessed Student's fine motor skills, visual-motor integration, and visual perception, vision, and oculomotor functioning, handwriting, sensory modulation and processing. Student has strengths in visual perception, manual dexterity, and upper limb coordination. Student struggles with some aspects of eye-hand coordination primarily due to a slight lack of pencil control due to a loose pencil grip. The evaluator noted that Student types twice as fast as Student handwrites. (Witness 1's testimony, Petitioner's Exhibit 11)

7. Based on two sensory processing questionnaires completed by Student's parent, the evaluator concluded Student has challenges in the following sensory areas: touch modulation, balance and motion and body position modulation, and some problems with visual sensory input. The evaluator speculated that Student's in-school behavior difficulties were related to over-responsivity to sensory input in the school environment. The evaluator made recommendations including, among other things, that Student be provided 60 minutes per week of direct OT services that focus on writing alternatives, including keyboarding, assessment of sensory aspects of Student's full-day, organization, and self-regulation training. The evaluator recommended that the IEP team add the following, among other things, to the Classroom Aides and Services section of Student's IEP: keyboarding training and the use of a keyboard (laptop, chrome book, etc.) for all writing activities. (Witness 1's testimony, Petitioner's Exhibit 11)
8. The evaluator recommended the use of a computer be included in the IEP's classroom aids and services to help Student with writing assignments. The evaluator was not aware whether Student already had access to a computer and software in the classroom, and she did not conduct an assessment specifically for Student's use of assistive technology. She always includes keyboarding in her evaluation recommendations. The evaluator opined that Student would be better able to use a computer for writing had Student received OT services at the beginning of January 2019 along with training in writing soft-ware. She speculated that 150 hours of tutoring in reading, math, and written expression would be adequate to compensate Student for not have OT services during that period. (Witness 1's testimony, Petitioner's Exhibit 11)
9. Student was eventually placed at School A and began attending at the start of SY 2019-2020. Soon after Student began attending School A, DCPS conducted a 30-day review meeting on September 19, 2019, to discuss Student's progress. Petitioner and her attorney participated in the meeting. Petitioner had provided DCPS the completed IEE just days before that meeting, and DCPS did not have sufficient time to review the evaluation before the meeting. School A staff shared that Student was having some behavioral difficulties, including eloping from class and difficulty focusing on work. Petitioner and her counsel requested that recommendations from the IEE be implemented and that Student be provided a dedicated aide. The DCPS representative stated that the IEE would have to first be reviewed by a DCPS Occupational Therapist. To determine if a dedicated aide was warranted, School A agreed to focus on and collect behavior data for Student in two subject areas where additional staff would assist Student, and then discuss the data at an upcoming team meeting scheduled for October 16, 2019. At the September 19, 2019, meeting, there was no request by Petitioner for compensatory education related to the prior HOD. (Witness 4's testimony, Petitioner's Exhibits 2)
10. Student's transition to School A was challenging. Student was triggered the moment Student stepped in the door. Petitioner asked that School A alert her of difficulties Student had at school, so she was informed before Student got home from school. Student does fine with reading, but the moment Student has to write essays or do math assignments, Student is triggered. (Petitioner's testimony)

11. On October 9, 2019, a DCPS Occupational Therapist conducted a review of the IEE. The reviewer also spoke with Student's teacher. The reviewer accepted the results of the IEE and noted the following recommendations from that evaluation:

- Consider keyboarding as an option for written communication.
- Use of a self-regulation program ("Zones of Regulation") to help [Student] with self-regulation.
- Extended time for written assignments
- Sensory Diet of activities to aide in self-regulation
- Opportunities to transition to a quiet, low stimulating space when experiencing sensory overload. Alternative locations for lunch, P.E., or other over-stimulating activities should be provided. Provide [Student] with clear lines and organized frameworks to place written answers on.
- Avoid unlined, unnumbered, unstructured papers. Consider skipping lines to promote organization, spacing, legibility, and revising.
- Give [Student] a spacer to use when handwriting is required.
- Teach [Student] to use a proofreading checklist. That aligns with classroom expectations. A sample for the COPS method of editing (Capitalization,
- Organization, Punctuation, Spelling is attached.
- Try allowing [Student] to chew gum during work periods. It can help keep students calm/focused during agitating moments.

