

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

GRANDMOTHER and MOTHER,
on behalf of STUDENT,¹

Date Issued: August 11, 2020

Petitioners,

Hearing Officer: Peter B. Vaden

v.

Case No: 2020-0127

D.C. OFFICE OF THE STATE
SUPERINTENDENT OF EDUCATION,

Online Video Conference Hearing

Respondent.

Hearing Date: August 7, 2020

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioners, Student's Grandmother and Mother, under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In their due process complaint, Petitioners seek relief for Respondent, D.C. Office of the State Superintendent of Education's (OSSE), allegedly not providing a dedicated aide on Student's special education school bus during the 2018-2019 and 2019-2020 school years.

Petitioners' Due Process Complaint, filed on July 1, 2020, named OSSE, as the District of Columbia State Education Agency (SEA), as Respondent. The undersigned

¹ Personal identification information is provided in Appendix A.

hearing officer was appointed on July 2, 2020. On July 10, 2020, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. My final decision is due by August 15, 2020.

On July 13, 2020, OSSE filed a motion to dismiss the due process complaint for failure to state a claim upon which relief may be granted and failure to join the local education agency (LEA) for Student, PUBLIC CHARTER SCHOOL (PCS), as a necessary party. By order issued July 17, 2020, I denied OSSE's motion to dismiss.

Due to the closing of hearing rooms at the Office of Dispute Resolution in the wake of the Coronavirus outbreak, the due process hearing in this case was held online and recorded, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned Impartial Hearing Officer on August 7, 2020. Grandmother and Mother appeared online for the hearing and were represented by Petitioners' COUNSEL. (Mother remained on line for only a short period of time.) Respondent OSSE was represented by OSSE'S COUNSEL.

Counsel for the parties made opening statements. Grandmother testified at the hearing and Petitioners called EDUCATIONAL ADVOCATE, SCHOOL BUS DRIVER, BUS ATTENDANT and ASSOCIATE DIRECTOR as additional witnesses. OSSE called no additional witnesses. Petitioners' Exhibits P-8 through P-10, P-29 through P-34, P-36, P-38, P-46, P-49, and P-59 through P-75 were all admitted into evidence without objection. Petitioners' remaining exhibits disclosed prior to the hearing were not offered. OSSE's Exhibits R-1 through R-37 were all admitted into evidence without

objection. At the conclusion of the taking of the evidence, counsel for the respective parties 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-E, § 3029. *See, also Chavez ex rel. M.C. v. New Mexico Pub. Educ. Dep't*, 621 F.3d 1275, 1283 (10th Cir. 2010) (Absent a determination that it was providing direct services to child, state education agency was not responsible for the matters covered by due process hearings.) In the present case, the hearing officer determines he has jurisdiction over OSSE because OSSE was providing direct IEP transportation services to Student.

ISSUES AND RELIEF SOUGHT

The issue for determination in this case, as certified in the July 10, 2020 Prehearing Order, is:

Whether OSSE denied Student a FAPE during the 2018-2019 and 2019-2020 school years by failing to appropriately implement Student's transportation services by denying Student access to a dedicated aide, which is necessary for Student to access education.

For relief, Petitioners request that OSSE be ordered to provide Student a dedicated aide for the school bus and provide private transportation to take Student to and from school. Petitioners also seek a compensatory education award for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

After considering all of the evidence received at the on-line hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides with Grandmother and Mother in the District of Columbia. Testimony of Grandmother.

2. Student was most recently reevaluated for special education eligibility on August 15, 2018 by Student's local education agency, PCS. Student was found eligible under the Autism Spectrum Disorder (ASD) disability classification. Exhibit P-8.

3. For most of the 2018-2019 school year, Student attended NONPUBLIC SCHOOL 1. On June 4, 2019, PCS convened a change of location meeting for Student because Nonpublic School 1 was closing at the end of the school year. At that meeting, Grandmother reported that the school transportation situation was not good – that she could hear Student screaming all the way from her apartment and that the bus driver was refusing to come to the building and hold Student's hand and walk Student to the bus. PCS suggested and the team agreed to add a school bus dedicated aide to Student's Individualized Education Plan (IEP). Exhibit P-29.

4. Student's IEP was amended on June 7, 2019 to provide, *inter alia*, that Student required special education transportation services and required a dedicated aide on the school bus. The IEP states Student "has a classification of Autism and experiencing anxiety when being transported on the school bus with other students.

[Student] become physically aggressive towards the transportation staff, as well as displays unsafe behavior. [Student] will not remain seat, will not keep [Student's] seat belt on, and stands up. [Student] requires a dedicated aide for support on the school bus for the safety of [Student] and others." [sic] Exhibit P-8.

