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OSSE  
Office of Dispute Resolution  
September 28, 2023

**Confidential**

Parent on Behalf of Student, <sup>1</sup>	HEARING OFFICER'S DETERMINATION
Petitioner,	Hearing Dates: September 8, 2023 September 11, 2023 September 15, 2023 September 18, 2023
v.	Counsel for Each Party listed in Appendix A
District of Columbia Public Schools (Local Education Agency "LEA")	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
Respondent.	
Case # 2023-0117	
Date Issued: September 28, 2023	

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<sup>1</sup> 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 ("Petitioner") in the District of Columbia. The District of Columbia Public Schools ("DCPS" or "Respondent") is Student's local education agency ("LEA"). Student is a child with a disability pursuant to IDEA with a classification of developmental delay ("DD"). Student attends a public special education day school ("School A").

Petitioner alleges that in July 2022 she requested that School A reevaluate Student to include the following evaluations: comprehensive psychological, assistive technology ("AT"), speech-language, physical therapy ("PT"), and occupational therapy ("OT").

Petitioner alleges that School A conducted a PT evaluation and an educational evaluation that a team reviewed on October 28, 2022. Student was subsequently discharged from consultative PT services, which were later removed from Student's IEP on February 16, 2023.

On June 22, 2023, Student's parent ("Petitioner") filed due process complaint against DCPS as the LEA alleging that School A denied Student a free appropriate public education ("FAPE") by failing to appropriately reevaluate Student and failing to provide Student an appropriate individualized educational program ("IEP") by removing consultative PT services from Student's IEP.

**Relief Sought:** Petitioner seeks as relief a finding that Student has been denied FAPE and that DCPS be ordered to:

- conduct, or fund, and review a comprehensive psychological evaluation that includes cognitive, academic, social emotional and adaptive measures;
- conduct, or fund, and review an independent PT evaluation;
- reconvene the MDT/IEP team to review and revise Student's IEP as appropriate based on the updated data from the evaluations;
- reinstate Student's PT services on Student's IEP;
- conduct an AT evaluation; fund the purchase of an augmentative alternative communication ("AAC") system for Student to have access to in school;
- fund compensatory education for Student for the alleged denials of FAPE.

## **DCPS's Response to the Complaint:**

DCPS filed a response to the complaint on July 14, 2023. In its response, DCPS stated, inter alia, the following:

On May 25, 2021, a multidisciplinary team (“MDT”) including Petitioner convened to review Student’s existing data and determine if any additional assessments were necessary. The team determined Student did not require a PT assessment. The MDT determined that an updated OT and speech-language pathology (“SLP”) assessments should be conducted. The MDT determined that no additional assessments were warranted. DCPS completed updated SLP and OT assessments for Student.

On July 22, 2021, the MDT convened to review the assessments and update the IEP. The reevaluation was appropriate. Student’s next triennial reevaluation is due in July 2024. On July 15, 2022, the MDT convened an annual IEP meeting. During the meeting, School A acknowledged the July 14, 2022, request for testing received from Petitioner’s counsel. The team agreed to reconvene at the beginning of school year (“SY”) 2022-2023 to discuss the need for additional testing.

On August 26, 2022, the MDT, including Petitioner and her counsel, convened and reviewed the OT and SLP assessments completed in 2021. The team agreed to conduct updated PT and educational assessments, which were completed in October 2022 and were appropriate.

On October 28, 2022, the MDT convened to review the assessments. The team appropriately determined Student no longer required PT as a related service and agreed to remove the PT consultation from Student’s IEP. On February 16, 2023, the IEP was amended to remove PT consultation. The IEP was appropriate when it was developed.

### **Resolution Meeting and Pre-Hearing Conference:**

Petitioner and DCPS participated in a resolution meeting on July 7, 2023. The parties did not mutually agree to shorten the 30-day resolution period. The due process complaint (“DPC”) was filed on June 22, 2023. The 45-day period began on June 22, 2023, and ended [and the Hearing Officer’s Determination (“HOD”) was initially due] on September 5, 2023. The parties were unavailable on the hearing dates offered by the Hearing Officer.<sup>2</sup> DCPS filed an unopposed motion to continue the hearing and extend the HOD due date by 23 calendar days. The HOD is now due September 28, 2023.

The undersigned independent hearing officer (“IHO”) conducted a pre-hearing conference on July 13, 2023, and issued a pre-hearing order (“PHO”), outlining, inter alia, the issues to be adjudicated.

### **ISSUES:**<sup>3</sup>

The issues adjudicated are:

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<sup>2</sup> The dates offered were August 15 & 16, 2023.

