

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office
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OSSE
STUDENT HEARING OFFICE
2012 NOV 30 AM 9:19

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Case # 2012-0611</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: November 19, 2012</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioner: Miguel Hull, Esq. Brown & Associates 1220 L Street, N.W. Suite 700 Washington, D.C. 20005</p> <p>Counsel for DCPS: District of Columbia Assistant Attorney General Maya L. Washington, Esq. 1200 First Street, NW Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened for one day on November 19, 2012, at the Office of the State Superintendent (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2004.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age [REDACTED] and residing with his parent in the District of Columbia. Based on a settlement agreement between Petitioner and the District of Columbia Public Schools (“DCPS”) executed August 1, 2012, the student began attending a private special education day school, hereinafter referred to as (“School A”) with DCPS funding at the start of school year (“SY”) 2012-2013. The student’s current individualized educational program (“IEP”), developed November 2, 2011, prescribes that DCPS provide the student transportation services.

Petitioner filed the due process complaint on September 5, 2012, alleging DCPS failed to provide the student transportation to and/or from School A for at least four school days at start of SY 2012-2013. Petitioner alleges that as a result the student missed at least four days of school and thereby suffered academic loss. Petitioner seeks as relief that the Hearing Officer provide the student tutoring services as compensation for the days of school missed.

DCPS filed a response to the complaint on September 11, 2012. DCPS asserted that prior to the complaint being filed DCPS was not alerted to the alleged transportation problems, and that OSSE is responsible for providing transportation service and DCPS has done its part in effectuating the transportation services to the student and any complaint should be made the OSSE transportation parent call center.

The resolution meeting was held September 24, 2012, and was unsuccessful in resolving the issues. The parties expressed no desire to proceed directly to hearing; rather, the parties chose to allow the full 30-day resolution period to expire before the 45-day timeline began. Thus, the 45-day period began on October 6, 2012, and originally ended (and the HOD would have been due) on November 19, 2012. However, because of scheduling difficulties of the parent and Petitioner’s counsel, Petitioner filed a motion to continue the hearing date and to extend the final decision due date by ten (10) calendar days. The motion was unopposed and the Hearing Officer granted the motion. Thus, the HOD is due November 29, 2012.

The Hearing Officer conducted a pre-hearing conference on October 22, 2012,² at which the issue to be adjudicated was discussed and determined. On October 25, 2012, the Hearing Officer issued a pre-hearing order outlining, inter alia, the issue to be adjudicated.

² The PHC was convened on the first date that both counsel were available following the resolution meeting.

ISSUES: ³

The issue adjudicated is:

Whether DCPS failed to provide the student transportation services to and/or from School A for four school days at the start of SY 2012-2013 and if so whether DCPS' failure to do so denied the student a FAPE.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-32 and DCPS Exhibit 1-6) that were admitted into the record and are listed in Appendix A. Any documents not admitted into the record are so noted in Appendix A. Witnesses are listed in Appendix B. DCPS disclosed a list of witnesses but presented no witnesses at hearing.

FINDINGS OF FACT: ⁴

1. The student is age [REDACTED] and residing with his parent in the District of Columbia. The student has been determined eligible for special education with a disability classification of specific learning disability ("SLD"). (Petitioner's Exhibit 2-1)
2. The student's current individualized educational program ("IEP") was developed November 2, 2011. The IEP indicates that the student is operating significantly below grade level in math, reading and written expression. In addition to the instructional services prescribed the student's IEP also requires that DCPS provide the student transportation services. (Petitioner's Exhibit 2-2, 2-5, 2-7, 2-12)

³ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order do not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated. Petitioner's counsel acknowledged during the pre-hearing conference ("PHC") that the transportation services are currently being provided but stated that the student has been late to school on occasion because of transportation delays. However, only the four days that transportation was not provided at all were at issue.