(Witness 4's testimony, Respondent's Exhibit 18)

12. On October 12, 2019, DCPS issued a prior written notice ("PWN"), noting its review of the IEE. (Respondent's Exhibit 6)

13. DCPS and the School A team reviewed the IEE on October 16, 2019. Petitioner's attorney attended the meeting. During the meeting, the DCPS Occupational Therapist reviewed the evaluation, and the team added OT goals and services of 60 minutes per week to Student's IEP. The team discussed Student's behavioral goals, and Petitioner's attorney requested that Student be allowed to use more technology in class, including the use of a computer as opposed to writing assignments, particularly in math. The DCPS representative stated that Student's use of a computer would be added to Student's IEP. The team also added Student's use of headphones. Petitioner's attorney renewed the request for the dedicated aide. The School A team did not see the need for a dedicated aide at that time and stated that they would see if the additional OT services and use of a computer would improve Student's behavior. DCPS did not agree that Student's use of the computer qualified as assistive technology ("AT"). At the meeting, there was no request by Petitioner for compensatory education related to the prior HOD. DCPS officially amended Student's IEP to include OT services, setting and frequency, and the new accommodations. DCPS generated the IEP amendment form on October 28, 2019, and provided Petitioner's attorney a copy of the form. (Witness 3's testimony, Witness 4's testimony, Petitioner's Exhibits 3, 4)

14. As of October 16, 2019, Student had use of a laptop computer in Student's classroom during the school day. (Witness 5's testimony, Witness 6's testimony, Petitioner's Exhibit 23-1)
15. On October 16, 2019, DCPS issued a PWN noting that Student's needed OT services to access FAPE. School A needed to add the present levels of performance and other data to Student's IEP, which was done on October 28, 2019. Although all the data for the amended IEP had been entered into the data system that DCPS uses to track students' special education services and create the IEP document, the DCPS representative inadvertently failed to finalize Student's amended IEP document in that system promptly and did not do so until February 27, 2020. However, the services that the IEP team agreed to at the October 16, 2019, meeting were implemented timely. (Witness 3's testimony)
16. On October 28, 2019, DCPS issued a PWN noting that Student's IEP had been amended to include OT as a related service at a level of 60 minutes per week and that present levels and OT goals were added. Additionally, it noted that the IEP was amended to include noise-canceling headphones as an accommodation. The PWN also noted that the team had discussed a part-time dedicated aide at the September 30-day review meeting and at the October 16, 2019, meeting, but that at the time of the October 16, 2019, meeting the School A staff and DCPS did not believe Student required a part-time dedicated aide to access FAPE. The notice stated that Student's behavior had improved according to data, and the addition of OT services should further address Student's needs. (Witness 3's testimony, Respondent's Exhibits 7, 8)
17. On October 30, 2019, Petitioner's attorney sent an email to the DCPS representative asking for a copy of Student's updated IEP with the services and accommodations that had been added by the team at the October 16, 2019, meeting. She also raised concerns about Student's continued behavioral incidents. (Petitioner's Exhibit 21-1)
18. On November 8, 2019, the DCPS representative sent Petitioner's attorney an email that stated that based on new information DCPS was open to providing Student a dedicated aide. (Petitioner's Exhibit 22-2, 22-3)
19. On November 11, 2019, Petitioner's counsel sent an email to the DCPS representative asking that a dedicated aide be added to Student's program as soon as possible. (Petitioner's Exhibit 22-1)
20. On November 12, 2019, School A sent Petitioner's attorney an email that the laptop computer had been integrated into Student's services at School A as of October 16, 2019. (Petitioner's Exhibit 23-1)
21. On November 18, 2019, DCPS and School A agreed to include a dedicated aide in Student's IEP, and the dedicated aide started working with Student by December 1, 2019. (Witness 5's testimony, Respondent's Exhibit 22-128)

