

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

Office of Dispute Resolution
1050 First Street, N.E., 3rd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
April 2, 2023

PARENTS,)	
on behalf of STUDENT, ¹)	
)	Date Issued: April 2, 2023
Petitioners,)	
)	Hearing Officer: Peter Vaden
v.)	
)	Case No: 2022-0223
DISTRICT OF COLUMBIA)	
PUBLIC SCHOOLS and)	Online Videoconference Hearing
)	
D.C. OFFICE OF THE STATE)	Hearing Date: March 28, 2023
SUPERINTENDENT OF EDUCATION,)	
)	
Respondents.)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the parents (the Parents or Petitioners) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-A, Chapter 5-A30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). The Parents allege in their December 23, 2022 due process complaint that Respondents District of Columbia Public Schools (DCPS) and the D.C. Office of the State Superintendent of Education (OSSE) denied their child (Student) a free appropriate public education (FAPE) by not ensuring that Student was provided appropriate special education transportation in the 2022-2023 school year.

The undersigned hearing officer was appointed on December 23, 2022. On

¹ Personal identification information is provided in Appendix A.

January 5, 2023, the Parents and DCPS met for a resolution session and were unable to resolve the issues in dispute. On January 12, 2023, I convened a videoconference prehearing conference with counsel to set the hearing date and discuss the issues to be determined and relief requested and other matters. At the prehearing conference, I set the hearing date for February 22, 2023, subject to confirmation of parties' availability. PETITIONERS' COUNSEL subsequently notified me that the Parents were unavailable that week and that the Parents were not able to attend the due process hearing on any days that schools were closed. The next mutually available date to set the hearing was March 28, 2023. To accommodate that date, I granted DCPS' request, opposed by the Parents, to extend the final decision due date in this case from March 8, 2023 to April 7, 2023.

On March 22, 2023, DCPS, by counsel, filed a motion to dismiss the complaint as to DCPS, to which the Parents, by counsel, filed a response in opposition on March 27, 2023. On March 28, 2023, I issued an order granting in part and denying in part DCPS' motion. At the start of the due process hearing on March 28, 2023, DCPS renewed its motion to dismiss, which I took under advisement.

With the consent of the Parents, the due process hearing was held online on March 28, 2023 and recorded, using the Microsoft Teams videoconference platform. MOTHER appeared online for the hearing and was represented by Petitioners' Counsel. Respondent DCPS was represented by DCPS' COUNSEL. Respondent OSSE was

represented by OSSE'S COUNSEL.

Counsel for Petitioners and for OSSE made opening statements. Mother testified as the Parents' only witness. DCPS called RESOLUTION SPECIALIST as its only witness. OSSE called as witnesses ASSOCIATE DIRECTOR and PROGRAM MANAGER.

Parents' Exhibits P-1 through P-23 were admitted into evidence, including Exhibits P-9 and P-13 admitted over DCPS' objections. DCPS' Exhibits R-1, R-3 through R-6, R-8, R-10 and R-12 through R-15 were admitted into evidence without objection. OSSE offered only one exhibit, a transportation log, to which I sustained the Parents' objection. I also admitted as Hearing Officer Exhibit 1, a prior Hearing Officer Determination concerning this student, issued on November 23, 2022 by Impartial Hearing Officer Michael Lazan in Case No. 2022-0168 (the November 23, 2022 HOD).

Following the presentation of the evidence, the respective parties, by counsel, made oral closing arguments. There was no request to file post-hearing written memoranda.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-A, § 3049.

ISSUES AND RELIEF SOUGHT

The issues for determination, as certified in the January 26, 2023 Second Revised

Prehearing Order, are:

Issue 1

Has DCPS and/or OSSE denied Student a FAPE by not implementing Student's April 27, 2022 IEP special education school transportation requirement for Student to arrive at his/her home, after school, no later than one hour after school is dismissed and by not ensuring that Student is secured by a safety harness while on school transportation?

Issue 2

Has DCPS and/or OSSE denied Student a FAPE by not implementing the school transportation order in the November 2022 Hearing Officer Determination?

Issue 3

Has DCPS and/or OSSE denied Student a FAPE by not providing in Student's April 27, 2022 IEP that Student not be on the school bus – in the morning as well as in the afternoon – for more than one hour at a time?

