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**Confidential**

<p>Parents on Behalf Student,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”) Local Education Agency (“LEA”)</p> <p>Case # 2021-0038 &amp; # 2021-0050</p> <p>Date Issued: June 21, 2021</p>	<p>CORRECTED HEARING OFFICER’S DETERMINATION <sup>1</sup></p> <p>Hearing Dates: June 7, 2021, &amp; June 10, 2021</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<sup>1</sup> This Corrected HOD includes typographical and grammatical changes and eliminates personally identifiable information. The issuance date, June 21, 2021, remains unchanged. Personal identifiable information is in the attached Appendices A & B.

## **JURISDICTION:**

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

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student who is the subject of this due process hearing (“Student”) resides with Student’s parents (“Parents”) in the District of Columbia, and the District of Columbia Public Schools (“DCPS”) is Student’s local educational agency (“LEA”). Student is currently age \_\_\_<sup>2</sup> and attends a non-public special education separate school (“School A”) where Student was unilaterally placed by Parents. Student is eligible for special education and related services pursuant to IDEA with a disability classification of specific learning disability (“SLD”).

DCPS conducted a speech & language evaluation and psychological evaluation of Student in December 2020 and January 2021, respectively. Due to the current COVID19 pandemic, DCPS conducted the evaluations virtually rather than using “in-person” assessments. DCPS convened a multidisciplinary team (“MDT”) meeting on January 12, 2021, at which the psychological and speech-language evaluations were discussed. After a review of these evaluations, Parents disagreed with the validity of the virtual evaluations and requested that DCPS fund independent educational evaluations (“IEEs”).

On March 31, 2021, DCPS filed a due process complaint to defend its evaluations. (Case # 2021-0038) DCPS believes the evaluations conducted are appropriate, and Parents are not entitled to IEEs at the public’s expense. DCPS sought as relief that its evaluation(s) conducted of Student be determined appropriate under IDEA pursuant to 34 CFR §§ 300.304 – 300.306.

### **Parents’ Response to LEA’s Complaint:**

Parents, through counsel, filed a response to the DCPS’s complaint on April 7, 2021. Their response included a counterclaim against DCPS, which after being directed to do so by the Hearing Officer, was incorporated in a due process complaint that Parents filed on April 23, 2021. (Case # 2021-0050)

In their response, Parents stated, among other things, that at the January 12, 2021, MDT meeting, DCPS’s school psychologist reviewed the psychological evaluation and a DCPS occupational therapist reviewed an occupational therapy (“OT”) IEE. Parent’s requested the IEE with regard to the psychological evaluation not just because of its virtual format, but for, among other reasons, multiple mistakes in the evaluation report such as other students’ names and information that led Parents question whether the information in the report was actually about

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

Student. These reasons were all discussed during the January 12, 2021, meeting. Parent's also alleged that they requested an IEE for the OT evaluation because, among other reasons, there were misstatements regarding Student's current level of services at School A.

### **Parents' Counter Claim**

In their counterclaim, Parents allege that DCPS denied Student a free appropriate public education ("FAPE") by unreasonably delaying authorization of the IEEs for the comprehensive psychological and OT evaluations that Parent's requested on January 11, 2021, and January 12, 2021, respectively. Parents sought as relief that the Hearing Officer order DCPS to issue Parents IEEs for both a comprehensive psychological evaluation and an OT evaluation, order DCPS to convene a meeting within 30 calendar days of receipt of the completed IEEs to review the evaluations and revise Student's IEP accordingly; and fund compensatory education to address the denials of FAPE found if there are missed services from delay in evaluating Student.

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

On April 26, 2021, Parents moved to consolidate cases 2021-0038 and 2021-0050, and for case 2021-0038 to be continued so that both cases proceed on a 75-day timeline starting from April 7, 2021, the filing date of Parents' response to DCPS's due process complaint, Case 2021-0038. DCPS did not oppose the consolidation. On May 4, 2021, the undersigned hearing officer ("Hearing Officer") issued an order consolidating the complaints for purposes of hearing and setting the hearing dates. The HOD due date for both cases is June 21, 2021.