22. On November 20, 2019, School A sent an email to the DCPS representative and Petitioner's attorney stating the following: "The Assistive Technology Device, the laptop, is accessible to [Student] on a daily basis. At times [Student] uses the laptop, and at other times [Student] is not interested in using it. [Student] would benefit from the added support of the dedicated aide who will be in place shortly." (Respondent's Exhibit 22-137)
23. On November 22, 2019, School A informed a staff member that he would be assigned to work permanently with Student as a one-to-one dedicated aide. School A printed class list for December 6, 2019, that reflected that the School A staff member was assigned to Student as a one-to-one aide in Student's classroom. (Witness 6's testimony, Respondent's Exhibits 21-125, 22-127)
24. School A scheduled Student to be provided OT services on October 18, 2019, and October 25, 2019. However, Student's did not receive services on those dates because the provider was not available. School A's Occupational Therapist provided Student direct OT services for 60 minutes for the first time on October 31, 2019. Thereafter, School A provided Student 60 minutes of direct OT services on the following dates: November 7, 2019, November 14, 2019, November 18, 2019, December 5, 2019, December 19, 2019. Student was absent from school on December 12, 2019. Student received 8 of the 11 scheduled OT sessions before to the December 25, 2019, holiday. Students missed 2 of the 11 sessions because the provider was not available, and one because Student was absent. (Respondent's Exhibits 19, 20)
25. Student received 7 of the 10 scheduled OT sessions from January 1, 2020, to March 3, 2020. Student received 60 minutes of direct OT services on the following dates: January 14, 2020, January 23, 2020, February 7, 2020, February 13, 2020, February 21, 2020, February 27, 2020, and March 3, 2020. Student was absent on January 9, 2020, and January 30, 2020, when OT services were scheduled and would have otherwise been provided. The provider was absent on January 2, 2020. (Respondent's Exhibits 19, 20)
26. On February 27, 2020, the DCPS representative finalized Student's IEP in the special education database. DCPS issued a PWN noting that Student's IEP was amended to include a full-time dedicated aide effective, November 20, 2019, to include the dedicated aide for 6 hours per day. The IEP included the OT goals and services that were agreed to at the October 16, 2019, meeting, and the classroom accommodations included, among other things, the use of a calculator and noise buffer headphones. One of Student's four OT goals included a reference to typing and stated the following: "[Student] will complete a beginner touch typing program focusing on learning key locations with at least 90% accuracy." There was no specific reference to Student's use of a computer mentioned in the IEP. (Respondent's Exhibit 9, Petitioner's Exhibit 5)
27. Page "3" of the February 27, 2017, IEP contained a section entitled "Consideration of Special Factors." This section noted, among other things, that "No assistive technology needs at this time" (Respondent's Exhibit 2-18)

