

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE**

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STUDENT,¹

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Case No.

Bruce Ryan, Hearing Officer

Issued: March 29, 2011

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools (“DCPS”). The Complaint was filed January 13, 2011, by a year old student (the “Petitioner” or “Student”) who has been determined to be eligible for special education and related services as a child with a disability under the IDEA, and who currently attends a non-public, special education day school (“School”) pursuant to a hearing officer placement.

Petitioner claims that DCPS has denied her a free appropriate public education (“FAPE”) by failing to provide transportation via metro pursuant to the requirements of her individualized education program (“IEP”) since January 3, 2011. DCPS filed its Response on or about January 20, 2011, which responded that DCPS has not denied the Student a FAPE. A Prehearing Conference (“PHC”) was held before Hearing Officer Jim Mortenson, and a Prehearing Order was issued, on January 24, 2011. *See Prehearing Order*, issued Jan. 24, 2011. The parties agreed to schedule the due process hearing for March 2, 2011.

¹ Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

On February 16, 2011, a resolution meeting was held, which did not resolve the Complaint. On February 18, 2011, the case was reassigned to this Hearing Officer for further proceedings. Disclosures were then filed by both parties, as directed, on or about February 23, 2011, and the Due Process Hearing was held on March 2, 2011. Petitioner elected for the hearing to be closed.

During the Due Process Hearing, the following Documentary Exhibits were admitted into evidence:

Petitioner's Exhibits: P-1 through P-5; and P-8 through P-15.²

Respondent's Exhibits: R-1 through R-7.

In addition, the following Witnesses testified on behalf of each party:

Petitioner's Witnesses: (1) Student-Petitioner; (2) Educational Advocate; and (3) the evaluating Psychologist.

Respondent's Witness: (1) Transportation Coordinator, School; (2) DCPS Progress Monitor; and (3) DCPS Compliance Case Manager ("CCM").

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *SOP*. The HOD deadline is March 29, 2011.

² DCPS objected to Exhibits P-4, P-5, P-6, P-7, P-12 and P-13 on grounds of relevance and/or outside the scope of the issue specified for hearing. For the reasons stated on the record, the Hearing Officer sustained DCPS' objection to Exhibits P-6 and P-7 and excluded them from evidence, but overruled DCPS' objections to the other exhibits.

III. ISSUE AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioner resulted in the following single issue being presented for determination at hearing:

Failure to Implement IEP — “Whether the Respondent failed to provide the Student related services (transportation) free of charge and in conformity with her individualized education program (IEP), to and from school since January 3, 2011?”³

The requested relief is: (1) implementation of the IEP; (2) reimbursement for expenditures on transportation; (3) an opportunity to make up missed school work; and (4) compensatory education, consisting of tutoring, independent counseling, and a laptop with software.⁴

IV. FINDINGS OF FACT

1. The Student is a -year old student who has been determined to be eligible for special education and related services under the IDEA as a child with a disability. Her primary disability is Specific Learning Disability. *P-3*.
2. The Student currently attends a non-public, special education day school located in the District of Columbia (“School”), where she was originally placed by a Hearing Officer Determination issued in August 2008. *See Student Testimony; Transportation Coordinator Testimony*.
3. The Student’s most recent IEP, developed on April 19, 2010, provides for 26 hours per week of specialized instruction and 1.5 hours per week of behavioral support services in a setting outside general education. *P-3*, p. 7. The IEP also provides that the Student requires transportation services, and states that the “Mode of Transportation” is to be “Metro.” *Id.*, p. 9.
4. During the 2010-11 School Year, the Student has generally been provided with tokens or fare cards to be used for transportation via Metro. The tokens or fare cards were provided by DCPS at the School on a monthly basis from September to December 2010.

³ *See Prehearing Order*, issued Jan. 24, 2011, ¶ 4 (A).

⁴ *Id.*, ¶ 4 (B).