There was no resolution held on the complaint filed by DCPS. The parties participated in a resolution meeting on Parents' complaint on May 21, 2021, and did not resolve the complaint. The Hearing Officer conducted a pre-hearing conference on May 21, 2021, and issued a pre-hearing order ("PHO") on May 21, 2021, outlining, inter alia, the issues to be adjudicated.

### **PHO Issues to be Adjudicated:**

1. Whether DCPS denied Student a FAPE by failing to provide independent evaluations (psychological and OT) without unnecessary delay, or timely requesting a due process hearing after a parental request for independent evaluations and DCPS's refusal.<sup>3</sup>
2. If DCPS requested a due process hearing without unnecessary delay, are the evaluations DCPS conducted of Student appropriate under IDEA pursuant to 34 CFR §§ 300.304 – 300.306.<sup>4</sup>

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<sup>3</sup> This issue is derived from the complaint filed by Parents.

<sup>4</sup> This issue derived from the complaint filed by DCPS.

### **DCPS's Motion to Amend & Notice of Withdrawal:**

On March 28, 2021, DCPS first filed a motion to amend its due process complaint and then filed a notice of withdrawal without prejudice. The Hearing Officer determined that DCPS's notice of withdrawal superseded its motion to amend and the motion to amend was, therefore, moot. The Hearing Officer addressed DCPS' notice of withdrawal at the outset of the due process hearing.

### **DUE PROCESS HEARING:**

Due to the COVID-19 emergency, the hearing was conducted via video teleconference on June 7, 2021, and June 10, 2021. At the outset of the hearing, the Hearing Officer entertained both parties' positions concerning DCPS's notice of withdrawal, as Parents' counsel requested that the withdrawal be with prejudice. DCPS counsel made an oral motion that Parents' complaint be dismissed without prejudice based upon DCPS having granted Parents authorization for IEEs on June 1, 2021, for both a psychological evaluation and an OT evaluation. The Hearing Officer denied DCPS's motion to dismiss on the record and allowed Parents to proceed with their case because additional relief beyond the IEEs remained outstanding. The Hearing Officer concluded that DCPS's due process complaint was withdrawn without prejudice, and therefore, issue #2 listed above, which derived from DCPS's due process complaint, would no longer be adjudicated.<sup>5</sup> Therefore, only issue #1 above is adjudicated in this HOD.

### **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the following as evidence and are the sources of the findings of fact: (1) the testimony of the witnesses, and (2) the documents submitted in the parties' disclosures (Parent's Exhibits 1 through 39 and DCPS's disclosed documents that are listed as Respondent's 1 through 8) that were admitted into the record and are listed in Appendix A. Witnesses' identifying information is in Appendix B.<sup>6</sup>

### **SUMMARY OF DECISION:**

Based on the evidence adduced, the Hearing Officer concludes that DCPS failed to provide independent evaluations (psychological and OT) without unnecessary delay or timely request a due process hearing after Parents requested the independent evaluations. However, the Hearing Officer determined that DCPS's failure was a procedural violation, and it is premature to determine if DCPS's delay denied Student a FAPE. Because DCPS has already granted Parents authorization to obtain the requested evaluations, the Hearing Officer dismissed

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<sup>5</sup> Although DCPS requested that its due process complaint be withdrawn without prejudice, the Hearing Officer noted for the parties that adjudication of issue #1 might render moot the issue raised in DCPS' complaint: issue #2.

<sup>6</sup> The Hearing Officer found the witnesses credible unless otherwise noted in the Conclusions of Law. Any material inconsistencies in the testimony of witnesses that the Hearing Officer found are addressed in the Conclusions of Law. Petitioner presented five witnesses, all of whom testified as expert witnesses, except for Petitioner. The witnesses were (1) Parent's Education Advocate, (2) Student's father. DCPS presented one witness, a Compliance Specialist.