<sup>3</sup> At the outset of the due process hearing, the IHO reviewed issues to be adjudicated from PHO. Petitioner withdrew the third issue from the PHO regarding educational records. The parties agreed that the two issues as stated here are the issues to be adjudicated.

1. Did DCPS deny Student a FAPE by failing to timely and comprehensively conduct the following evaluations during SY 2021-2022: psychological, speech-language, occupational therapy, physical therapy, and assistive technology?
2. Did DCPS deny Student a FAPE by failing to provide Student an appropriate individualized educational program (“IEP”) on October 28, 2022, and/or February 17, 2023, to present because DCPS removed physical therapy consult services from the IEP(s) on or about October 28, 2022.

### **DUE PROCESS HEARING:**

The Due Process Hearing was convened on September 8, 2023, September 11, 2023, September 15, 2023, and September 18, 2023. 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 39 and Respondent’s Exhibits 1 through 50) that were admitted into the record and are listed in Appendix 2.<sup>4</sup> The witnesses testifying on behalf of each party are listed in Appendix B.<sup>5</sup>

### **SUMMARY OF DECISION:**

Petitioner held the burden of production on both issues adjudicated. Petitioner held that the burden of persuasion on issues #1. Respondent held the burden of persuasion on issue #2 after Petitioner has presented a prima facie case on that issue.

### **FINDINGS OF FACT:<sup>6</sup>**

1. Student is a child with a disability pursuant to IDEA with a DD disability classification. Student resides with Petitioner, Student's parent, in the District of Columbia. DCPS is

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<sup>4</sup> Any item disclosed and not admitted or admitted for limited purposes was noted on the record and in Appendix A.

<sup>5</sup> Petitioners presented four witnesses: (1) Petitioner and four other witnesses all of whom testified as experts: (2) Petitioner’s educational advocate, (3) an independent occupational therapist, and (4) a psychologist associated with the law firm representing Petitioner, and (4) an independent physical therapist. Respondent presented four witnesses, three of whom testified as experts: (1) a School A physical therapist, (2) School A Director of Therapeutic Services, (3) a DCPS psychologist, and (4) School A LEA representative and special education teacher. 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.

<sup>6</sup> 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.

Student's LEA. Student attends School A, a DCPS special education day school, where Student has attended since August 2019. (Petitioner's testimony, Petitioner's Exhibits 7, 70)

2. Student was referred for early intervention services on January 26, 2016, which led to a qualification for early intervention services and diagnosis of Down Syndrome. Student was reassessed by OSSE's Strong Start Early Intervention Program in March 2018, by a physical therapist and a speech-language pathologist. They assessed Student using the Bayley Scales of Infant and Toddler Development, 3<sup>rd</sup> Edition and the Battelle Developmental Inventory 2<sup>nd</sup> Edition. Student was 29 months of age at the time. Student's cognitive functioning was considered Extremely Low with a age equivalence of 13 months. Student's gross motor development was Average with an age equivalence of 23 months. Student's fine motor skills were characterized as Borderline with an age equivalence of 17 months. Student's expressive communication skills were considered Extremely Low with a age equivalence of 7 months. Student's receptive communication skills were characterized as Borderline with an age equivalence of 13 months. (Petitioner's Exhibit 69)
3. In March 2018, Student's social interaction and adaptive skills were measured using the Battelle Developmental Inventory 2<sup>nd</sup> Edition and characterized respectively as Low Average, with an age equivalence of 22 months, and mild developmental delay, with an age equivalence of 18 months for self-care. Student was characterized as Low Average with mild developmental delay for personal responsibility, with a age equivalence of less than 24 months. The Strong Start Assessment Report noted that Student qualified for services with a 50% delay in cognitive development and communication development, and a 25% delay in adaptive development and fine motor development. (Petitioner's Exhibit 69)
4. DCPS Early Stages determined Student eligible for special education services on August 10, 2018, with the DD disability classification. (Petitioner's Exhibit 11)
5. In May 2021, School A conducted a Student Annual Needs Determination Inventory ("SANDI"). On May 25, 2021, School A convened an eligibility meeting in which Petitioner participated. Based upon data reviewed, School A determined that Student continued to be eligible for special education under the DD disability classification. (Respondent's Exhibit 5)
6. In July 2021, School A conducted a speech-language and an OT evaluation and on July 22, 2021, issued a final eligibility determination report and a prior written notice ("PWN") noting the recent evaluations and that Student continued to be eligible for special education. (Respondent's Exhibits 9, 12, 13, 14)
7. On July 22, 2021, School A convened an annual IEP review meeting. Petitioner participated. The OT and PT evaluations were reviewed. (Respondent's Exhibit 4)

