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Confidential

<p>Parent on Behalf of Student, ¹</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (Local Education Agency “LEA”)</p> <p>Respondent.</p> <p>Case # 2024-0036</p> <p>Date Issued: June 7, 2024</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Dates: April 22, 2024 April 26, 2024 May 10, 2024 May 21, 2024 May 23, 2024.</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter 5-A30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's parent in the District of Columbia. The District of Columbia Public Schools ("DCPS") is Student's local education agency ("LEA"). Student has been determined eligible for special education pursuant to IDEA with a disability classification of other health impairment ("OHI"). Student attends a DCPS school ("School A") for school year ("SY") 2023-2024.

On February 29, 2024, Student's parent ("Petitioner") filed a due process complaint ("DPC") alleging that DCPS ("Respondent") denied Student a free appropriate public education ("FAPE") by inter alia, failing to timely and comprehensively evaluate Student, failing to provide Student with an appropriate IEP, and failing to provide Petitioner full access to Student's educational records.

Petitioner seeks as relief a finding that Student has been denied a FAPE and that DCPS be ordered to fund a comprehensive psychological evaluation to include assessment for autism, of social-emotional functioning, sensory processing, and Student's writing skill level; revise Student's individualized educational program ("IEP") to provide support and services addressing the following: language or communication and reciprocal social interaction relating to autism, and writing skills; reconvene Student's IEP team to review the results of the above-named evaluation(s) and to revise Student's IEP as appropriate, and immediately provide Petitioner access to the educational records that have not yet been provided.

DCPS's Response to the Complaint:

DCPS filed a response to the DPC on March 11, 2024. In its response, DCPS stated, inter alia, the following:

Student has not been denied a FAPE. There has been no violation of IDEA. Student was referred for special education evaluation in February 2024. Student was comprehensively assessed over four dates for the psychological assessment to ensure the fidelity of information and the comprehensive nature of the evaluation procedures used. The report was completed on February 28, 2024, and reviewed at the subsequent IEP meeting. Student was considered for the suspected disabilities at the time, including autism. The subsequent programming and placement were appropriately determined based on this report's results and the other relevant student data and information.

In mid-June 2023, School A's LEA representative provided a folder with numerous records enclosed, including beginning-of-year ("BOY") and end-of-year ("EOY") results of testing, attendance, report

cards, service trackers, and the April 2023 psychological report. The parent had made an oral referral in early February 2023. On the referral information, the parent reported Attention Deficit Hyperactivity Disorder (“ADHD”), anxiety, and some behavior issues. However, no information or reference in any way was made to autism. A month after that response from DCPS with records, Petitioner’s counsel sought additional records and a LEA representative again replied with the documents/records on July 24, 2023.

Lastly, procedural violations such as those alleged do not per se warrant relief such as that requested by Petitioner. Again, it is Petitioner’s burden to demonstrate that there has been substantive harm that rises to the level of a FAPE denial.

Resolution Meeting and Pre-Hearing Conference:

Petitioner and DCPS participated in a resolution meeting on March 12, 2024. The parties did not mutually agree to shorten the 30-day resolution period. The DPC was filed on February 29, 2023. The 45-day period began on March 31, 2023, and ended [and the Hearing Officer’s Determination (“HOD”) was originally due] on May 20, 2024. The parties agreed to a continuance of the hearing, an extension of the HOD due date, and an additional extension to file closing arguments. The HOD is now due June 7, 2024.

The undersigned impartial hearing officer (“IHO”) conducted a pre-hearing conference on March 20, 2024, and issued a pre-hearing order (“PHO”) on April 1, 2024, stating, inter alia, the issue to be adjudicated.

ISSUES:²

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to timely and comprehensively evaluate Student for autism, ADHD, and anxiety?
2. Did DCPS deny Student a FAPE by failing to assess Student, as a part of Student's initial evaluation, in the areas of (a) writing skills, (b) sensory processing, (c) need for occupational therapy?
3. Did DCPS deny Student a FAPE by failing to provide Student an appropriate IEP on May 8, 2023?
4. Did DCPS deny Student a FAPE by failing to provide Student appropriate IEPs dated January 29, 2024, and February 20, 2024?
5. Did DCPS deny Student a FAPE by failing to provide Petitioner full access to Student's educational records?

² At the outset of the due process hearing, the IHO reviewed the single issue to be adjudicated the parties agreed to the issue as stated herein.