Parents' due process complaint without prejudice. Once the IEEs are completed and provided to DCPS and reviewed by an MDT, it can then be determined, as Parents' prayer for relief stated, whether there are missed services from DCPS's delay in evaluating Student. The Hearing Officer directed DCPS to convene an MDT meeting to review the IEE once they are provided to DCPS and to revise Student's IEP as appropriate considering the results and recommendations of the evaluations and to discuss compensatory education if warranted.

#### **FINDINGS OF FACT:<sup>7</sup>**

1. Student resides with Parents in the District of Columbia, and DCPS is Student's LEA. Student attends School A, a non-public special education separate school where Student was unilaterally placed by Parents for school year ("SY") 2019-2020. Student is eligible for special education and related services pursuant to IDEA with a disability classification of SLD. (Parents' Exhibits 29, 33)
2. DCPS first determined Student eligible for special education services and developed an individual education plan ("IEP") for Student on February 8, 2018, when Student was attending a DCPS school. DCPS updated Student's IEP on January 18, 2019. (Parents' Exhibit 33)
3. In August 2019, an independent OT evaluation was conducted of Student by School A's occupational therapist. (Parents' Exhibit 7)
4. Shortly after the start of SY 2019-2020, Parents filed a due process complaint against DCPS alleging, among other things, that DCPS failed to evaluate Student in all areas of suspected disability after Parents requested evaluations in February 2020. Parents contended that they requested an OT assessment in February 2018 that should have been completed by January 2019. Petitioners also contended that Student should have received an OT assessment and a speech-language pathology assessment after they requested those evaluations in or about February 2020. (Parents' Exhibit 33)
5. On November 23, 2020, a DCPS occupational therapist reviewed the August 2019 independent OT evaluation. As a part of the review, the DCPS occupational therapist observed Student during School A virtual instruction on October 29, 2020, and reviewed a short video clip of Student during instruction provided by School A. The DCPS occupational therapist also interviewed Student's mother on November 20, 2020, and administered a sensory processing rating scale given to Student's School A teacher and Student's parent. (Parents' Exhibit 17)

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<sup>7</sup> The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parenthesis following the finding. Documents cited are noted by the exhibit number. If there is a second number following the exhibit number, it denotes the page of the exhibit (or the page number of the entire disclosure document) from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately, the Hearing Officer may only cite one party's exhibit.

6. On November 13, 2020, and November 20, 2020, DCPS conducted a speech-language evaluation of Student. The evaluation report is dated December 28, 2020. DCPS conducted a psychological reevaluation of Student on the following dates: November 24, 2020, December 22, 2020, and January 4, 2021. The evaluation report is dated January 9, 2021. (Parents' Exhibits 20, 21)
7. A due process hearing was convened on Parents' due process complaint on December 1, 2020. The hearing was conducted on multiple days and concluded on February 4, 2021. The HOD was issued in that matter on March 14, 2021.<sup>8</sup> (Parents' Exhibit 33)
8. On January 12, 2021, before Parents' due process hearing concluded, DCPS convened an MDT meeting with Parents and their attorneys, at which DCPS reviewed its comprehensive psychological and speech-language evaluations and its review of School A's independent OT evaluation. DCPS decided, based on the January 12, 2021, meeting, that Student continued to meet the criteria for eligibility as a student with an SLD and issued a prior written notice ("PWN") to that effect. (Parents' Exhibits 22, 24, 25)
9. On January 11, 2021, a day before the meeting, Parents' attorney sent an email to DCPS stating that the Parents had concerns about the validity of the evaluations that DCPS had conducted, including the evaluation report reviewing the August 2019 independent School A OT evaluation. The email included another email sent to Parents' counsel from the School A occupational therapist raising her concerns about DCPS's review of her independent OT evaluation. In the email Parents' attorney requested IEEs for "each evaluation DCPS concluded," and stated that they would renew their requests at the January 12, 2021, MDT meeting. (Parents' Exhibit 2, page 117)
10. During the January 12, 2021, MDT meeting, Student's father expressed concerns about the validity of evaluation reports that DCPS presented because there were references in the reports to named children other than Student, other schools than Student attended, and reference to a different gender than Student. These references undermined his confidence in the evaluation reports. Student's father took notes during the meeting and later provided the notes to his attorney, who incorporated them into the attorney's notes of the meeting. The attorney's notes from the meeting indicate that the attorney requested an IEE for OT and speech-language during the meeting. (Father's testimony, Parents' Exhibit 22)
11. On January 19, 2021, Student's father emailed DCPS, noting his specific concerns about DCPS's comprehensive psychological evaluation. In his email, Student's father noted that he had requested an IEE. He did not receive an answer to the IEE requests before DCPS filed its due process complaint on March 31, 2021. (Father's testimony, Parents' Exhibit 2, page 119)