8. Student's July 22, 2021, IEP prescribed 28.5 hours of specialized instruction per week outside general education, 1 hour per week of SLP, 30 minutes per week of OT, and 30 minutes per month of PT consultation services. The IEP also prescribed AT in the form of a dynamic display speech generating device provided by Student's family and a manual communication board. (Petitioner's Exhibit 5)
9. Student's July 22, 2021, IEP stated the following regarding Student's communication: Student presents with delays in receptive and expressive language. Student benefits from communication partners modeling a variety of verb tenses as well as simple and complex sentences. Student is a limited verbal communicator who uses verbal approximations, gestures, some basic signs, facial expression body movements and high-tech speech generating device (SGD) to communicate with a variety of communication partners including family members, classroom teacher, staff, therapists, and peers. (Petitioner's Exhibit 5)
10. Student's July 22, 2021, IEP also stated the following: Student benefits from assistive technology to support learning and communication. Due to Student's limited verbal speech and intelligibility, Student benefits from the use of a dynamic display high-tech speech generating device accessed via direct selection that utilizes semantic compaction and pixon symbol icons. Student has access to an unmasked 60 sequenced overlay and uses a keyguard to increase accuracy in selecting icons. Student's AAC system is provided by student's family it is recommended that Student also have access to a low tech back up system such as a communication board. (Petitioner's Exhibit 5)
11. Petitioner's attorney sent a letter to School A dated July 14, 2022, requesting that School A conduct the following evaluations of Student: psychological evaluation, OT, PT, and AT. (Petitioner's Exhibit 92)
12. On July 15, 2022, School A convened an annual IEP review meeting in which Petitioner participated. Student's July 15, 2022, IEP prescribed 28.5 hours of specialized instruction per week outside general education, 1 hour per week of SLP, 30 minutes per week of OT, and 30 minutes per month of PT consultation services. The IEP also prescribed AT in the form of dynamic display speech generating device provided by Student's family and a manual communication board. (Petitioner's Exhibits 6, 10)
13. Student's July 15, 2022, IEP, had the following statement included in the present level of performance in the area of Motor Skills/Physical Development: "PT: [Student] continues to negotiate 4–8-inch hurdles and a 4-inch step-stair equipment independently. [Student] is able to jump in place or jump forward independently ([Student] is only able to minimally clear the floor when [Student] jumps in place). [Student] needs bilateral handheld assist and/or prompts to be able to jump over a 2-inch hurdle. [Student] is able to run for up to 200 feet with good pacing and speed. [Student] uses reciprocal pattern (placing just one foot on each step) when using the stairs when motivated." (Petitioner's Exhibit 6-96)
14. In the area of Motor Skills/Physical Development, Student's July 15, 2022, IEP described how Student's disability affects Student's access to the general education curriculum as

follows: OT: [Student] presents with needs in the areas of visual motor skills as [Student's] delays in these skills hinder [Student's] access to the general education curriculum noted by difficulties to complete, engage, and participate adequately in tasks which these skills are warranted throughout the general education curriculum: PT 2020-21: [Student] demonstrates delays in higher gross motor skills such as jumping in place and jumping forward without given any prompts/ physical assistance.” (Petitioner’s Exhibit 6-96)

15. In the area of Motor Skills/Physical Development, Student’s July 15, 2022, IEP described how Student’s disability affects Student’s progress in the general education curriculum as follows: OT: [Student’s] delays in the areas of visual motor skills result in a hinderance to progress in the general education curriculum as [Student] is currently unable to complete grade/age-appropriate tasks required for the general education curriculum in which these skills are warranted. PT: [Student’s] higher gross motor deficits negatively affect [Student’s] ability to participate in higher gross motor skill level activities during adaptive PE classes. (Petitioner’s Exhibit 6-96)
16. Student’s July 15, 2022, IEP had the following Goal 2 related to PT with an anticipated date of achievement of July 14, 2023: [Student] will demonstrate increased lower extremity muscle strength, balance, and coordination to improve higher gross motor skills as evidenced by 80% achievement of the following objectives as observed and/or reported by the physical therapist (PT) and/or the special education team (SET). (Petitioner’s Exhibit 6-97)
17. The goal had the following objectives: (1) [Student] will consistently jump forward for distance of 2 feet while demonstrating the ability to take off and land with both feet together in 4 out of 5 trials on 3 consecutive sessions as observed and/or reported by physical therapist (PT) and/or the special education team (SET). (2) [Student] will jump over a one inch hurdle/object on the floor while demonstrating the ability to take off and land with both feet together while given one hand-held assistance in 4 out of 5 trials on 3 consecutive sessions as observed and/or reported by physical therapist (PT) and/or the special education team (SET).
18. The goal’s baseline was as follows: [Student] continues to negotiate 4-8 inch hurdles and a 4 inch step-stair equipment independently. [Student] is able to jump in place or jump forward independently ([Student] is only able to minimally clear the floor when ■ jumps in place). [Student] needs bilateral handheld assist and/or prompts to be able to jump over a 2 inch hurdle. [Student] is able to run for up to 200 feet with good pacing and speed. [Student] uses reciprocal pattern 100% of the time (placing just one foot on each step) when using the stairs (both ascending and descending) when motivated. (Petitioner’s Exhibit 6-98)
19. Student’s progress report noted that in July 2022, Student had not yet mastered the PT goal and objectives, but was preforming the skills relative to the goal and objectives from 40% to 79%:

7/22/22 5/6/22

Annual Goal: Student will demonstrate increased lower extremity muscle strength, balance, and coordination to improve independence with stair negotiation and to complete higher level tasks as evidenced by 80% achievement of the following objectives as observed and/or reported by the physical therapist (PT) and/or the special education team (SET)	E	E	E	E <sup>7</sup>
Short term Objectives:				
[Student] will demonstrate a reciprocal pattern for 75% of the time when ascending and descending 1 flight of stairs using one handrail with verbal prompts provided as needed in 4 out of 5 trials over 3 consecutive sessions as observed and/or reported by physical therapist (PT) and/or the special education team (SET)	P	P	P	p
[Student] will jump forward for distance of 2 feet while demonstrating the ability to take off and land with both feet together in 4 out of 5 trials on 3 consecutive sessions as observed and/or reported by physical therapist (PT) and/or the special education team (SET)	E	D	D	D

(Petitioner's Exhibit 84-460)

20. School A convened an MDT meeting on August 26, 2022, to review assessments from Student's file. Petitioner and her attorney participated in the meeting. The MDT agreed to have an educational and PT update conducted to report on Student's present levels. Petitioner's attorney requested that School A also evaluate Student in the areas of OT and speech-language and that Student's IEP services be increased. School A did not agree to those additional requested services. Petitioner and her representatives disagreed with the decision to not also update testing for OT and speech-language and objected to School A refusal to increasing Student's IEP services. (Respondent's Exhibit 6)
21. Petitioner's educational advocate who works with the law firm representing Petitioner, sent a dissent letter to School A referencing the meeting held on August 26, 2022. In the letter the advocate requested that Student's SLP services be increased from 60 minutes per week to 120 minutes per week, that Student's OT services be increased from 30 minutes per week to 60 minutes per week and that Student's consultative PT services be changed to direct services of 30 minutes per week. (Petitioner's Exhibit 91)
22. In September/October 2022, School A issued a PT evaluation report that stated that Student was referred for a PT evaluation by the IEP team and the physical therapist to determine Student's continued eligibility for PT services and to update testing and present levels. The School A physical therapist assessed Student and observed Student in a variety of settings within the school. (Witness 5's testimony, Petitioner's Exhibit 73)
23. The physical therapist concluded the following: "[Student] scored well in the travel section with [the] ability to walk on even and uneven surfaces inside and around the school building including sidewalks, grass, mulch and playground surfaces as well as negotiating ramps independently. [Student] negotiates [Student's] classroom environment independently

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<sup>7</sup> Mastered Goal being Performed at 80-100% accuracy  
Progressing Goal being Performed at 60-79% accuracy  
Expanding Goal being Performed at 40-59% accuracy



without bumping into obstacles or peers and can enter the room and take [a] seat independently. [Student] transitions with [] class throughout the school day and [] keeps pace with [] peers. [Student] is able to move through congested hallways independently without bumping into obstacles or [] peers and [] adapts to the setting when necessary. [Student] scored lower in areas pertaining to moving around slippery surfaces (icy pathways), crossing traffic areas and maneuvering around ruts, holes and other dangerous surfaces, requiring supervision to light physical assistance (one handheld and verbal prompts) with pacing and direction for safety.” (Witness 5’s testimony, Petitioner’s Exhibit 73)