5. DCPS last provided the Student with such tokens or fare cards on or about November 30, 2010, to cover the month of December 2010. No tokens or fare cards were provided to the Student beginning with the month of January 2011. *See R-2 (Token and Farecard Reconciliation Form SY 10-11); Transportation Coordinator Testimony; Student Testimony.*
6. The Student's attendance record this school year has been poor. She was absent for 23 days and tardy for 14 days during the 1st Quarter, and she was absent for 33 days during the 2d Quarter. *See R-1 (Attendance Report).* During December 2010 alone, she had 12 unexcused absences and attended school on only one day. *Id.*
7. In October 2010, the School sent home letters in reference to its growing concern regarding the absences and tardiness of certain students, mainly those whose source of transportation was Metro. The Student was included in this group. *See R-3; Transportation Coordinator Testimony.*
8. On or about January 3, 2011, the School sent another letter to the Student stating that, due to continued excessive absences and tardies, she would "no longer receive a monthly flash pass." In an "effort to improve [her] attendance ... [her] transportation has been switched to the school bus." *R-3; see also R-4 (1/10/2011 bus transportation route); R-6, p. 3 (1/4/2011 email stating that "she was put on the school bus because she has missed so many days of school").* The Transportation Coordinator also informed the Student directly regarding this change. *See Transportation Coordinator Testimony.*
9. DCPS implemented the change in transportation service by inputting the information into the OSSE database system (i.e., by changing the mode of transportation from "Metro" to "bus"). *Progress Monitor Testimony.* DCPS attempted to schedule an MDT/IEP team meeting in early January 2011, both to review further evaluations and to address the change in transportation, but the Student was not available. *See Id.; R-5; R-6.*
10. A DCPS school bus was assigned to cover the Student's residence address, to pick her up at approximately 6:51 AM and return her home at approximately 3:51 PM each day, beginning January 3, 2011. *See R-4; Transportation Coordinator Testimony.*

11. The Student attended school on January 3 and 4, 2011. *R-1*. It appears that the Student took the school bus to and from school on those days, although the bus may have arrived late to pick her up. *See Testimony of Student, Progress Monitor, and Transportation Coordinator*. The Student testified that she was willing to take the school bus, but she apparently did not attempt to access the bus transportation thereafter. *Student Testimony*.
12. Beginning January 5, 2011, the Student was absent from school on eight of the next 10 school days, and she was tardy the other two days. *R-1*.⁵ The Student testified that due to her depression and pregnancy, she was feeling “overwhelmed” and thus was unable to attend school regularly. *Student Testimony*. *See also Psychologist Testimony* (symptoms of depression and anxiety have interfered with abilities to attend school for at least a year). The evidence shows that the Student’s lack of attendance is not a transportation issue.

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Summary

The Hearing Officer concludes that Petitioner did not meet her burden of proving that DCPS denied her a FAPE by failing to provide transportation via metro pursuant to the requirements of her IEP. DCPS did not deviate materially from the IEP since it continued to provide transportation services to the Student, albeit through a different mode that DCPS believed would encourage greater school attendance. Moreover, to the extent DCPS committed a procedural violation of the IDEA by failing to convene an IEP team meeting regarding the change in mode of transportation, such violation was not shown to have caused educational harm to the Student.

B. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to implement an IEP. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See DCMR 5-E3030.3*.

⁵ There are no attendance records in evidence past January 19, 2011. *See R-1*.

The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

C. Issue/Alleged Denial of FAPE

Petitioner claims that DCPS denied the Student a FAPE by failing to provide transportation via metro pursuant to the requirements of her IEP since January 3, 2011. For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to present sufficient evidence to prevail on this issue in accordance with applicable legal standards.

The IDEA requires that all students be provided with a Free Appropriate Public Education (“FAPE”). FAPE means:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are ***provided in conformity with the individualized education program (IEP)***...” 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; DCMR 5-E3001.1 (emphasis added).⁶

“Related services” under the IDEA specifically include transportation services to and from school, as are provided in the Student’s IEP. *See* 34 C.F.R. 300.34 (c) (16).