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<sup>8</sup> The Hearing Officer determined in the March 14, 2020, HOD that DCPS denied Student a FAPE; however, the Hearing Officer concluded that DCPS had not failed to evaluate Student in all areas of suspected disability and dismissed that claim.

12. On March 1, 2021, Parent's attorney emailed DCPS asking about the IEE requests that the attorney stated had been made by Parents a few weeks prior in a meeting for Student. The email stated that the "law requires IEEs be given without delay." The email asked for an answer of whether DCPS would grant the IEE requests for SLP, OT, and comprehensive psychological evaluations. (Parents' Exhibit 2, page 121)
13. On March 2, 2021, DCPS's attorney responded to that email, stating, "The HOD is due in this matter by 3/14/21. In light of the fact that the HOD could impact the prospective position of the parties, DCPS deems that it is reasonable for the parties to agree to allow that process to complete and to respond after the issuance of the HOD." (Parents' Exhibit 2, page 122)
14. On March 8, 2021, Parents' attorney sent an email to DCPS stating that she disagreed with that decision by DCPS and believed DCPS was unnecessarily delaying the Parents' right to have an IEE. (Parents' Exhibit 2, page 123)
15. On March 25, 2021, Parents' attorney sent an email to DCPS asking about the IEE requests to determine whether Parents would have to take other measures to get IEE authorizations from DCPS. (Parents' Exhibit 2, page 124)
16. On February 17, 2021, DCPS convened an IEP meeting to update Student's IEP. Parents and their educational advocate participated in the meeting. The educational advocate asked for a status update regarding the three requested IEEs. DCPS finalized Student's IEP, which is dated February 17, 2021. Subsequent IEP meetings were convened on March 10, 2021, and March 22, 2021, at which DCPS indicated that it would need to conduct further evaluations of Student. (Witness 1's testimony)
17. DCPS issued a PWN on April 2, 2021, of the update of Student's IEP goals and regarding transportation and extended school year ("ESY"). (Parent's Exhibit 36)
18. On May 20, 2021, DCPS issued a PWN informing that it would be moving forward in the evaluation process by conducting additional speech measures in person and an in-person comprehensive psychological. The PWN stated the MDT would be doing these evaluations to gather more information in these areas that could not be completed virtually. (Parent's Exhibit 37)
19. On June 1, 2021, DCPS issued Parents authorization to obtain an independent comprehensive psychological evaluation and an independent OT evaluation at public expense. (Parent's Exhibit 39)

## **CONCLUSIONS OF LAW:**

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

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

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, (2005). The PHO stated that DCPS would hold the burden of persuasion on issues #1 and #2.<sup>9</sup> The normal standard is the preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

**Issue 1:** Whether DCPS denied Student a FAPE by failing to provide independent evaluations (psychological and OT) without unnecessary delay, or timely requesting a due process hearing after a parental request for independent evaluations and DCPS's refusal.

**Conclusion:** The Hearing Officer concludes that DCPS failed to provide independent evaluations (psychological and OT) without unnecessary delay or timely request a due process hearing after Parents requested the independent evaluations.

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<sup>9</sup> Pursuant to DC Code § 38-2571.03 (6):

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

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



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).

An independent evaluation is one "conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." 34 C.F.R. § 300.502(a)(3)(i).

The IDEA regulations provide parents with a limited right to obtain an independent educational evaluation at public expense. The limited right arises only after the agency has procured an evaluation with which the parent "disagrees." 34 C.F.R. § 300.502(b)(1).