In my March 27, 2023 order on DCPS' motion to dismiss, I dismissed the Petitioners' claims against DCPS in Issue 1. Petitioners' Issue 1 claims against OSSE were not dismissed.

For relief, Petitioners requested in their complaint that the hearing officer order DCPS and/or OSSE to implement the time requirement and harness requirement on Student's current IEP; order DCPS to ensure that Student's IEP is revised to provide that he/she not be on either the morning or afternoon school bus for more than one hour at a time and to state that the student should arrive home within one hour of school dismissal; order OSSE to provide the Parents its Special Education Services

Transportation Policy document; order DCPS/OSSE to provide transportation logs for Student for the period at issue and order DCPS and OSSE to comply with the orders issued by the Hearing Officer Lazan in the November 23, 2022 HOD.

November 23, 2022 HOD

In Case No. 2022-0168, Mother alleged that DCPS and OSSE denied Student a FAPE by failing to implement the school-to-home transportation requirements in DCPS' April 27, 2022 IEP. Specifically, Mother alleged that DCPS and OSSE did not comply with the IEP requirement that Student arrive home from school within an hour of the end of the school day. In his November 23, 2022 decision, Hearing Officer Lazan found that during the 2022-2023 school year, the student had come home late from school more than half of the time. The hearing officer concluded that given Student's severe disabilities, the failure to timely transport Student from school to home was a material violation of the Student's IEP which resulted in the denial of FAPE. For relief, Hearing Officer Lazan ordered,

1. For the remainder of the 2022-2023 school year, Respondents [DCPS and OSSE] shall arrange for a private transportation provider to pick up the Student for travel from PUBLIC CHARTER SCHOOL to the Student's home at the end of the school day and
2. Such private transportation shall transport the Student from Public Charter School to home so that the Student arrives at home within one hour of the end of the school day.

Hearing Officer Exhibit 1.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in the current case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides with the Parents in the District of Columbia. Student is eligible for special education and related services as a student with Multiple Disabilities (Autism Spectrum Disorder, Other Health Impairment). Exhibit P-1.

2. Student's disabilities are severe. Student is nonverbal, incontinent and relies on a wheelchair. Student suffers from Autism and Epilepsy. Testimony of Mother. Student's condition is caused by a chromosomal 2p duplication responsible for his/her autism, hypotonia, asthma, gastroesophageal reflux disease (GERD), hearing loss and global developmental delay. Exhibit P-2.

3. Student attends Public Charter School (PCS) for the 2022-2023 school year. He/she has been at PCS for more than XX years. Student is well cared for at PCS and happy there. Testimony of Mother. DCPS is the local education agency for PCS. Representation of Counsel.

4. Student's April 27, 2022 PCS IEP provided, *inter alia*, that Student requires Special Education Transportation Services, that Student's mode of Special Education Transportation is a "DOT Vehicle," and that Student will have a safety harness and that Student must be home within 1 hour. Exhibit P-1.

5. OSSE is the public agency which is responsible for providing special education transportation for children with disabilities who reside in the District of Columbia . Testimony of Associate Director.

6. In the November 23, 2022 HOD, Hearing Officer Lazan concluded, *inter alia*, that DCPS and OSSE had not complied with the April 27, 2022 IEP transportation requirement that Student arrive home from school within an hour of the end of the school day. As a remedy, Hearing Officer Lazan ordered that for the remainder of the 2022-2023 school year, Respondents [DCPS and OSSE] shall arrange for a private transportation provider to pick up the Student for travel from PCS to the Student's home at the end of the school day and that such private transportation shall transport the Student from PCS to home so that the student arrives at home within one hour of the end of the school day. Hearing Officer Exhibit 1.

7. Following issuance of the November 23, 2022 HOD, OSSE put into place private transportation for Student to and from PCS, provided by a contract vendor (VENDOR). The private transportation for Student started on or about December 12, 2022 and remained in place as of the hearing date. Testimony of Associate Director.

8. The distance between Student's home and PCS is approximately 15 miles. According to OSSE's records, since December 12, 2022, there have been two instances when the Student did not arrive at home after school within one hour. On one trip, Student arrived 5 minutes after the 1 hour limit. On another trip, Student arrived 36

minutes after the 1 hour limit. Testimony of Associate Director. Mother did not refute this testimony but testified that in 2023, there have been maybe 15 days when Vendor picked up Student late in the morning. Testimony of Mother.