DUE PROCESS HEARING:

The Due Process Hearing was convened on April 22, 2024, April 26, 2024, May 10, 2024, May 21, 2024, and May 23, 2024, with closing arguments submitted on May 30, 2024. The hearing was conducted via video teleconference on the Microsoft Teams platform.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 102 and Respondent's Exhibits 1 through 85) that were admitted into the record and are listed in Appendix 2.³ The witnesses testifying on behalf of each party are listed in Appendix B.⁴

SUMMARY OF DECISION:

Petitioner held the burden of persuasion on issues #1, #2, and #5. Respondent held the burden of persuasion on issues #3 and #4 after Petitioner presented a prima facie case on those issues. Based on the evidence adduced, the IHO concluded that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on issues #1, #2, and #5. Respondent sustained the burden of persuasion of issues #3 and #4. The IHO dismissed Petitioner's DPC with prejudice.

FINDINGS OF FACT:⁵

1. Student resides with Student's parent, Petitioner, in the District of Columbia. DCPS is Student's LEA. Student has been determined eligible for special education pursuant to IDEA with a disability classification of OHI. Student is currently in _____grade and attending School A, a DCPS school. (Parent's testimony, Petitioner's Exhibit 19)

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

⁴ Petitioners presented four witnesses: (1) Student's mother (Petitioner), (2) an educational advocate who testified as an expert, (3) a psychologist and educational advocate who testified as an expert, and (4) a legal assistant to Petitioner's counsel who testified about record requests. Respondent presented six witnesses, all of whom testified as expert witnesses: (1) a DCPS school psychologist, (2) a DCPS occupational therapist, (3) a DCPS speech-language pathologist, (4) School B's LEA representative, (5) Student's School A case manager and special education teacher, and (6) School A's director of specialized instruction. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

⁵ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit submitted by more than one party separately, the IHO may only cite one exhibit.

2. During SY 2022-2023, Student attended another DCPS school, ("School B") where Petitioner, on February 6, 2023, requested that Student be evaluated for special education eligibility due to Student's ADHD, anxiety and struggle to remember things. School B prepared and analysis of existing data ("AED") report dated March 8, 2023. (Respondent's Exhibit 6, Petitioner's Exhibit 4)
3. The AED report noted the following regarding Student's academics: "[Student's] strength that [Student] displays is that of some letter and number recognition. [Student] can solve simple math problems which involve counting on and breaking apart numbers to create number bonds. [Student] can segment and blend CVC words. [Student] is an active participant in Heggerty, Foundations and building math fluency. [Student] enjoys making the connection that letters have sounds and realizing that these letters create words and form sentences. [Student] can identify that a sentence begins with an uppercase letter and ends with a punctuation mark. [Student] participates in student turn and talks along with modeling to [Student's] peers how to create number bonds/counting on and segmenting and blending CVC words. [Student] enjoys having a class job and completes [REDACTED] job when assigned." (Respondent's Exhibit 6)
4. The AED report noted that School B's occupational therapist had informally assessed Student. The AED report noted the following: "OT screen outside of classroom on 3/2/2023; OT screen completed on 3/2/23 and overall it was noted that [Student] displayed difficulty keeping [Student's] body regulated during a small group session with [Name] (noted in observation). A brief ocular motor screen was completed in which localizations were fair/fair+ response, alternating between 2 stationary points fair/good with min A direction repetitions for both horizontal and vertical directions, eye tracking "H" pattern good, identifying letters from far point mode with 3/3 success. A prewriting stroke screen was completed and handwriting in which [Student] stabilized the paper well, copied 2 words and wrote [Student's] name. [Student] was observed to draw [Student's] letters versus forming them. [Student] displayed a few reversals. Able to copy the words with approx. 60-70% legibility. [Student] was able to copy bilateral body movements. [Student] reported a good home life and relationship with teacher, love to play and finds reading along with writing easy, identifies math as the hardest subject and feels sad when math is difficult, stated fear of cats. With cutting [Student] utilized a dominant right hand to cut within 1/2" while using L non- dominant hand with pronated grasp; WNL. With dressing manipulation/fm skills; zippers: emerging skill; coordination well; needs experience. With tying: unable to; needs experience; able to do loops and crossing. With Snap Buttons: WNL." (Respondent's Exhibit 6)
5. In April 2023, a DCPS psychologist evaluated Student to determine if Student qualified for special education with developmental delay ("DD"). Student was age __ years, __ months at the time of the evaluation, The psychologist noted that Student had been diagnosed with ADHD and anxiety. The psychologist conducted classroom observations and interviews and administered the Kaufman Assessment Battery for Children, second edition ("KABC-II") to assess Students' cognitive abilities and the Woodcock-Johnson IV – Tests of Achievement ("WJ-IV") to assess Students' academic functioning. (Petitioner's Exhibit 4)
6. Regarding Student's academic functioning, the evaluation report noted the following:

- “[Student’s] overall reading score was in the low average range. [Student] was able to correctly name 10 out of 10 letters. [Student] could sometimes pick a word [Student] heard from a word bank. [Student] was able to correctly identify beginning sounds and 2 out of 4 individual letter sounds. [Student] was not yet able to blend two sounds into a word.”
 - “[Student’s] overall math score was in the low average range for [Student’s] age. [Student] was able to count objects with and without distractors. [Student] was able to complete simple addition and subtraction word problems read to [Student]. On calculation, [Student] was able to correctly write digits and complete 2 out of 7 single digit addition problems.”
 - “[Student’s] overall writing score was in the low average range. [Student] was able to trace shapes and write 4 out of 6 letters. [Student] was not able to spell any words. On writing samples, [Student] wrote enough of [Student’s] first name to get credit but was unable to write a missing word in a sentence read to [Student]. Instead, [Student] copied the words of the sentence provided. (Petitioner’s Exhibit 4)
7. The psychologist noted in the evaluation report: “[Student] showed age-appropriate cognitive abilities in short-term memory, visual processing, and general knowledge. However, [Student] struggled with long-term storage and retrieval. [Student’s] academic skills measured [Student’s] reading, mathematics, and writing skills in the low average to average range, with the exception of decoding being low.” (Petitioner’s Exhibit 4)
 8. Based on the evaluation results, the psychologist concluded that “[Student] displayed academic skills in the low average to average range for [Student’s] age. These scores match [Student’s] cognitive scores, which were in the low average range, with the exception of weakness in long-term memory, which corresponds with [Student’s] lowest academic score in decoding. These scores suggest that [Student] does not meet the qualifications of a student with a Specific Learning Disability (SLD). [Student’s] cognitive scores are largely in the average range, with a weakness in long term storage and retrieval. This may be indicative of a Developmental Delay (DD).” (Petitioner’s Exhibit 4)
 9. School A completed an evaluation summary report dated April 25, 2023. The report noted the following from a classroom observation of Student: “On March 2, 2023, [Student] was observed in the classroom for approximately 15 minutes during a math lesson by [occupational therapist] OT and OT student. [Student] started by sitting at [Student’s] desk with activity materials. After about 3 minutes, [Student] moved to a back table to continue working on math skills. [Student] was observed to interact verbally with peers and staff during the observation. [Student] followed staff directions with minimal cues when being spoken to directly. Generally, [Student] fidgeted and moved often when instructed to be seated at tabletop: [Student] rocked in [Student’s] chair laterally and front to back ~57 times, mouthed marker cap 6 times, fell out of [Student’s] chair after fidgeting 2 times.

[Student] demonstrated a pattern of leaning forward on the desk instead of sitting up straight and calmly.” (Petitioner’s Exhibit 13)

10. The April 25, 2023, evaluation Summary report noted Student’s strengths and areas of concern: “Description of Strengths: Prewriting strokes (lines, basic shapes) Age-appropriate cutting on a line R hand dynamic quadruped grasp; functional and age-appropriate, general good demeanor and participation in school activities (“I did it!” during math and writing numbers)” “Description of Concerns Weaknesses; keeping body calm/regulated while sitting at tabletop (sitting and fidgeting, one leg standing and other leg on chair, rocking in chair laterally and front to back, falling out of chair given “wiggles”) minor mouthing on expo marker cap (may fade with age and experience) Awareness of hygiene (put hands down back of pants in observation)” (Petitioner’s Exhibit 13)
11. On April 25, 2023, School B convened an eligibility meeting and determined Student eligibility under the OHI disability classification due to ADHD and determined that Student's disability impacts Student academically in math and reading. (Petitioner's Exhibit 29)
12. Student's initial IEP was developed on May 8, 2023. The IEP stated the following regarding Positive Behavior Interventions and Support: Student's behavior impedes Student's learning and that of other children. "[Student] has been described as verbally and physically combative when [Student] is denied a privilege. At times, [Student] also struggles to remember one-step tasks. Teachers and staff have attempted one on one conferences with the child, close proximity, pairing with a buddy student and parent conferences to eradicate the behaviors. However, the behaviors persist.” (Petitioner’s Exhibit 16)
13. The IEP also noted the following in the present levels of performance: "[Student] is a ___-year-old student who is on the verge of completing [Student's] _____ school year at [School B]. [Student] is delightful and enjoys socializing with peers and adults. According to [Student's] teachers, [Student] struggles with observing appropriate physical boundaries and often needs redirection to remain on task. [Student] been diagnosed as ADHD and with anxiety." (Petitioner's Exhibit 16)
14. The IEP included goals in math and reading, emotional, social and behavioral development. The IEP stated the following in the description of how the Student’s disability affects the Student’s access to the general education curriculum: “Given [Student’s] diagnosis of ADHD and anxiety and its impact on [Student’s] behavior, [Student] will likely have difficulty assessing the general education curriculum without special education and behavior support services.” (Petitioner’s Exhibit 16)
15. The IEP prescribed the following services:

Special Education Services

Service	Setting	Begin Date	End Date	Time/Frequency
Reading	Outside General Education	05/08/2023	05/07/2024	2.5 hr per wk

Mathematics	Outside General Education	05/08/2023	05/07/2024	2.5 hr per wk
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Related Services

Service	Setting	Begin Date	End Date	Time/Frequency
Behavioral Support Services	General Education	05/08/2023	05/07/2024	60 min per mon

Consultation Services

Service	Begin Date	End Date	Time/Frequency
Behavioral Support Services	05/08/2023	05/07/2024	30 min per mon

(Petitioner’s Exhibit 16)

16. On May 23, 2023, on behalf of Petitioner, Petitioner's counsel requested Student's educational records from School B. The request was for 27 categories of educational records, including evaluations, report cards and IEP progress reports. A staff member of the counsel's firm made follow up phone calls to obtain the records. Some of the requested records were received, but not all. As of the due process hearing, the outstanding documents were some of Student's related services trackers, some standardized testing, and an evaluation. A follow-up correspondence was sent for recent educational records on January 8, 2024. Following Student's January 12, 2024, IEP meeting the firm requested Student's IEP progress reports. DCPS provided additional records in response to each request. The records that Petitioner's counsel's firm asserts that Petitioner still needs to be provided are SY 2020-2022 standardized testing, SY 2023-2024 related service trackers and a psychological reevaluation prior to SY 2022-2023. (Witness 2’ testimony, Petitioner’s Exhibits 94, 95, 98)

17. Student began attending School A at the start of SY 2023-2024. In October or November of 2023, Petitioner provided School A with an independent assessment conducted on April 27, 2023, using the Autism Diagnostic Observation Schedule- Second Edition (“ADOS-2). The assessment indicated that Student's scores were consistent with autism. A DCPS psychologist reviewed this assessment on January 9, 2024. The DCPS psychologist concluded that the independent assessment was valid and reliable for the specific purpose for which it was used but noted that the assessment was lacking in several areas, including a review of relevant background information, insufficient data, and a variety of assessment tools were not used in assessing Student for autism. The IEE check list stated that additional information was needed and that a DCPS assessment was not waived. The IEE review stated the following:

“The report completed by [Name] did not include any cognitive nor academic assessments. It is unclear in the report what the findings are from the CARS-2 and ADOS-2 as it is not specified. Background and developmental history was not included. It is unclear if the parent or student were interviewed. Data was not included from one of [Student’s] teachers. It is unclear if the examiner observed [Student] across multiple settings. The DCPS examiner will need to complete a cognitive

assessment, academic assessment, classroom observations, parent interview, teacher interviews, student interview and autism rating scales. The DCPS examiner made several attempts over several weeks to make contact with the external examiner and the agency to obtain a copy of the evaluation report.”

(Petitioner’s testimony, Petitioner’s Exhibits 5, 6)