24. The PT evaluation report also noted the following: Student scored well in maintaining and changing positions, with a perfect score, demonstrating that ■ can maintain an adequate position in a classroom chair during classroom instruction throughout the school day. Student can sit with stability on the floor and transition from floor to stand and sit to stand and back independently. Student can board and disembark from the school bus independently. Student scored well in the recreational movement section. Student scored highest in areas pertaining to playing on moveable play equipment such as the swing and the seesaw and playing on low stable playground equipment. Student demonstrated throwing and catching a large playground ball and ■ demonstrates running and jumping. Student demonstrated throwing and catching a large playground ball and ■ demonstrates running and jumping independently. Student can play one or more games involving kicking such as kick ball. Student scored lower in areas pertaining to catching a smaller playground ball (baseball) and playing two or more games involving hitting a target (baseball, basketball). Student demonstrated playing on higher stable play equipment such as climbing playground ladders using a reciprocal stepping pattern independently. (Witness 5’s testimony, Petitioner’s Exhibit 73)
25. The PT evaluation report also noted the following: Student scored well in the up/downstairs section, with a perfect score, demonstrating that Student can move up and down a flight of stairs (at least 12 steps) independently with regular speed and carrying a small object. Student used a single handrail to no handrail and a reciprocal stepping pattern. Upon assessing Student’s gross motor and functional mobility skills, Student demonstrated gross motor skills that were age appropriate such as postural control, sitting balance, ambulation, and stair negotiation skills to access ■ school environment. Student demonstrated good functional independence with negotiating Student’s school environment safely. The physical therapist recommended that Student be discharged from school-based physical therapy services so that Student may progress towards educational goals in a less restrictive environment. The report noted that the physical therapist would coordinate with the adaptive physical education teacher to continue working on Student’s higher-level gross motor skills. (Witness 5’s testimony, Petitioner’s Exhibit 73)
26. School A conducted an educational evaluation summary report in October 2022. That report concluded that Student’s scores indicated that Student was functioning academically at an average grade equivalent of pre-kindergarten. Student’s strengths were in the areas of knowing and recognizing colors, identifying body parts and self-help skills. The scores indicated that Student’s academic skills fell significantly below age and grade-level and were commensurate with Student’s current observed level of academic performance. The evaluator recommended that instruction focus on functional life skills, functional academics, and personal independence. It was also recommended that Student receive

specialized instruction at then current rate and in the current placement. (Petitioner's Exhibit 74)

27. Student's PT service tracker for October 2022 noted the following relative to the Student's PT consultation service:

Date of Service	Service Type	Duration	Group Size	Area Covered	Response	ESY Service?	Provider Initials
10/11/2022	Consultation	30	1	Physical Therapy Services/Treatment	Maintaining	No	
<b>Progress Notes:</b> PT conducted physical therapy consultation session from 10:00-to 10:30 am with [Student]. [Student] presents in physical education class participating in a modified volleyball activity. [Student] demonstrates good balance with bilateral overhead reaching and hitting the ball. [Student] worked on jumping to a target with bilateral takeoff and landing for 4 consecutive jumps. ■ demonstrates ■ demonstrates ascending a flight of stairs using a single handrail and alternating stepping pattern. [Student] descends using a mixed pattern of step to and alternating when motivated with single handrail and occasionally reaches for 2 handrail.							
10/14/2022	Consultation	15	1	Physical Therapy Services of Treatment	Maintaining	No	
<b>Progress Notes:</b> PT conducted physical therapy consultation session from 9:30-9:45 a.m. with [Student]. [Student] worked on dynamic balance skills with walking forward on the balance beam with one handheld assistance and balancing on uneven surface with moderate to maximal perturbations. [Student] worked on forward jumping for 3 consecutive jumps over 12-18 inches with bilateral takeoff and landing. [Student]							

(Petitioner's Exhibit 47-253)

28. On October 28, 2022, School A convened a meeting to review the assessments that had been conducted. Petitioner participated in the meeting along with her attorney. The physical therapist recommended that Student be discharged from PT consultative services. The meeting notes indicate that there was no disagreement by Petitioner about the recommendation and the team agreed to proceed with amending Student's IEP to remove PT school-based services. No one at the meeting wanted Student to continue PT services and there no disagreement with the PT evaluation and its recommendations. (Witness 5's testimony, Petitioner's Exhibit 89)
29. Although the School A team members agreed at the October 28, 2022, meeting to remove Student's PT consultative services from Student's IEP, the IEP was not amended until February 17, 2023. During the period following the October 28, 2022, meeting until the February 17, 2023, amendment, Student did not receive PT consultative services. (Witness testimony 5's testimony, Petitioner's Exhibit 7, Respondent's Exhibit 16)
30. School A convened an annual IEP review meeting on July 18, 2023. Student's current IEP is dated July 18, 2023. The IEP contains the following statement regarding AT: "[Student] benefits from assistive technology to support learning and communication. Due to [Student's] limited verbal speech and intelligibility, [Student] benefits from the use of a dynamic display high-tech speech generating device accessed via direct selection that utilizes semantic compaction and pixon symbol icons. [Student] has access to an unmasked 60 sequenced overlay and uses a keyguard to increase [Student's] accuracy in selecting icons. [Student's] AAC system is provided by family. It is recommended that [Student] also have access to a low tech back up system such as a communication board." (Petitioner's Exhibit 8)
31. Student's July 18, 2023, IEP prescribes the following services:

**Special Education Services**

Service	Setting	Begin Date	End Date	Time/Frequency
Specialized Instruction	Outside General Education	07/14/2023	07/13/2024	28.5 hr per wk

**Related Services**

Service	Setting	Begin Date	End Date	Time/Frequency
Speech-Language Pathology	Outside General Education	07/14/2023	07/13/2024	1 hr per wk
Occupational Therapy	Outside General Education	07/14/2023	07/13/2024	30 min per wk

**Assistive Technology**

Category	Device
AT for Communication	dynamic display speech-generating device provided by the family, manual communication board

**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 production on both issues adjudicated. Petitioner held that the burden of persuasion on issues #1. Respondent held the burden of persuasion on issue #2 after Petitioner has presented a prima facie case on that issue. The burden of persuasion shall be met 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 conduct the following evaluations during SY 2021-2022 psychological, speech-language, occupational therapy, physical therapy, and assistive technology?

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS failed to timely and comprehensively evaluate Student during SY 2021-2022, by failing to conduct the following evaluations: psychological, speech-language OT, PT, and AT.

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, states, as well as the District of Columbia, that receive federal educational assistance must establish policies and procedures to ensure that a FAPE is made available to disabled children. *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir. 2005).

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).

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. 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 34 C.F.R. § 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 that that may assist in determining: (1) Whether the child is a child with a disability under this chapter; and (2) The content of the child's IEP, including information related to enabling the child to be involved and progress in the general education curriculum;, and information related to enabling the child to be involved in and progress in the general curriculum... D.C. Mun. Regs. Title 5A § 3006.7 (a).

The LEA shall ensure that no single assessment or source of data or information is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child... D.C. Mun. Regs. Title 5A § 3006.7(e).

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 5A § 3006.7(f).

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).

The evidence demonstrates that in July 2021, as a part of Student's triennial evaluation, School A conducted a speech-language and an OT evaluation and on July 22, 2021, issued a final eligibility determination report and PWN noting the recent evaluations and that Student continued to be eligible for special education. On July 22, 2021, School A convened an annual IEP review meeting, at which the OT and PT evaluations were reviewed. Petitioner participated in this meeting.

Prior to Student's next annual IEP annual review meeting, Petitioner's attorney sent a letter to School A dated July 14, 2022, requesting that School A conduct the following evaluations of Student: psychological evaluation, OT, PT, and AT. Petitioner asserts in her DPC that during SY 2021-2022 School A should have conducted the evaluations noted above: psychological, OT, PT, and AT. Because Petitioner's July 14, 2022, evaluation request was made after SY 2021-2022 had ended, the IHO concludes based upon the issue certified to be adjudicated, that Petitioner's contention is that the noted evaluations should have been conducted as a part of Student's 2021 triennial evaluation, rather than based upon the request Petitioner's attorney made in July 2022, after SY 2021-2022 had concluded.

The evidence demonstrates that following Student's triennial evaluation, Student's July 22, 2021, IEP prescribed an least restrictive environment ("LRE") removed from general education with

specialized instruction and the following related services: 1 hour per week of SLP, 30 minutes per week of OT, and 30 minutes per month of PT consultation services.

Generally, IDEA does not mandate that during a student's triennial evaluation, the same evaluations that were conducted three years prior need to be repeated or that comprehensive and formal standardized assessments need to be conducted.

As to the need for a psychological evaluation being conducted as a part of Student's triennial evaluation, Petitioner presented the expert testimony of a psychologist who opined that because Student's cognitive functioning had not been formally assessed since the Strong Start evaluation in 2018, School A should have conducted a psychological evaluation to determine Student's current cognitive functioning. This witness also pointed to some assessment tools that she believed could have been administered to gauge Student's cognitive, social-emotional, and adaptive functioning. Petitioner's expert witness had, however, never met Student, had never conferred with Student's parent or service providers, and had not functioned as a school-based psychologist.

On the other hand, DCPS presented a psychologist with far more school-based experience, who cogently testified that at the time of Student's triennial evaluation during SY 2021-2022, the primary function of a cognitive assessment would have been to determine Student's continued eligibility for special education services and the appropriate disability classification. She testified that because during SY 2021-2022, Student still qualified according to age for the DD disability classification, a full cognitive and adaptive assessment was premature. In addition, she testified that the Covid 2019 restrictions did not allow for full in person assessments using the assessment tools noted by Petitioner expert witness.