The regulations limit the parent to one independent evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees. *Id.* Once the parent expresses her disagreement, she may request an independent reevaluation at public expense, which the agency must either provide or file a due process complaint to establish that its evaluation is "appropriate." See 34 CFR § 300.502(b)(2). If the agency's evaluation is found to be appropriate, the parent may still obtain an independent evaluation at her own expense. 34 C.F.R. § 300.502(b)(3). See *South Kingstown School Committee v. Joanna S.*, 2014 WL 197859 (D.R.I. 2014).

Whether a school's actions under 34 C.F.R. § 300.502 constitute an "unnecessary delay" is an inquiry that must be addressed on a case-by-case basis. *J.P. ex rel., E.P. v. Ripon Unified School Dist.*, 2009 WL 1034993 (E.D. Cal. 2009) (citation omitted). The facts of each case are therefore critical.

The IDEA and its implementing regulations provide no additional guidance on what constitutes an "unnecessary delay." Though vague, this Court has interpreted the statute and regulations as requiring "prompt resolution of disputes involving the educational placement of learning-disabled children." *Herbin ex rel. Herbin v. Dist. of Columbia*, 362 F. Supp. 2d 254, 259-60 (D.D.C. 2005). But while such an undue delay constitutes a procedural violation of the IDEA, it does not "inexorably lead a court to find a child was denied FAPE." *Smith v. Dist. of Columbia*, No. 08-2216, 2010 U.S. Dist. LEXIS 125754, 2010 WL 4861757 (D.D.C. Nov. 30, 2010). Rather, the procedural violation must have affected the child's substantive rights. *Id.* "A delay does not affect substantive rights if the student's education would not have been different had there been no delay." *D.R. ex rel. Robinson v. Gov't of Dist. of Columbia*, 637 F. Supp. 2d 11, 18 (D.D.C. 2009). On the other hand, "[a] delay of more than 2-3 months is likely fatal to the [school] district's case, although the exact length will depend on the circumstances rather than being a bright-line test." Perry A. Zirkel, Independent Educational Evaluation Reimbursement

Under the IDEA: An Update, 306 Educ. L. Rep. 32, 35 (2014). citing *Hill v. District of Columbia*, No. 14-cv-1893 (GMH), at \*42 (D.D.C. Aug. 26, 2016)

The evidence in this case demonstrates that DCPS conducted a comprehensive psychological evaluation, a speech-language evaluation and reviewed an independent OT evaluation conducted by School A. DCPS reviewed these evaluations in an MDT meeting on January 12, 2021, during the pendency of a prior due process complaint Parents had filed against DCPS that involved an issue, among others, regarding Parents' alleged prior requests for evaluations.

This meeting proceeded even with the pending litigation between the parties because Student's then-current IEP was due to expire in February 2021. A day before the January 12, 2021, meeting Parents' attorney sent an email to DCPS noting Parents' disagreement with the evaluations that DCPS had conducted. The evidence demonstrates, based on Student's father's testimony and subsequent email to DCPS, that Parents requested IEEs at the January 12, 2021, MDT meeting. Although DCPS' witness testified that he did not recall a request for IEEs at the January 12, 2021, meeting, the Hearing Officer found Student's father testimony more credible because it was bolstered by the emails sent before the meeting indicating that Parents were requesting IEEs and would reiterate the request at the meeting.

The evidence demonstrates that even though DCPS conducted a review of an independent OT evaluation, the DCPS occupational therapist conducted a classroom observation, interviewed Student's parent, and administered rating scales to Student's parent and teacher. Parents considered this IEE review to be an evaluation for which it also requested an IEE.

The Hearing Officer agrees that because the DCPS occupational therapist conducted her assessment as a part of her review and Petitioner disagreed with the review report, Parents were justified in asking for an IEE for the OT evaluation and the psychological and speech-language evaluations that DCPS had conducted. Parents eventually discarded their request for an independent speech-language evaluation and sought only the IEE for a comprehensive psychological evaluation and an OT evaluation.