In the complaint Petitioner did not state the specific dates that transportation was not provided. Thus, the Hearing Officer directed Petitioner's counsel to inform DCPS counsel and the Hearing Officer of the specific dates that DCPS did not provide transportation on or before November 7, 2012. Petitioner's counsel did not provide that information by the date required. At the outset of the hearing the Hearing Officer confirmed that no specific dates had been provided by the date required and thus limited the claim to a total of four days as alleged in the complaint that the student missed school as a result of the alleged failure to provide transportation services.

⁴ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

3. Based on a settlement agreement between Petitioner and the District of Columbia Public Schools ("DCPS") executed August 1, 2012, the student began attending a private special education day school, hereinafter referred to as ("School A") at the start of school year ("SY") 2012-2013 with DCPS funding. (Parent's testimony, Petitioner's Exhibit 37-1)
4. On August 8, 2012, DCPS initiated a student transportation data form for the student to begin to be provided bus transportation to and from school pursuant to a request made by Petitioner's counsel. (Respondent's Exhibit 2-1, 2-2, 2-3)
5. DCPS provided the student transportation to and from School A from the start of SY 2012-2013. A transportation representative came to the student's home and spoke with his parent prior to the first day of school to confirm the transportation arrangements. The student began attending School A on August 21, 2012, and the DCPS school bus came consistently thereafter until an interruption in service began on August 29, 2012. The student did not attend school on August 29, 2012, because the parent did not think the school came. The parent telephoned the OSSE transportation call center to report that the bus did not come. (Parent's testimony)
6. During the first week of school following the Labor Day holiday September 2012, the bus failed to come to the student's home and thus the student missed at least four days of school. The parent called the OSSE call center about these days as well. The parent received an explanation as to why the student's transportation to and from School A was interrupted. She was told the special education coordinator from the student's previous school mistakenly submitted a different transportation request for the student to receive Metro tokens. Once the mistake was rectified then the student's bus transportation to and from School A resumed. (Parent's testimony)
7. Prior to attending School A the student had difficulty making academic progress at his previous school. He has begun to make progress since attending School A. The student missed instruction during the days that transportation was not provided. When the student returned to school after the transportation services resumed he was able to make up the class work he missed. However, the student believes he should still be provided tutoring in any and all subjects to compensate him for the time he missed school and to assist him in raising his grades and progressing toward completing high school. (Student's testimony)
8. The parent believes twenty (20) hours of independent tutoring is sufficient to make up for four of what she believed to be a total of six days that the student missed school because of no transportation services. The student is currently being provided two hours per week of tutoring pursuant to a previous award. There are less than ten hours left to that previous award. The student is likely to be able to use up to two additional hours per week of tutoring to address what he missed from being absent due to the transportation being interrupted. (Parent's testimony)
9. The student's first advisory report card at School A reflects that he is below average in three of the six courses he is currently taking. The report card indicates the student was

absent eight days and present 38 days in the first quarter between the start of SY 2011-2012, August 20, 2012, to November 1, 2012. (Petitioner's Exhibit 37-1)

10. The student has earned the following grades during the first advisory of SY 2012-2013 at School A:

Petitioner's Exhibit 37-1)

Subject:	Adv 1
English 9	D
Algebra 1	F
US History	C
Biology	D
Physical Education	C
Health	B

11. Petitioner filed the due process complaint on September 5, 2012, alleging DCPS failed to provide the student transportation to and/or from School A for at least four school days at start of SY 2012-2013. Petitioner alleged that as a result, the student missed at least four days of school and thereby suffered academic loss. (Petitioner's Exhibit 1)
12. Petitioner engaged the services of an educational consultant to develop a compensatory education plan. The consultant reviewed the student's academic records and evaluations, spoke with the student and his parent and one of his teachers about what the student missed during the days he was not provided transportation services. The consultant proposed a plan designed to compensate the student for DCPS' failure to provide the student transportation services and for him missing school and instruction as a result. The plan made the following recommendation: 21 hours of tutoring. [REDACTED] testimony, Petitioner's Exhibit 33)

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 provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's *substantive* rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

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

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

ISSUE: Whether DCPS failed to provide the student transportation services to and/or from School A for four school days at the start of SY 2012-2013 and if so whether DCPS' failure to do so denied the student a FAPE.