9. Before Hearing Officer Lazan ordered in the November 23, 2022 HOD that DCPS and OSSE arrange a private transportation provider for Student, OSSE had transported Student to and from PCS on OSSE Department of Transportation (DOT) buses. The DOT buses have passenger lap belts but no shoulder belts. The buses were equipped with safety harness securement systems specially made for school bus seats. After receiving the order in the November 23, 2022 HOD to implement private transportation for Student, OSSE discontinued Student's DOT bus service and arranged for Vendor to transport Student in a private vehicle. When the November 23, 2022 HOD was issued, OSSE was unaware that Student would need a safety harness in the Vendor vehicles because, unlike DOT buses, private vehicles are equipped with shoulder harnesses. Testimony of Program Manager.

10. In an email exchange beginning December 14, 2022, Mother wrote PCS that the private van for Student did not have a safety harness and that OSSE took the position that the agency does not provide the harness for private transportation. Mother write PCS' ADMISSION DIRECTOR that Student still needed a safety harness for private vehicle transportation and that Student's physician had told the Parents to use a harness in their family car. Exhibit P-12. By email of December 16, 2022,

Admission Director wrote OSSE that the PCS team believed that the harness accommodation should be approved and that PCS was willing to purchase the harness for Student's transport. PCS requested that OSSE obtain Vendor's approval for use of the proposed harness for Student. On January 23, 2023, OSSE informed PCS that Vendor had approved use of the harness. Exhibit R-12. On or about January 25, 2023, PCS issued a purchase order for the private vehicle harness for Student. Exhibit R-5. Student has had the safety harness on the private transportation vehicle since a couple of months before the March 28, 2023 due process hearing. Testimony of Mother.

11. In September 2022, Mother began trying to have the April 27, 2022 IEP amended to provide that Student would spend no more than one hour on the bus when he/she is picked up from home in the morning (as well as in the afternoon). Exhibit P-23.

12. In a September 23, 2022 "Letter of Medical Necessity," one of Student's physicians wrote that due to Student's medical and developmental issues, Student must be home within one hour of school ending and should not spend more than one hour on the buses. The physician wrote that several of Student's conditions could be exacerbated by bus rides over an hour and if Student does not arrive home within an hour of school ending to receive necessary medical treatment. Exhibit P-2. The Parents provided the physician's letter to PCS and/or DCPS. Exhibit P-6.

13. At the January 5, 2023 Resolution Session Meeting (RSM) for this case,

DCPS proposed to amend Student's IEP to provide that Student must be transported within 1 hour for AM and PM transport. Testimony of Resolution Specialist, Exhibit R-1. Mother stated that in October 2022, she had already provided proposed IEP language for Student's transportation. Exhibit R-1.

14. On January 26, 2023, PCS amended Student's IEP without a meeting to provide for a Change in Transportation Services: Change in amount of time on bus when being transported to school in the morning. The new language stated,

Due to a documented medical condition, [Student's] ride time on the bus in the morning and afternoon between home and school cannot exceed 1 hour. In the afternoon, [he/she] must be home within 1 hour of the end of the school day: 3:00 pm on regular days, and 12:30 pm on half-days. (Per the OSSE Parent Transportation Handbook, pg. 3, traffic and weather conditions may impact ride times on a given day.) In order to provide adequate trunk support during transport, [Student] requires a safety vest/harness while in transit. If a safety vest/harness is not available for the vehicle transporting, [Student's] stroller can provide the adequate support and the vehicle should accommodate the stroller.

...

Exhibit R-3. The Parents never consented to the language in this amendment.

Testimony of Mother. The January 26, 2023 IEP amendment was adopted, allegedly without the Parents' participation or consent, after the due process complaint in this case was filed. Whether DCPS violated IDEA procedures by adopting the amendment has not been alleged as an issue in this case. Hearing Officer Notice.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my conclusions of law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Parents this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the public agency, the agency shall hold the burden of persuasion on the appropriateness of the proposed IEP or placement; provided that the Parents shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

Issue 1

Has DCPS and/or OSSE denied Student a FAPE by not implementing Student's April 27, 2022 IEP special education school transportation requirement for Student to arrive at his/her home, after school, no later than one hour after school is dismissed and by not ensuring that Student is secured by a safety harness while on school transportation?