There was no specific testimony or evidence that indicated that School A not conducting a psychological evaluation as a part of Student's triennial evaluation during SY 2021-2022, had any deleterious effect or any way negatively affected the development of Student's programming or the effectiveness of Student's IEPs that were developed following Student's triennial evaluation. Therefore, the IHO concludes that evidence does not support a finding a denial of FAPE regarding a psychological evaluation.

School A had conducted an OT and a speech-language evaluation during SY 2021-2022 as a part of Student's triennial evaluation. Therefore, the IHO concludes that evidence does not support a finding a denial of FAPE regarding an OT or speech-language evaluation.

Petitioner also asserts that School A should have conducted a PT evaluation during SY 2021-2022. Although School A did not conduct a formal PT evaluation as a part of Student's triennial evaluation, the evidence demonstrates that that School A convened an MDT meeting on August 26, 2022, at which School A agreed to conduct PT evaluation. That evaluation was conducted in September/October 2022. Petitioner presented an expert witness who testified to the appropriateness of the evaluation. Student's IEP that was developed following the triennial evaluation continued to provide PT consultative services, even though a formal PT evaluation had not yet been conducted. There was no evidence that supported a finding that School A not conducting a formal PT evaluation as a part of Student's triennial evaluation during SY 2021-2022, had any deleterious effect or any way negatively affected the development of Student's

programming or the effectiveness of Student's IEPs that were developed following Student's triennial evaluation.

Finally, Petitioner asserts that School should have conducted an AT evaluation during SY 2021-2022. The evidence demonstrates that following Student's triennial evaluation, Student's July 22, 2021, IEP prescribed AT in the form of a dynamic display speech generating device. Student's IEP states the following regarding AT: "Due to Student's limited verbal speech and intelligibility, Student benefits from the use of a dynamic display high-tech speech generating device accessed via direct selection that utilizes sematic compaction and pixon symbol icons. Student has access to an unmasked 60 sequenced overlay and uses a keyguard to increase accuracy in selecting icons."

Petitioner presented an expert witness who testified that an AT evaluation would be warranted to determine which AT device(s) would be most appropriate to meet Student's communication and other needs and to have a trial period in which an AT specialist could make a recommendation regarding a device. This witness, however, had not met Student, spoken with Student's mother, teachers, or related services providers.

The evidence demonstrates, based upon testimony of both Petitioner and the School A staff who work with Student that Student effectively uses that AT device that is prescribed in Student's IEP. Petitioner's expert witness testimony did not support a finding that an formal AT assessment would have resulted any change in the device and Student's use of the device the school environment. Although Petitioner asserted that the device Student's uses is not provided by School A, the evidence demonstrates that Student uses the device at school. There was no evidence that a request was made that School A provide Student a device to supplement the existing device. Consequently, the IHO concludes that evidence does not support a finding a denial of FAPE regarding an AT evaluation.

As previously stated, Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS failed to timely and comprehensively evaluate Student during SY 2021-2022, by failing to conduct the following evaluations: psychological, speech-language OT, PT, and AT.

**ISSUE 2:** Did DCPS deny Student a FAPE by failing to provide Student an appropriate individualized educational program ("IEP") on October 28, 2022, and/or February 17, 2023, to present because DCPS removed physical therapy consult services from the IEP(s) on or about October 28, 2022.

**Conclusion:** Respondent sustained the burden of persuasion by a preponderance of the evidence that Student's IEP developed on July 15, 2022, was reasonably calculated and that IEP remained appropriate despite the removal of PT consultative services as of October 28, 2022, and noted in Student's amended IEP dated February 17, 2023.

In *Board of Education v. Rowley*, the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. To be appropriate under 34 C.F.R. § 300.324, the IEP must

consider the (i) strengths of the child; (ii) concerns of the parents; (iii) results of the initial or most recent evaluation; and (iv) academic, developmental, and functional needs of the child.

“The IEP is ‘the centerpiece of the statute’s education delivery system for disabled children.’” *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). “The IEP is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.” *Endrew F.*, 137 S. Ct. at 994, quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Endrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

“The IEP is the “centerpiece” of the IDEA’s system for delivering education to disabled children,” *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

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

The second substantive prong of the *Rowley* inquiry is whether the IEP DCPS developed was reasonably calculated to enable Student to make progress appropriate in light of Student’s individual circumstances.

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), the U.S. Supreme Court elaborated on the “educational benefits” requirement pronounced in *Rowley*: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. *Endrew F.*, supra, 137 S. Ct. at 999–1000 (citations omitted).