18. On November 27, 2023, School A conducted a comprehensive occupational therapy (“OT”) evaluation of Student with a report dated December 31, 2023. In December 2023, School A conducted a speech-language evaluation with a report dated December 31, 2023. School A completed an evaluation summary report dated January 5, 2024. (Petitioner’s Exhibits 7, 8, 14).
19. On January 12, 2024, School A convened an eligibility meeting at which the OT evaluation was reviewed, and the team determined Student eligible for OT services. The notes from the meeting reflect the following: “Overall, [Student] presented with deficits in the areas of visual motor integration and motor integration on skills, average performance in the area of visual perception on skills, and sensory processing deficits. When asked if [Student] would qualify for services at this point in time, [The OT evaluator] stated that [Student] would likely benefit from OT services at this time, but that would ultimately be a team decision. [Student’s] mother noted that [Student] is exhibiting difficulty with reading and writing homework, including letters/letter sounds. [OT evaluator] indicated that [Student] was able to recognize [] letters, and [Special Education Teacher] spoke to [Student] knowing a lot of letters and letter sounds. [Special Education Teacher] also noted that [Student] rushes through [Student’s] work and often tries to guess. She also indicated that once more data is collected regarding middle of the year assessments and the upcoming comprehensive psychological assessment, a clearer picture of how [Student] is being impacted will be presented. The team agreed to add occupational therapy services to [Student’s] IEP. [The OT evaluator] agreed to propose a level of service and would return back to the team with a more concrete level of service minutes/frequency.” School A completed a final eligibility report dated January 17, 2024. (Petitioner’s Exhibit 31,71)
20. In February 2024, School A conducted a comprehensive psychological reevaluation with a report dated February 28, 2024. The DCPS psychologist administered the following assessments: Woodcock-Johnson IV Tests of Achievement, Woodcock-Johnson IV Tests of Cognitive Abilities, and Gilliam Autism Rating Scale- Third Edition (GARS-3), in addition to reviewing Student's prior evaluations, educational records and conducting interviews with Student's parent and teachers and conducting a classroom observation. (Petitioner’s Exhibit 10)
21. The psychologist summarized her findings in the evaluation report as follows: “In summary, [Student] is a ___-year-old girl in the ____ grade at [School A] in Washington, D.C. [Student] was referred for this re-evaluation by [Student’s] mom due to receiving a diagnosis of Autism Spectrum Disorder by another outside provider. Data from this evaluation indicates that [Student] demonstrates Low Average overall cognitive skills. [Student] presents with High Average (SS=112) Oral Vocabulary skills and Average verbal

attention (SS= 102) and long-term retrieval (SS=109) skills. [Student] also presents with Low Average Visualization (SS=88), Number Series (SS= 82) and Letter-Pattern Matching skills (SS= 89). [Student] demonstrated a weakness in the area of Phonological Processing (SS= 64). [Student's] overall academic functioning fell within the Low range (SS=72). [Student] demonstrated Low functioning in the areas of Math (SS=74) and Written Language (SS=79). [Student's] reading skills fell within the Very Low range (SS=69)." (Petitioner's Exhibit 10)

22. The psychologist went on to state regarding the autism assessment: "Lastly, data from the GARS-3 shows that [Student] demonstrates many behaviors characteristic of ASD within the home setting, but within the school setting [Student] emotional responses are the only elevated behaviors observed in the school setting. [Student] appears to get along well with [] peers and has developed several friendships. Teacher concerns include [Student's] dishonesty and emotional responses in the classroom. At this time, [Student's] behavior in school varies greatly from parent report at home. [Student] may continue to benefit from repetition of directions, repeated exposure to content, and frequent redirection at school. It is important to remember that [Student] is also a student with other disabilities that also appear to impact [Student's] ability to access instruction. A student with this overall presentation will require additional support to complete grade-level content." (Petitioner's Exhibit 10)
23. School A amended Student's IEP on January 29, 2024. The IEP amendments noted the following: "According to [Student's] recent eligibility determination meeting, the student was deemed eligible for occupational therapy (OT) goals, and the social worker would like to make changes to [Student's] behavioral goals. Therefore, the LEA proposed to add occupational therapy goals to the existing IEP and amend the current behavioral goals." (Petitioner's Exhibit 17)
24. School A convened an IEP meeting on February 8, 2024, to "initiate occupational therapy services for [Student] as per the recent eligibility determination meeting held on 1/12/24. The MDT determined that [Student] would benefit from related services in occupational therapy. Also, the social worker is proposing to add an additional hour of pull-out behavioral group support, monthly." (Petitioner's Exhibit 72)
25. School A amended Student's IEP on February 20, 2024, to account for a technical problem when the OT services were added. The IEP amendment noted the following: Due to technical issues, when the IEP was finalized, the services and supplemental aids page were deleted. Therefore, this IEP must be amended to reinstate [Student's] specialized instruction and related services to [Student's] IEP." (Petitioner's Exhibit 18)
26. When Student first arrived at School A, Student would not want to engage in assignments or academic conversations. Student did not have letter knowledge and did not know how to spell Student's name or write numbers. Student did not know how to copy simple words and letters. Regarding reading, Student could not identify letters. Student has received writing support since arriving at School A. Student's work must be modified to fewer questions within the time that Student's typically developing peers must complete. Math

word problems must be broken down for Student to work on in stages. For Student to put a question in writing, Student needs more time. Student can follow directions with up to two verbal prompts. Student is placed in a classroom at School A that is very structured. Student has been given management duties in the classroom, and as a result, Student's apprehension decreased significantly over time, and the Student's confidence in Student's academic abilities has grown. (Witness 8's testimony)

CONCLUSIONS OF LAW:

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

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding 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 5A DCMR 3053.6, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Petitioner held the burden of persuasion on issues #1, #2, and #5. Respondent held the burden of persuasion on issues #3, and #4 after Petitioner presented a prima facie case on those issues. 6 The burden of persuasion shall be met

⁶ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child's individual educational program or placement or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement, provided that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

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

by a preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 F. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Did DCPS deny Student a FAPE by failing to timely and comprehensively evaluate Student for autism, ADHD, and anxiety?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to timely and comprehensively evaluate Student for autism, ADHD, and anxiety.