28. On April 28, 2019, DCPS conducted Student's annual IEP review at School A. Petitioner and her attorney participated by telephone. The team discussed, among other things, Student's transportation services, behavioral supports, occupational therapy services, and attendance. Student had 56 total absences for SY 2019-2020, with 49 excused and 5 due to transportation issues. Student's IEP was updated to include, among other things, a statement in the "Other Classroom Aids and Services" section that Student would have access to a desktop or laptop computer in the classroom for completion of assignments. In stated that Student's had "access to a desktop or laptop computer in the classroom for completion of assignments." The School A team noted during the meeting that Student had daily access to Student's own personal computer in the classroom since November 2019, for writing assignments, for at least two hours per day. However, Student did not always use the computer. At the meeting, there was no request by Petitioner for compensatory education related to the prior HOD. (Witness 5's testimony, Respondent's Exhibits 3-45, 14, 15, Petitioner's Exhibit 7)
29. At the April 28, 2020, IEP meeting Petitioner's attorney stated that Petitioner wanted the computer in the AT section of Student's IEP. DCPS did not agree to add a laptop computer to the AT section of the IEP, as computers are available to all students in the classroom and are more appropriately addressed in the other classroom aides and services section of the IEP. In DCPS, students are usually evaluated specifically for the use of AT devices, and the AT section is used for devices such as those used by students with a hearing and/or visual impairment. (Witness 3's testimony, Respondent's Exhibit 3-45)
30. On April 28, 2020, DCPS issued a PWN noting that at Student's annual IEP review, the present levels of performance and IEP goals were updated, and 60 minutes per month of behavioral support consult services were added to the IEP and that Student was eligible for extended school year ("ESY") services. At the April 28, 2019 annual review meeting, Petitioner wanted to explore other schools and wanted Student's IEP to reflect the current services Student was receiving, so DCPS included Student's use of a computer in the IEP. (Witness 3's testimony, Respondent's Exhibit 10)
31. On May 8, 2020, DCPS issued a PWN noting that Student's IEP includes clear language about Student's access to a computer for completion of assignments as a classroom aid, but this language is not under the Assistive Technologies section of "Special Considerations" as parent has requested. The PWN went on to state that DCPS received parent's request to include the computer under AT, but declined to do so. (Respondent's Exhibit 11)
32. Petitioner's educational advocate sent a dissent letter stating Petitioner's disagreement with the team's decisions at the April 28, 2020, meeting. The letter stated that Petitioner disagreed with, among other things, the team's decision not to include AT in Student's IEP for a laptop computer and software. (Witness 2's testimony, Petitioner's Exhibit 32)
33. Prior to the COVID-19 emergency, DCPS usually conducts an AT screening or evaluation before any student is allowed to take and laptop computer home. After

Petitioner filed her due process complaint, DCPS offered to conduct an AT assessment of Student, and Petitioner declined the offer. (Witness 3's testimony)

34. On May 14, 2020, DCPS issued Petitioner an authorization for 40 hours of independent occupational therapy at the rate of \$130.38 per hour. (Respondent's Exhibit 24-143)

35. On May 26, 2020, DCPS issued Petitioner an authorization for 20 hours of independent tutoring at the rate of \$65.95 per hour. (Respondent's Exhibit 24-144)

36. Petitioner's educational advocate prepared and testified to a compensatory education proposal for the denials of FAPE Petitioner alleged. The advocate asserted that DCPS failed to provide AT in Student's IEP for 50 weeks, failed to provide a timely OT evaluation from January 2019, and delayed in administering OT services for 28 weeks. She alleged that if Student had been provided these services, Student would have made a year's worth of academic progress and mastered the goals on Student's IEP. As compensation, she proposed DCPS provide Student the following: 150 hours of tutoring, 33 hours of OT, and provide Student with a laptop computer or iPad with programs used in school and 54 hours of training to complete homework assignments and access to instructional programs such as CLEVER. The proposal did not distinguish what amount of services she was requesting that was specifically related to DCPS's delay in conducting Student's OT evaluation as determined by the July 27, 2019, HOD. (Witness 2's testimony, Petitioner's Exhibit 35)

CONCLUSIONS OF LAW:

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

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

34 C.F.R. § 300.17 provides:

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

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

facie case on issue #1; thus, the burden of persuasion fell to Respondent on issues #. Petitioner held the burden of persuasion on issue #2.⁸ 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 provide Student an appropriate and timely amended IEP following the October 16, 2019, MDT meeting because the amended IEP did not include a dedicated aide and/or OT goals and services.

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that despite DCPS not finalizing Student's IEP following the October 16, 2019, IEP meeting until February 27, 2020, the IEP that the team amended at that meeting was appropriate and, Student nonetheless received the services that the IEP team agreed Student would receive. The fact that Petitioner did not receive a copy of the amended IEP until February 27, 2020, was a procedural violation that did not deny Student a FAPE.

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

⁸ Pursuant to DC Code § 38-2571.03 (6):

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

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

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.