5. On September 19, 2019, PCS amended Student's IEP to provide for, *inter alia*, 29.5 hours per week of Specialized Instruction outside general education. The IEP provision for transportation services and the requirement for a dedicated aide for support on the school bus were left unchanged. Exhibit P-9.

6. Student's PCS IEP team met for the annual IEP review on April 15, 2020. The IEP provisions for transportation services with a dedicated aide for support of Student on the school bus were left unchanged. Exhibit P-10.

7. Effective July 1, 2019, Student transferred to NONPUBLIC SCHOOL 2. Testimony of Grandmother, Exhibit R-36. The bus ride between Student's home and Nonpublic School 2 takes about 1½ hours each way. Testimony of School Bus Driver.

8. Requests for special education transportation for children with disabilities are submitted by the child's LEA to OSSE's Division of Transportation. On or about July 3, 2019, PCS submitted a transportation request to OSSE for Student. The request specified that Student required a dedicated aide for support on the school bus. Testimony of Associate Director, Exhibit R-24. The transportation request was updated on July 10, 2019 and July 17, 2019. Exhibits R-25, R-26. The evidence in the record does not establish whether PCS made a request to OSSE to provide a dedicated aide to

support Student on the school bus before July 3, 2019.

9. At a meeting at PCS on October 11, 2019, Nonpublic School 2 staff reported that Student did not have a dedicated aide on the school bus. Testimony of Educational Advocate, Exhibit P-31.

10. Beginning in July 2019, OSSE provided direct school transportation services for Student to and from Nonpublic School 2. The assigned school bus transported about 6 children to Nonpublic School 2 and was staffed by the driver and a bus attendant. The bus attendant is supposed to monitor all of the students. Exhibit R-27, Testimony of Bus Attendant. School Bus Driver and Bus Attendant staffed Student's school bus from on or about August 14, 2019 until schools were closed in March 2020. Exhibits R-28 through R-35.

11. The purpose of a dedicated aide on the school bus is to monitor the student to whom he or she is assigned, to make the student safe and to make sure that the student is not doing anything the student is not supposed to do. Testimony of Bus Attendant.

12. Bus transportation for Student was suspended upon the closing of schools in the District on March 16, 2020 due to the Coronavirus pandemic. From July 2019 through March 16, 2020, Student was never provided dedicated aide on the school bus. Testimony of Grandmother, Testimony of Associate Director. Student was assigned the seat next to Bus Attendant on the school bus, but the only direct services Bus Attendant provided Student was to get Student on and off the bus. Testimony of Bus Attendant.

13. Student has had numerous behavior incidents on the school bus. Student would scream, yell, spit, call the staff names, unbuckle the seat belt and get out of the seat. The acting out incidents occurred around 2-3 times per week. About three times per month, the incidents were so severe that bus staff would call the OSSE dispatcher for guidance. Testimony of School Bus Driver, Testimony of Bus Attendant. During an incident in March 2020, Student began to hit and punch Bus Attendant. The OSSE dispatcher told Bus Attendant to call 911 because Student was out of control. Testimony of Bus Attendant.

14. When ■ got home after behavior incidents on the school bus, Student's anxiety level would be so high that Mother had to hold and cuddle Student to sooth the child. This occurred on 4 or 5 days over the school year. Since the closing of schools in March 2020, the family has not been experiencing a lot of anxiety issues with Student. Testimony of Grandmother.

15. Over the 2019-2020 school year at Nonpublic School 2, including the summer session, Student's grades in all academic subjects improved from "B" (Beginning) to "D" (Developing). Exhibit R-37.

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 Petitioners in 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, which are not at issue in this

case. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

– Did OSSE deny Student a FAPE during the 2018-2019 and 2019-2020 school years by failing to appropriately implement Student’s transportation services by denying Student access to a dedicated aide, which is necessary for Student to access education?

In the District of Columbia, the SEA, OSSE, provides school transportation services for special education students and, when requested by the LEA for a particular student, is responsible for staffing the bus with a dedicated aide. Beginning June 7, 2019, Student’s PCS IEPs provided that Student required special education transportation to and from school and that Student required a dedicated aide for support on the school bus for the safety of Student and that of others. On July 3, 2019, PCS submitted a Transportation Request Form to OSSE requesting a dedicated aide for Student on the OSSE school bus. (The evidence does not establish whether a request form, specifying the requirement for a dedicated aide, was submitted to OSSE before July 3, 2019.) Student started attending Nonpublic School 2 on July 2, 2019. It is undisputed that from July 2, 2020 through the closing of schools due to the Coronavirus outbreak in March 2020, OSSE never staffed Student’s school bus with a dedicated aide. Petitioners contend that this was a failure by OSSE to implement Student’s IEP and resulted in a denial of a free appropriate public education (FAPE). OSSE responds that its failure to provide the dedicated aide was a *de minimis* omission, because there was,

at all times, a bus attendant on Student's school bus.