Pursuant to 34 CFR § 300.15, Evaluation means procedures used in accordance with §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. (Authority: 20 U.S.C. 1414(a) (c))

Pursuant to 34 C.F.R. § 300.304 (c) a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5A § 3006.7(a).

All areas "related to the suspected disability" should be assessed, including academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5A § 3006.7(f).

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).

Petitioner contends that Student's April 17, 2023, psychological evaluation was not comprehensive as it did not assess for autism, did not have any social-emotional-behavioral assessment(s), and failed to assess how ADHD and anxiety affected Student in the school environment.

There was insufficient evidence that DCPS was made aware of the outside evaluation when Student was initially evaluated during SY 2022-2023. Based upon Petitioner's testimony, she did not provide DCPS the outside evaluation until October or November 2023 to School A. School A reviewed the outside evaluation in January 2024 and conducted a psychological reevaluation in

February 2024, which included an assessment for autism. Before Petitioner provided the outside evaluation to School A, there was little if any data that would have caused DCPS to suspect that Student should have been evaluated for autism. Regarding the evaluation for ADHD or anxiety, DCPS's initial evaluation noted these diagnoses and the Student's initial IEP addressed these concerns.

Although the evaluation did not include specific assessment tools in these areas, the conditions were noted and addressed with social emotional and behavioral goals in Student's IEP. The IHO did not credit Petitioner's witnesses' testimony that these areas should have been assessed in the initial evaluation because they lacked interaction with Student directly and had not observed Student in the classroom. There was insufficient evidence of any detrimental effect that the areas were not specifically assessed given the fact that Student's IEP and programming addressed these areas. Consequently, the IHO concludes that Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

ISSUE 2: Did DCPS deny Student a FAPE by failing to assess Student, as a part of Student's initial evaluation, in the areas of (a) writing skills, (b) sensory processing, (c) need for occupational therapy?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied the Student a FAPE by not assessing the Student's writing skills, sensory processing, and need for occupational therapy during the initial evaluation.

As previously noted, pursuant to 34 C.F.R. § 300.304 (c) a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." The evaluators shall utilize "a variety of assessment tools and strategies [to] gather relevant functional and developmental information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general curriculum ... that may assist in determining whether the child is a child with a disability." D.C. Mun. Regs. Title 5A § 3006.7(a).

All areas "related to the suspected disability" should be assessed, including academic performance, health, vision, hearing, social and emotional status, general intelligence (including cognitive ability and adaptive behavior), communicative status, and motor abilities. The evaluations must be "sufficiently comprehensive to identify all of the child's special education and services needs." D.C. Mun. Regs. Title 5A § 3006.7(f).

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).

Petitioner contends that Student's writing skills, particularly the mechanics of writing and fine motor skills, should also be evaluated based on then-available data through an occupational therapy assessment.

The evidence demonstrates that when School B evaluated the Student in SY 2022-2023, the psychological evaluation and the evaluation summary indicated Student's writing skills were assessed and that a DCPS occupational therapist conducted an OT screening of Student. The credible testimony of the DCPS witnesses indicated that Student's skill levels were not atypical of Student's same-age peers and did not warrant further assessment at the time. When Student moved from _____ to _____ grade at School A, the school-level demands increased such that it was appropriate to conduct a more formal OT assessment, which was done, and the Student was provided services as a result. The fact that the services were provided the following school year did not necessarily indicate that such an evaluation was warranted the year prior at the time of Student's initial evaluation.

Likewise, in writing skills and sensory processing, the Student's skill levels were similar to the Student's same-age peers. They did not warrant further assessment at the time of the initial evaluation beyond the DCPS school psychologist's assessment. As discussed in the issue above, there was at that time no indication that Student might have autism, or any sensory concerns associated with autism. The initial evaluation included an assessment of Student's writing abilities. Although writing was not explicitly addressed with goals in Student's initial IEP, the DCPS witnesses credibly testified that with Student skill level at the time, Student pre-writing skills were being focused on in the IEP's academic goals.