Pursuant to IDEA, an assistive technology device is any item, piece of equipment, or product system, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. An assistive technology service is any service that directly assists a child with a disability in the selection, acquisition or use of an assistive technology device.⁹

⁹ 34 CFR § 300.5: *Assistive technology device* means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device. 34 CFR § 300.6: *Assistive technology service* means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes— (a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child’s customary environment; (b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities; (c) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices; (d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs; (e) Training or technical assistance for a child with a disability or, if appropriate, that child’s family; and (f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child.

Pursuant to DC Code § 38-2571.03(4)(A) no later than 5 business days after a meeting at which a new or amended IEP has been agreed upon, the public agency shall provide the parents with a copy of the IEP. If an IEP has not yet been completed by the 5th business day after the meeting or additional time is required to comply with subchapter II of Chapter 19 of Title 2 [§ 2-1931 et seq.] (“Language Access Act”), the public agency shall provide the parent with the latest available draft IEP and a final copy upon its completion; provided, that the final copy of the IEP shall be provided to the parents no later than 15 business days after the meeting at which the IEP was agreed upon.

Provision of OT Services:

The evidence demonstrates that Petitioner presented DCPS with the IEE just days before the September 19, 2019, 30-day review meeting. Consequently, the IEE could not be reviewed until the IEP meeting on October 16, 2019. At that meeting, the team determined that Student required OT services and approved goals and weekly services. School A needed to update Student's IEP to include the new services, which was done by October 28, 2019. Although the DCPS representative inadvertently failed to promptly finalize Student's amended IEP document in DCPS's database system and did not do so until February 27, 2020, the evidence reflects the services that the IEP team agreed to at the October 16, 2019, meeting were implemented immediately.

The evidence reflects based on the service tracker logs, and the IEP progress reports that Student's OT services were due to start and did start in October 2019. Although it appears that Student did not receive all the OT services that Student was due to receive, DCPS provided most of the services. There was no claim raised in Petitioner's due process complaint of any failure to implement Student's IEP.

Provision of a Dedicated Aide:

The evidence reflects that although Petitioner requested that Student be provided a dedicated aide at both the September 2019, 30-day review meeting, and the October 16, 2019, IEP meeting, the team did not agree at either of those meetings that Student needed a dedicated aide. The team agreed to collect more data and provide Student more assistance in two subject areas and discuss the request for a dedicated aide at a later date. On November 18, 2019, due to Student's continued behavior difficulties, School A determined, and then DCPS agreed that Student required a dedicated aide.

The dedicated aide was provided to Student by December 1, 2020. Although Petitioner testified that she was not aware that Student was ever provided the dedicated aide, the credible testimony of the School A staff members and the School A class roster demonstrated that Student had a dedicated aide. There was testimony from Student's classroom teacher that was not consistent

with the other School A witness's testimony as to when the particular staff member served as Student's dedicated aide. However, the class roster coincided with the testimony of the other School A witness, and these two were convincing as to when School A provided the aide and who the aide was.

Assistive Technology:

As to Petitioner's claim that Student's IEP should have reflected AT services, specifically the use of a computer, the evidence demonstrates that School A provided Student use of a computer in the classroom as of October 2019. Although Student's IEP did not expressly reflect the use of the computer until after the April 28, 2020, IEP meeting, the credible testimony from the School A staff, including Student's classroom teacher, was that Student consistently had use of a computer for writing assignments. The fact that DCPS agreed to add the computer to Student's IEP may not have been effectuated until April 28, 2020, but the evidence was convincing that Student had use of a computer immediately after the October 16, 2019, meeting.

Although Petitioner asserts that even after the April 28, 2020, IEP meeting, DCPS still did not list the computer on Student's IEP as "assistive technology," there is no requirement that the use of a computer be listed as AT in a student's IEP. Petitioner cited a recent U.S. District Court case that remanded to the Hearing Officer the task to resolve an inconsistency in an IEP related AT. However, Petitioner's reliance on the case was misplaced. The Court did not conclude that technology such as a computer must be identified as AT in an IEP.¹⁰

The evidence that Student was consistently provided use of a computer following the October 16, 2020, meeting and was provided a computer for home use after the COVID-19 emergency, belies Petitioner's claim that Student was denied a FAPE because Student's IEP did not reflect the use of a computer.