The Parents' due process complaint in this case is focused on OSSE's and DCPS' implementation of the special education transportation requirements in Student's IEP,

subsequent to the issuance of the November 23, 2022 HOD. Student's last IEP, developed on April 27, 2022, provided that Student's mode of Special Education Transportation is a "DOT Vehicle," that Student shall have a safety harness and that Student must be home within 1 hour. The Parents allege that since the November 23, 2022 HOD was issued, DCPS and IEP have not fully complied with the one hour school-to-home transportation time limit or with the requirement that Student be secured by a safety harness. In my order on DCPS' partial motion to dismiss, I dismissed the Parents' Issue 1 claims against DCPS, but not against OSSE, because under District of Columbia regulations, OSSE, not DCPS, is responsible for implementing IEP special education transportation services.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), that a material failure to implement substantial or significant provisions of a child's IEP may constitute a denial of FAPE.

A school district "must ensure that . . . special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). A material failure to implement a student's IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268–69 (D.D.C. 2013). To meet its burden, the moving party "must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). "Generally, in analyzing whether a student was deprived of an educational benefit, 'courts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.' " *Id.*

(quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

Middleton at 144.

OSSE argues that Hearing Officer Lazan's transportation order in the November 23, 2022 HOD modified the April 27, 2022 IEP provision for Student's school transportation and that OSSE has substantially complied with the modified transportation requirement. I agree with OSSE that Hearing Officer Lazan's order effected a modification of the April 27, 2022 IEP transportation requirement, namely that in place of the "DOT vehicle" specified in the IEP, OSSE was ordered to arrange a private transportation provider for Student. However, the IEP's requirement that Student arrive at home within one hour of the end of the school day was not changed.

I find that the Parents, who have the burden of persuasion on their failure to implement claim, have failed to establish that OSSE denied Student a FAPE by not ensuring that Student arrived at home within one hour of the end of the school day. OSSE records indicated that since December 12, 2022, there were only two instances when the Student did not arrive at home after school within one hour. On one of those days, the delay was only 5 minutes. I find that OSSE's getting Student home late on two occasions, over a period of some 60 school days, does not constitute a failure to implement substantial or significant provisions of the modified IEP transportation requirement.

OSSE's failure, after December 12, 2022, to provide a safety harness for Student's use in the private transportation vehicle is a different matter. OSSE initially assumed that Student would not need a safety harness in a private vehicle, because, unlike DOT buses, private vehicles are equipped with standard shoulder belts. That assumption was reasonable. But by mid-December 2022, the Parents and PCS had informed OSSE that due to his/her disability, Student continued to require a safety harness even in a private vehicle. Under the IDEA, if a child needs a seat harness for safe special education transport, the public agency has a duty to provide it. *See, e.g., Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, p 7. (OSERS 2004) (If an IEP Team determines that a child with a disability requires special transportation arrangements or accommodations for safety, the LEA must provide these services.)

The evidence established that Student required a seat harness for safety. When OSSE did not provide a harness for Student's use in the Vendor vehicles, PCS provided the safety harness around January 25, 2023. I conclude that OSSE's failure to provide a safety harness from mid December 2022 until PCS provided the harness in late January 2023 was a failure to implement substantial or significant provisions of the IEP transportation requirement.

Issue 2

Has DCPS and/or OSSE denied Student a FAPE by not implementing the school transportation order in the November 2022 Hearing Officer Determination?

In the November 23, 2022 HOD, Hearing Officer Lazan ordered that for the remainder of the 2022-2023 school year, Respondents [DCPS and OSSE] were to arrange for a private transportation provider to pick up the Student for travel from PCS to Student's home at the end of the school day, so that the Student arrived at home within one hour of the end of the school day. As explained in the preceding part, the evidence at the due process hearing indicated that since December 12, 2022, OSSE contracted with a private provider to transport Student to and from school and there were only two instances when the Student did not arrive at home after school within the one hour time limit. I find that the Parents did not meet their burden of persuasion that OSSE or DCPS denied Student a FAPE by not implementing Hearing Officer Lazan's school transportation order.²

Issue 3

Has DCPS and/or OSSE denied Student a FAPE by not providing in Student's April 27, 2022 IEP that Student not be on the school bus – in the morning as well as in the afternoon – for more than one hour at a time?