Conclusion: The evidence clearly demonstrates from both the student and parent's credible testimony that the student's transportation service to and from School A was interrupted and as a result the student did not attend School A for a least four days. The failure to provide transportation services which is a component of the student's IEP caused the student educational harm as a result of missed instruction. Petitioner sustained the burden of proof by a preponderance of the evidence that the student was denied a FAPE.

34 C.F.R. § 300.323 (c) (2) requires that an LEA to ensure that as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

The IEP is the central part of the special education process and the failure to develop and implement an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also *Scott v. District of Columbia*, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 276, 182 (1982)

⁵ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

Material violations of a student's IEP will be a denial of FAPE and a violation of IDEA for which a parent and student can obtain redress in a due process hearing. *Savoy v. District of Columbia*, 58 IDELR 129 (D.D.C. 2012);

In determining whether there has been a material violation of the IEP, "...the focus is on the proportion of services mandated to those actually provided, viewed in context of the goal and import of the specific service that was withheld." *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 275 (D.D.C. 2011).

The evidence clearly demonstrates that pursuant to the student's IEP he is to be provided transportation services.⁶ There was sufficient evidence presented by the parent and the student who testified credibly⁷ that the student's transportation services to and from School A were interrupted. Although it appears that the interruption was not intentional and the result of an error by the student's previous school, the student missed school and valuable instruction as result of not being provided transportation services.⁸ The parent testified that the student missed instruction and even though the student stated that he was able to make up the work he missed he still expressed the need for additional assistance to make academic progress and his testimony in this regard amounted to an assertion that he was harmed by not attending school during the days he was without transportation.⁹ DCPS presented not witness to refute this testimony.

The Hearing Officer concludes, absent any evidence presented by DCPS to refute the credible testimony of the parent and student, that the student suffered academic harm as a result of missing at least four days of school due to interruption of the student's transportation services to and from School A. The Hearing Officer concludes that in this instance the failure to provide this student transportation services for four school days was a material violation of the IEP and a denial of a FAPE.

Compensatory Education

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

⁶ FOF #2

⁷ Both the student and parent testified credibly. They were unhesitant, clear, concise and forthright in their testimony.

⁸ FOF #s 5, 6, 7

⁹ FOF #7

The student's current academic performance is well below grade level and based on the student's most recent grades that reflect that he is earning below average grades in half of his courses,¹⁰ the Hearing Officer is convinced that the student missing any classroom instruction is detrimental to his academic progress. As a result the Hearing Officer concludes that the failure to provide the student transportation services for four days near the start of SY 2012-2013 is a denial of a FAPE for which compensatory education is warranted.

Petitioner requested that the student be provided independent tutoring to compensate him for the four days of school he missed. There was sufficient evidence based on the parent's testimony as to the current tutoring services the student is receiving and his current academic performance at School A¹¹ that twenty hours of tutoring is reasonable and would serve to place the student in the position he would have been had he been provided transportation and he attended school on the days missed. Accordingly, the Hearing Officer will grant Petitioner independent tutoring as compensatory education for the missed services.

ORDER:

1. As compensatory education to the student for DCPS having not provided transportation services for four days near the start of SY 2012-2013 and as a result the student having missed school on those four days, DCPS shall fund twenty (20) hours of independent tutoring at the DCPS prescribed hourly rate.
2. Petitioner shall use this award of compensatory independent tutoring by the end of SY 2012-2013.

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 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/s/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: November 29, 2012

¹⁰ FOF #s 9, 10

¹¹ FOF #s 8, 102