The appropriateness of Student's IEP does not rise or fall based on a one-sentence statement on page "3" of the IEP, while the IEP clearly documents in the "Other Classroom Aides and Services" section, that Student will have use of a computer. Structure and organization of the IEP document are left to the discretion of the State or local educational agency.¹¹ The DCPS witness testified that the IEP team made a specific determination that the computer would not be considered AT and DCPS generally evaluates Student's needs specifically for AT.

¹⁰ *R.B. v. District of Columbia* 75 IDELR 102 (September 30, 2019)

¹¹ "Assistive technology devices and services needed to facilitate a student's participation in a regular education program must also be reflected in the child's IEP.... On the other hand, an IEP need not address assistive technology if the IEP team determines that assistive technology devices and services are not needed as part of the child's special education, related services, or supplementary aids and services. Structure and organization of the IEP document are left to the discretion of the State or local education agency. Each IEP, however, must satisfy the IEP requirements in Part B, including the above requirements related to assistive technology." Letter to Anonymous 24 IDELR 854

There was insufficient evidence that the statement on page “3” of the IEP would result in Student being denied use of a computer listed elsewhere in the IEP. On the contrary, DCPS presented sufficient evidence that Student was provided consistent use of a computer at School A.

The Hearing Officer concluded it was reasonable for DCPS to prescribe a computer in Students' April 28, 2020, IEP, under Other Classroom Aids and Services, and not as "assistive technology." The IEP sufficiently and appropriately prescribed computer use that the IEP team determined Student required to meet Student's unique needs.

If any school that Student attended with this IEP did not provide Student use of a computer, based upon the clear prescription in the IEP, Petitioner would have had a claim against DCPS for failure to implement the IEP as written.

The Hearing Officer concludes that although page “3” of Student's IEP stated “No assistive technology needs at this time,” the IEP, nonetheless, provided for Student's use of a computer listed in the IEP to address Student's unique needs. That IEP allowed for both effective implementation and enforcement of its contents.

Consequently, the Hearing Officer concludes that Student's IEP was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances.

Provision a Copy of the Amended IEP:

The fact that Student's amended IEP was not promptly finalized following the October 16, 2019, IEP meeting, and DCPS did not provide Petitioner a copy of that IEP until February 27, 2020, is a violation of the requirements of D.C. Code, § 38-2571.03(4)(A). However, because DCPS provided Petitioner a PWN that reflected the changes to the IEP and Student was consistently provided OT services and use of a computer following the October 16, 2019, meeting, the Hearing Officer concludes that this was a procedural violation that did not amount to a denial of a FAPE.

There was insufficient evidence that that delay in providing Petitioner the amended IEP impeded the Student's right to FAPE, significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of FAPE, or caused Student 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). Consequently, in the order below, the Hearing Officer dismisses with prejudice Petitioner claims reflected in issue #1.

Issue 2: Whether DCPS denied Student a FAPE by failing to provide Student with compensatory education for denials of FAPE found in the July 27, 2019, HOD (Case # 2019-0135), specifically delays in conducting a comprehensive and timely OT evaluation and/or providing OT services.

Conclusion: The Hearing Officer concludes that there was no denial a FAPE by DCPS failing to provide Petitioner compensatory education for the denials of FAPE found in the July 27, 2019, HOD from Case #2019-0135, specifically delays in conducting a comprehensive and timely OT evaluation and/or providing OT services.

Petitioner seeks to obtain additional compensatory education pursuant to the provision in the July 27, 2019, HOD that allowed Petitioner to “reserve” the compensatory education related to DCPS’s delay in conducting an OT evaluation that Petitioner had requested. That Hearing Officer concluded that Petitioner proved that DCPS should have conducted an OT evaluation. The Hearing Officer did not expressly state in the HOD when the OT evaluation should have been conducted. However, the Hearing Officer noted that Student’s advocate requested the evaluation, and Student’s team did not agree that Student had any OT concerns.