Student's initial IEP included goals in math and reading, emotional, social and behavioral development. The IEP stated the following in the description of how the Student's disability affects Student's access to the general education curriculum: "Given [Student's] diagnosis of ADHD and anxiety and its impact on [Student's] behavior, [Student] will likely have difficulty assessing the general education curriculum without special education and behavior support services." The IEP prescribed the following services: 2.5 hours each per week of specialized instruction in reading and math. In addition, the IEP prescribed both direct and consult behavior support services.

The IHO did not credit Petitioner's witnesses' testimony that these areas should have been assessed in the initial evaluation. Although Petitioner presented expert witnesses who testified to the contrary, the witnesses had not met Student or observed Student in an educational setting. There was insufficient evidence of any detrimental effect to Student because these areas were not specifically assessed during the initial evaluation. Consequently, the IHO concludes that Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

ISSUE 3: Did DCPS deny Student a FAPE by failing to provide Student an appropriate IEP on May 8, 2023?

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to provide Student an appropriate IEP on May 8, 2023.

The Individuals with Disabilities Education Act ("IDEA") was enacted to ensure that all disabled students receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). "Commonly referred to by its acronym 'FAPE,' a free appropriate public education is defined as 'special education and related services that' are 'provided at public expense, under public supervision ...;' and that 'meet the standards of the State educational agency;' as well as 'conform[] with [each disabled student's] individualized education program.'" *Charles H. v. District of Columbia*, 2021 WL 2946127 (D.D.C. June 16, 2021) (quoting 20 U.S.C. § 1401(9)) (alterations in original). "Special education" is defined as "specially designed instruction, at no cost to parents, [that] meet[s] the unique needs of a child with a disability." 20 U.S.C. § 1401(29). "Related services," on the other hand, are defined as "such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26)(A).

"Under [the] IDEA and its implementing regulations, students with disabilities ... are entitled to receive [a] FAPE through an Individualized Education Program (or IEP)." *Charles H.*, 2021 WL 2946127 (quoting 20 U.S.C. § 1401(9)(D)). An IEP is a written document that lays out how the student will obtain measurable annual goals and that mandates specific special education and related services that the student must receive. 20 U.S.C. § 1414(d)(1)(A)(i). It is created for each student by a special "IEP Team," consisting of the child's parents, at least one regular-education teacher, at least one special-education teacher, and other specified educational experts. *Id.* § 1414(d)(1)(B). An IEP is the main tool for ensuring that a student is provided a FAPE. See *Charles H.*, 2021 WL 2946127 (quoting *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013)). " (*Robles v. District of Columbia* 81 IDELR 183 D.D.C. August 26, 2022)

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 second substantive prong of the *Rowley* inquiry is whether the IEP developed was reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances. In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the "educational benefits" requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular

classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Andrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).

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

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

Petitioner contends that Student's May 8, 2023, IEP (a) lacked occupational therapy services and support services because DCPS failed to timely evaluate Student in this area to address, inter alia, Student’s visual motor integration, motor coordination, and sensory processing deficits (b) did not provide Student the support and services as a student with autism and (c) failed to consider Student's writing skills.

As noted in the issues above, there was no basis for DCPS to have assessed Student for autism or occupational therapy or in writing beyond the assessments conducted during Student's initial evaluation. Thus, the fact that the Student's initial IEP did not specifically address autism-related concerns, lacked OT goals and services, and did not have specific goals in writing is not a sufficient basis for the Student's IEP to be determined inappropriate.

The evidence demonstrates that when Student first arrived at School A, Student would not want to engage in assignments or academic conversations. Student did not have letter knowledge and needed to learn how to spell Student's name or write numbers. Student did not know how to copy simple words and letters. Regarding reading, Student could not identify letters. Student received writing support since arriving at School A and over time Student's confidence in Student’s academic abilities has grown.

As previously stated, Student's initial IEP included goals in math and reading, emotional, social, and behavioral development. The IEP stated the following in the description of how the Student’s disability affects the Student’s access to the general education curriculum: “Given [Student’s] diagnosis of ADHD and anxiety and its impact on [Student’s] behavior, [Student] will likely have difficulty assessing the general education curriculum without special education and behavior support services.” The IEP prescribed the following services: 2.5 hours each per week of specialized instruction in reading and math. In addition, the IEP prescribed both direct and consult behavior support services.

As discussed in the issues above, there was at that time Student’s initial IEP was developed no indication that Student might have autism, or any sensory concerns associated with autism. The initial evaluation included an assessment of Student's writing abilities. Although writing was not explicitly addressed with goals in Student's initial IEP, the DCPS witnesses credibly testified that

with Student skill level at the time, Student pre-writing skills were being focused on in the IEP's academic goals.