The failure to provide services in conformity with a student’s IEP may constitute a denial of FAPE in appropriate circumstances. *See* 34 C.F.R. §300.17(d). To constitute a denial of FAPE, the aspects of an IEP not followed generally must be “substantial or significant,” and “more than a *de minimus* failure”; in other words, the deviation from the IEP’s stated requirements must be “material.” *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007), *quoting Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341,349 (5th Cir. 2000). *See also Wilson v. District of Columbia*, 111 LRP 19583 (D.D.C. March 18, 2011) (“Although the D.C.

⁶ The “primary vehicle” for implementing the goals of the IDEA is the IEP, which the statute “mandates for each child.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe*, 484 U.S. 305, 311-12 (1988)). To be sufficient to provide FAPE under the IDEA, an “IEP must be ‘reasonably calculated’ to confer educational benefits on the child, but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.’” *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, *quoting Board of Education v. Rowley*, 458 U.S. 176,200,207 (1982). *See also Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *J.G. v. Abington School*, 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 (“while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit.”).

Circuit has not yet squarely addressed the question of what standard governs failure-to-implement claims under the IDEA, the consensus approach to this question among the federal courts that have addressed it has been to adopt the standard articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*"); *S.S. ex rel. Shank v. Howard Road Academy*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008).

As was recently confirmed by the District Court in *Wilson*, in the context of transportation services, "a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEPs, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit." 111 LRP 19583, slip op. at 5 (*quoting Bobby R.*). A "material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Id.*, *quoting Howard Road Academy*, 585 F. Supp. 2d at 68. In *Wilson*, DCPS failed to transport a student to three of the four weeks of an ESY program, and thus "almost entirely failed to provide a service that [student's] IEP team determined was necessary for his educational development." Hence, the deviation was found to be material, and not a "minor discrepancy." *Id.*, slip op. at 6-7.

That is not this case. Here, DCPS continued to provide transportation services to the Student, but simply altered the mode of transportation in an attempt to address the Student's severe truancy problem. The undisputed evidence shows that the Student was assigned to a school bus route, and that the school bus stopped to pick up the Student at her residence, beginning January 3, 2011. Petitioner has not shown that transportation via school bus provided any materially different service to the Student than transportation via Metro. *Cf. Veazey v. Ascension Parish School Board*, 42 IDELR 140, 121 Fed. Appx. 552 (5th Cir. 2005) (district did not fundamentally change IEP when it required student to ride special education bus instead of general education bus); *Enright v. Springfield School District*, 49 IDELR 100 (E.D. Pa. 2007) (school district's unilateral decision to modify transportation without regard to behavior of other students on bus placed student in vulnerable position).

Moreover, while DCPS should have convened an MDT/IEP team meeting before changing the Student's transportation arrangements in her IEP, 34 C.F.R. 300.324, such procedural violation has not been shown to have resulted in substantive educational harm to the Student in this case. *See* 34 C.F.R. §300.513 (a) (2); *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). Indeed, the evidence suggests the opposite. For example, in the month immediately prior to the change (December 2010), the Student failed to attend school on 12 of 13 school days, even though she received Metro farecards. There is no evidence to suggest that this pattern would not have continued had DCPS continued to provide farecards, rather than switching to school bus transportation, or that bus transportation made things worse. In reality, the change in mode of transportation appears to have had no significant impact on the Student's attendance record, and hence no significant impact on her ability to access her education.

Accordingly, Petitioner has failed to meet her burden of proving by a preponderance of the evidence that DCPS denied a FAPE to the Student by failing to provide transportation services in conformity with her IEP since January 3, 2011.

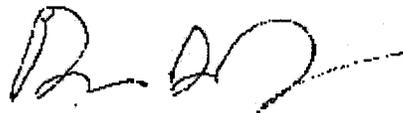
VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. Petitioner's requests for relief in her Due Process Complaint are **DENIED**;
2. The Complaint filed January 13, 2011, is **DISMISSED, With Prejudice**; and
3. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.

Dated: March 29, 2011



Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).