Although Petitioner’s advocate in her proposed compensatory education plan considered DCPS’s delay in conducting an OT evaluation, she measured that delay from January 2019. The Hearing Officer did not make that finding in the July 27, 2019, HOD. The Hearing Officer found that on June 6, 2019, DCPS issued a prior written notice stating that DCPS would not conduct an OT evaluation until it observed Student and interviewed Student’s teacher. The undersigned Hearing Officer concludes that the denial of FAPE that was determined in that HOD is most appropriately measured from the date that DCPS issued this PWN. At that point, Petitioner had the explicit right to challenge DCPS’s position stated in the PWN.

In the July 27, 2019, HOD, the Hearing Officer ordered that DCPS, among other things, fund an IEE. The July 27, 2019, HOD allowed Petitioner to “reserve” compensatory education that related to DCPS's failure to conduct an OT evaluation.

An Independent Occupational Therapist conducted the IEE on August 21, 2019. Petitioner provided DCPS the IEE just days before Student’s September 2019, 30-day review meeting at School A. DCPS conducted a review of the IEE and discussed it at the October, 16, 2019, IEP meeting. Student’s next IEP meeting was convened on April 28, 2019. The notes from these meetings do not reflect that Petitioner or her attorney requested that DCPS consider providing compensatory education for the delay in conducting Student’s OT evaluation pursuant to the July 27, 2019, HOD.

As Respondent aptly pointed out in its response to the due process complaint, the first time Petitioner made any request for compensatory education in this regard was in her due process complaint. The evidence demonstrates that the parties discussed settlement of the due process complaint and that DCPS has authorized Petitioner to obtain independent OT services and tutoring at public expense. Petitioner asserts now that what DCPS has provided is insufficient.

In the current hearing, Petitioner presented a request for compensatory education that combined the request related to the July 27, 2019, HOD, and the alleged denials of FAPE for which Petitioner did not prevail. Consequently, the evidence presented as compensatory education related to the July 27, 2019, HOD is difficult to discern. In addition, the evaluator in her speculation as to compensatory services used January 2019 as the date that the absence of should be measured, and she simply agreed with Petitioner’s advocate's proposal. This time frame far

exceeded the June 6, 2019, PWN. The evaluator was not aware that Student had use of a computer in school, and she had not seen Student since she conducted the evaluation. She had also had no communication with School A about Student progress. Therefore, her speculation as to compensatory education was not persuasive. The Hearing Office concludes there is insufficient evidence from which to make a compensatory education award.

Consequently, because Petitioner made no request to DCPS for compensatory education related to the July 27, 2019, before initiating due process, and because the evidence presented as compensatory education related to the July 27, 2019, HOD is insufficient, the Hearing Officer suggests that Petitioner first request additional compensatory education from DCPS and/or request that DCPS conduct an evaluation to determine same. Until Petitioner takes such action, the Hearing Officer concludes that Petitioner's claim under due process is premature. Petitioner's claim related to the July 27, 2019, HOD is dismissed without prejudice.

ORDER:

1. Petitioner claims as to the appropriateness of Student's current IEP and/or the failure to provide a timely amended IEP following the October 16, 2019, IEP meeting is dismissed with prejudice, and all relief sought by Petitioner is denied.
2. Petitioner's right to seek additional compensatory education than DCPS has already provided Petitioner, for the delay in DCPS conducting an occupational therapy evaluation from June 6, 2019, until October 16, 2019, determined by the July 27, 2019, HOD is hereby dismissed without prejudice,

APPEAL PROCESS:

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

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Hearing Officer
Date: June 21, 2020

Copies to: Counsel for Petitioners
Counsel for LEA
OSSE-SPED {due.process@dc.gov}
ODR {hearing.office@dc.gov}
contact.resolution@dc.gov