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

Petitioner asserts that Student's IEP was inappropriate because, as of October 28, 2022, and/or February 17, 2023, when Student's IEP was officially amended, the IEP no longer prescribed physical therapy consult services.

Student's July 15, 2022, IEP prescribed 28.5 hours of specialized instruction per week outside general education, 1 hour per week of SLP, 30 minutes per week of OT, and 30 minutes per month of PT consultation services.

Petitioner asserts that the PT goals in Student's IEP had been repeated from Student's previous IEP and that Student had not yet mastered the PT goals when the PT consultative services were removed. However, the evidence demonstrates otherwise.

Student's July 15, 2022, IEP had the following goal related to PT with an anticipated date of achievement of July 14, 2023: Student will demonstrate increased lower extremity muscle strength, balance, and coordination to improve higher gross motor skills as evidenced by 80% achievement of the following objectives as observed and/or reported by the physical therapist (PT) and/or the special education team (SET).

The goal had the following objectives: (1) Student will consistently jump forward for distance of 2 feet while demonstrating the ability to take off and land with both feet together in 4 out of 5 trials on 3 consecutive sessions as observed and/or reported by physical therapist (PT) and/or the special education team (SET). (2) Student will jump over a one-inch hurdle/object on the floor while demonstrating the ability to take off and land with both feet together while given one hand-held assistance in 4 out of 5 trials on 3 consecutive sessions as observed and/or reported by physical therapist (PT) and/or the special education team (SET).

The goal's baseline was as follows: Student continues to negotiate 4–8-inch hurdles and a 4-inch step-stair equipment independently. Student can jump in place or jump forward independently (Student is only able to minimally clear the floor when ■ jumps in place). Student needs bilateral handheld assist and/or prompts to be able to jump over a 2-inch hurdle. Student can run for up to 200 feet with good pacing and speed. Student uses reciprocal pattern 100% of the time (placing just one foot on each step) when using the stairs (both ascending and descending) when motivated.

Student's PT service tracker for October 2022 noted Student's progress relative to the Student's PT consultation service. It noted that Student demonstrated good balance with bilateral overhead reaching and hitting the ball, worked on jumping to a target with bilateral takeoff and landing for 4 consecutive jumps. Student demonstrated ascending a flight of stairs using a single handrail and alternating stepping pattern. Student descended using a mixed pattern of step to and alternating

when motivated with single handrail and occasionally reached for two handrails. Student worked on forward jumping for 3 consecutive jumps over 12-18 inches with bilateral takeoff and landing.

In September/October 2022, School A conducted PT evaluation to determine Student's continued eligibility for PT services. The School A physical therapist assessed Student and observed Student in a variety of settings within the school. The physical therapist concluded that Student scored well in the travel section with the ability to walk on even and uneven surfaces inside and around the school building including sidewalks, grass, mulch, and playground surfaces as well as negotiating ramps independently. Student negotiated Student's classroom environment independently without bumping into obstacles or peers and can enter the room and take a seat independently. Student transitioned with Student's class throughout the school day and kept pace with peers. Student was able to move through congested hallways independently without bumping into obstacles or peers. As a result of the evaluation, the physical therapist concluded that Student was no longer in need of PT consult services.

The evidence demonstrates that on October 28, 2022, School A convened a meeting to review the assessments that had been conducted. Petitioner participated in the meeting along with her attorney. The physical therapist recommended that Student be discharged from PT consultative services. There was no disagreement by Petitioner about the recommendation and the team agreed to proceed with amending Student's IEP to remove PT school-based services. No one at the meeting wanted Student to continue PT services and there no disagreement with the PT evaluation and its recommendations.

Petitioner asserted that Student was still in need of PT services despite the evaluation results. However, DCPS's witness, who evaluated Student and provided Student PT services was convincing in presenting her evaluation results and her work with Student that Student was and is no longer in need of PT consultative services and that discontinuation of those services after the October 28, 2022, meeting was appropriate. She also credibly testified that even though Student's IEP was not amended until February 17, 2023, to remove the PT consultative services, there was no harm to Student as a result.

Consequently, the IHO concludes that Respondent sustained the burden of persuasion by a preponderance of the evidence that Student's IEP developed on July 15, 2022, was reasonably calculated and that IEP remained appropriate despite the removal of PT consultative services as of October 28, 2022, and noted in Student's amended IEP dated February 17, 2023.

**ORDER:**

1. Petitioner's due process complaint and the claims therein are hereby dismissed with prejudice.
2. All other relief requested by Petitioner is denied.

**APPEAL PROCESS:**

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

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**

**Hearing Officer**

**Date: September 28, 2023**

Copies to:      Counsel for Petitioners  
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