Although DCPS's attorney proposed that the parties await the outcome of their pending litigation for DCPS to determine if it would grant the requested IEEs, Parents' counsel disagreed with that proposal and reiterated her clients' request for the IEEs.

Thus, Parents initially requested the IEEs on January 11, 2021, and reiterated that request on several occasions after that: in the January 12, 2021, meeting, at February 17, 2021, meeting and subsequent email exchanges between Parents' attorney and DCPS's attorney. DCPS filed its due process complaint on March 31, 2021, more than two months after Parents' initial request for the IEEs. The email exchange between the parties' attorneys on March 1, 2021, and March 2, 2021, clearly demonstrate that the parties had reached an impasse concerning Parents' request for the IEEs.

Although DCPS may have considered its pending litigation with Parents to be a justifiable reason to delay its response to Parents' request, DCPS still waited nearly two weeks following the issuance of that HOD to file its due process complaint. Ultimately, DCPS withdrew its due process complaint and granted Parents the requested IEEs. However, the authorizations for the IEEs were provided nearly four months after Parents' initial request.

The Hearing Officer concludes that DCPS's delay following the apparent impasse as of the March 1, 2021, and March 2, 2021, email exchange, by waiting until March 31, 2021, to file its due process complaint, amounted to unnecessary delay. See *Horne ex rel. R.P. v. Potomac Preparatory P.C.S.*, 209 F. Supp. 3d 146 (D.D.C. 2016) (finding the agency's delay in issuing an IEE or suing parents to be inappropriate because the parties were at an impasse and that agency did not take action. DCPS's unnecessary delay in either granting Parents' IEE request or filing a due process complaint to defend its evaluation was at least a procedural violation.

As pointed out in *Hill v. District of Columbia*, a procedural violation must have affected the child's substantive rights. *Id.* "A delay does not affect substantive rights if the student's education would not have been different had there been no delay." *D.R. ex rel. Robinson v. Gov't of Dist. of Columbia*, 637 F. Supp. 2d 11, 18 (D.D.C. 2009). Although *Hill* states that "A delay of more than 2-3 months is likely fatal to the [school] district's case," It goes on to state: "... the exact length will depend on the circumstances rather than being a bright-line test."

It has not yet been determined whether the delay in DCPS granting Parents' request for IEEs will result in Student's education being different from that already prescribed under the IEP DCPS has developed for Student. Once the IEEs are completed and provided to DCPS and reviewed by an MDT, it can then be determined, as Parents' prayer for relief stated, whether there are missed services from DCPS's delay in evaluating Student. Although the Hearing Officer has determined that DCPS committed a procedural violation in its unnecessary delay in granting Parents' request for the IEEs, there is insufficient evidence from which the Hearing Officer can yet conclude that DCPS's delay resulted in a denial of a FAPE to Student. Consequently, in the order below, the Hearing Officer dismisses Parent's due process complaint without prejudice.

### **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*, 2021 WL 3656471, 11 (D.D.C. Aug. 24, 2021) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that a denial of a FAPE has not yet been determined. However, Parents are free to file another due process complaint to pursue any claim of denial of a FAPE based upon the violation determined herein once the IEEs have been completed and reviewed by an MDT.

**ORDER:**<sup>10</sup>

1. DCPS's due process complaint filed on March 31, 2021, (Case # 2021-0038) is withdrawn without prejudice.
2. Parents' due process complaint filed on April 23, 2021, that incorporated their counterclaim filed on April 7, 2021, (Case # 2021-0050) is hereby dismissed without prejudice.
3. Within ten (10) business days of its receipt of the last independent evaluation ("IEE") report that DCPS authorized Parents to obtain through public funding on June 1, 2021, DCPS shall convene an MDT meeting to review and consider the results and recommendations of the IEE evaluation reports, review and revise Student's IEP as appropriate, and discuss compensatory education if warranted.
4. All other relief requested by Parents (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 concerning the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: June 21, 2021**

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<sup>10</sup> Respondent's deadlines for compliance with any of the provisions of this order shall be extended on a day for day basis for any delay in compliance caused by Petitioner.