Also, as discussed in the issues above, the evidence demonstrates that even though Student was recently evaluated for occupational therapy services and those services were added to Student's IEP, when Student's initial evaluation was conducted and Student's initial IEP was developed, School B screened for OT considerations and found that Student's skill levels were age appropriate. The fact that Student's IEP was later amended to include OT goals is not a sufficient basis to determine that the initial IEP was inappropriate because it lacked OT goals and services. Although Petitioner presented expert witnesses who testified to the contrary, the witnesses had not met Student and had not observed Student in an educational setting.

Based upon the evidence, the IHO concludes that Student's initial IEP developed on May 8, 2023, was reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances at the time it was developed.

ISSUE 4: Did DCPS deny Student a FAPE by failing to provide Student appropriate IEPs dated January 29, 2024, and February 20, 2024?

Conclusion: Respondent sustained the burden of persuasion by a preponderance of the evidence that DCPS did not deny Student a FAPE by failing to provide Student an appropriate IEP on January 29, 2024, and February 20, 2024.

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

Petitioner contends that Student's January 29, 2024, and February 20, 2024, IEPs (a) did not provide Student the support and services as a student with autism and (b) failed to consider Student's writing skills considering that Student was struggling in writing.

The evidence demonstrates that School A amended Student's IEP on January 29, 2024, to account for Student's recent eligibility determination for OT goals and changes to behavioral goals. School A amended Student's IEP on February 20, 2024, to account for a technical problem when the OT services were added. The IEP amendment noted when the IEP was finalized, the services and supplemental aids page were deleted.

However, the evidence demonstrates that there was no need at the time for Student's IEP to be amended to update the academic goals that were prescribed in Student's initial IEP as the annual review period for Student's IEP goals had not yet expired. There was no evidence that supported a finding that when Student's IEP was amended in January and February 2024, that there was any basis to for the IEP to have at that point added support and services for a student with autism or goals for writing. Based upon the evidence, the IHO concludes that Student's initial IEP developed on May 8, 2023, continued to be reasonably calculated to enable Student to make progress

appropriate in light of Student's circumstances when the IEP was amended January 29, 2024, and February 20, 2024.

ISSUE 5: Did DCPS deny Student a FAPE by failing provide Petitioner full access to Student's educational records?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that DCPS denied Student a FAPE by failing to provide Petitioner full access to Student's educational records.

IDEA regulations provide that each agency "must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under [IDEA]." 34 CFR § 300.613 (a). "The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing ... or resolution session ... , and in no case more than 45 days after the request has been made." *Id.* In addition, a parent's right to inspect and review includes: (1) the "right to a response from the participating agency to reasonable requests for explanations and interpretations of the records"; (2) the "right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records"; and (3) the "right to have a representative of the parent inspect and review the records." *Id.* § 300.613 (b).

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

The District of Columbia Municipal Regulations ("DCMR") provide that DCPS must honor the records request as soon as possible, but in no case in more than 45 calendar days. 5E DCMR § 2600.6. Failure to timely comply with a parent's request to inspect education records is a procedural violation of the IDEA. See, e.g., *N.P. v. E. Orange Bd. of Educ.*, No. CIV. 06-5130 DRD, 2011 WL 463037 at 7 (D.N.J. Feb. 3, 2011) (procedural violations of the IDEA by failing to timely respond to parent's requests for records.)

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)

The evidence demonstrates that on May 23, 2023, on behalf of Petitioner, Petitioner's counsel requested Student's educational records from School B. The request was for 27 categories of educational records, including evaluations, report cards and IEP progress reports. A staff member

of the counsel's firm made follow up phone calls to obtain the records. Most of the requested records were received.

During the due process hearing, the records that Petitioner's counsel's firm asserts that Petitioner has not been provided are SY 2020-2022 standardized testing, SY 2023-2024 related service trackers and a psychological reevaluation prior to SY 2022-2023.

Although Petitioner asserts that she has not been provided all requested records, there was competing testimony from Respondent witnesses that all requested and available records have been provided. Despite Petitioner's witness' testimony that all requested records have not yet been received, there was insufficient evidence of any detrimental effect to Student or to Petitioner's ability to participate in Student's educational planning that rises to the level of a denial of FAPE. Consequently, the IHO concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ORDER:

Petitioner's due process complaint filed on February 29, 2024, is hereby dismissed with prejudice and all relief requested by Petitioner is denied.

APPEAL PROCESS:

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

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Impartial Hearing Officer
Date: June 7, 2024

Copies to: Counsel for Petitioner
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