The April 27, 2022 IEP provided that Student required special education

² As I explained in my March 27, 2023 order on DCPS' motion to dismiss, the IDEA does not empower special education hearing officers to enforce Hearing Officer Determinations. However, if a public agency's non-compliance with a hearing officer order results in failure to provide FAPE, this failure may constitute a separate, actionable, violation of the IDEA. *Cf. Sellers by Sellers v. School Bd. of City of Manassas*, 141 F.3d 524, 531 (4th Cir.1998).

transportation and that Student “must be home within 1 hour.” In the November 23, 2022 HOD, Hearing Officer Lazan found that the same language had been on the Student’s earlier IEPs.³ In September 2022, Mother began trying to have the IEP amended to require that Student would also spend no more than one hour on the bus when he/she is picked up from home in the morning. The Parents submitted to PCS or DCPS a “Letter of Medical Necessity” dated September 23, 2022, in which Student’s physician wrote that due to Student’s medical and developmental issues, Student should not spend more than one hour on school buses. It appears that at least by the January 5, 2023 RSM for this case, DCPS agreed to add the 1-hour morning transportation time limit to Student’s IEP.

An IEP must be tailored to the student’s reasonably known needs at the time it is offered. *See, e.g., Z. B. v. District of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018). In this case, the evidence does not establish that at the time the April 27, 2022 IEP was developed – before Mother’s September 2022 request – there was a known need to provide in Student’s IEP that he/she not be on the school bus for more than one hour for travel to school. I conclude that the Parents have not established a *prima facie* case that the April 27, 2022 IEP was inappropriate for want of a provision that Student would not

³ Respondents did not assert as an affirmative defense that the Parents were barred by the doctrine of *Res Judicata*/Claim Preclusion from raising this inappropriate April 27, 2022 IEP claim after the final decision was rendered on November 23, 2022 in Case No. 2022-0168.

be on the school bus for more than one hour in the morning, was well as in the afternoon.

Relief

The only violation established by the Petitioners in this case was OSSE's failure, following Mother's request in mid-December 2022, to provide a safety harness for Student's use in Vendor's private transportation vehicle. For relief, the Petitioners seek an order for DCPS and/or OSSE to implement the harness requirement. However, OSSE's failure to ensure that Student had an appropriate harness was resolved when PCS provided the safety harness around January 25, 2023. Petitioners have not requested, or shown a need for compensatory education, to compensate Student for not being provided the safety harness until late January 2023. Since Student's need for a vehicle safety harness has now been met by the school, I decline to order OSSE to implement the harness requirement when the device is already being furnished. However, the special education transportation requirement in Student's IEP must be revised to reflect that Student is now to be transported by a private transportation provider and that Student continues to requires a safety harness in the private vehicle.

DCPS' Counsel represents that the next annual IEP review meeting for Student will occur this month. In my discretion as the hearing officer in this case, I will order DCPS to ensure that the IEP is revised to incorporate Student's updated transportation requirement. I will also direct DCPS to ensure that the IEP team considers the Parents'

request to include appropriate language in the revised IEP to address the concern that Student not be on the school transportation vehicle for more than one hour – in the morning was well as in the afternoon. *See Lee v. District of Columbia*, No.

1:15-CV-01802, 2017 WL 44288, at 2 (D.D.C. Jan. 3, 2017) (Broad discretion under the IDEA’s remedial provisions to craft appropriate relief.)

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. At the April 2023 annual IEP review meeting for Student, DCPS shall ensure that the IEP team revises Student’s IEP to provide, *inter alia*, for Student’s transport by a private transportation provider for the remainder of the 2022-2023 school year, per the November 23, 2022 HOD order, and to require that a safety harness be provided for Student’s private transportation transport. DCPS shall also ensure that the IEP team considers the Parents’ request to include appropriate language in the revised IEP to address the concern that Student not be on the school transportation vehicle for more than one hour – in the morning was well as in the afternoon;
2. In light of my findings and conclusions in this decision, DCPS’ renewed motion to dismiss is denied and
3. All other relief requested by the Petitioners herein is denied.

Date: April 2, 2023

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

Hearing Officer Determination
Case No: 2022-0223
April 2, 2023

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state 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 Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: Counsel of Record
Office of Dispute Resolution
DCPS - SPED
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