As U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), failure to implement all elements of an IEP does not necessarily give rise to 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. A mere "*de minimis* failure to implement all elements of [an] IEP" does not amount to a violation of the IDEA. *Id.* (citing *Wilson, supra*, 770 F.Supp.2d at 274.)

In the present case, Petitioners established that OSSE failed to provide a dedicated aide to support Student on the school bus from July 2, 2019 through March 2020 when schools closed due to the Coronavirus.² This was a failure to implement a substantial or significant provision of Student's IEPs. Student, who has ASD and an anxiety disorder, spent some three hours per school day traveling back and forth to

² Counsel represented that Nonpublic School 2 has a year-round program.

school on the OSSE school bus. The goal and import of the dedicated aide for Student was to assure the safety of Student, staff and other children on the bus. Student's IEPs specified that when being transported on the school bus, Student become physically aggressive towards the transportation staff, displayed unsafe behavior, would not remain in the seat, would not keep the seat belt on, and would stand up on the bus. Student needed a dedicated aide on the school bus out of safety concerns. On this evidence, I find that OSSE's omission to provide the dedicated aide over the entire truncated school year was not a *de minimis* failure to implement the IEP.

During the July 2019 to March 2020 time period, Student had numerous behavior breakdowns on the school bus. Student would scream, yell, spit, call the staff names, unbuckle the seat belt and get out of the seat. Bus Attendant testified that these incidents occurred two to three times per week. About three times per month, the incidents were so severe that bus staff would call the OSSE dispatcher for guidance. In one incident in March 2020, when Student began to hit and punch Bus Attendant, Student was so out of control that Bus Attendant had to call 911 for emergency assistance. When Student returned home after these behavior incidents, Student's anxiety level would be so high that Mother had to hold and cuddle Student to sooth the child.

OSSE argues that its not providing a dedicated aide on the school buse was merely a *de minimis* failure because, Student made some limited academic progress at Nonpublic School 2 over the 2019-2020 school year. However, a parent need not prove

that the child suffered educational harm from a failure to implement an IEP “because the Court has no way of knowing how much more progress a student might have made in the absence of the failure.” *Beckwith v. District of Columbia*, 208 F. Supp. 3d 34, 49 (D.D.C. 2016) (internal quotations and citation omitted.) I conclude that the Petitioners have met their burden of persuasion that OSSE’s failure provide a dedicated aide for Student on the school bus from July 2019 to March 2020 was a material failure to implement Student’s IEPs and resulted in a denial of FAPE.

Remedy

For relief in this case, Petitioners requested that the hearing officer order OSSE to provide a dedicated aide for Student on the school bus and to provide private, *i.e.*, non-OSSE, school transportation for Student. The evidence does not establish that with a dedicated aide on the bus, OSSE transportation would not be appropriate for Student. Therefore, I will order OSSE to provide a dedicated aide for Student on the OSSE school bus as required by Student’s IEPs.

Petitioners also request an award of compensatory education for Student for the denial of FAPE in this case. “An award of compensatory education aims to put a student . . . in the position he would be in absent the FAPE denial, and it accordingly 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. *Collette v. District of Columbia*, No. CV 18-1104 (RC), 2019 WL 3502927 (D.D.C. Aug. 1, 2019) (internal quotations and citations omitted.)

Quantifying the harm from OSSE's not providing a school bus dedicated aide is necessarily an exercise in some conjecture. Petitioners' expert, Educational Advocate, opined that while it was very difficult to quantify the position Student would now be in, if OSSE had not failed to provide the dedicated aide, OSSE's failure impacted Student's ability to self-regulate. To address the self-regulation concern, Educational Advocate recommended that Student be awarded 36 hours of Applied Behavior Analysis (ABA) therapy and 36 hours of play therapy. She opined that these services would help improve Student's social, communication, and learning skills through positive reinforcement and help Student learn more adaptive behaviors, connect with others in a positive way, stimulate creative thinking and exploration, regulate emotions, and boost Student's ego. I find these recommendations to be reasonably calculated to provide the educational benefits that likely would have accrued from the transportation services OSSE should have supplied Student under the PCS IEPs. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) (“[U]ltimate 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.”) Educational Advocate also recommended noise cancelling headphones for Student and private transportation, however she agreed in her testimony that these services were not compensatory education and I decline to award them.

ORDER

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

ORDERED:

1. OSSE shall ensure that from the first date that it resumes providing school transportation to Student after Student's school reopens, Student is provided a 1:1 dedicated aide for travel to and from school, in accordance with Student's IEPs;
2. As compensatory education for the denial of FAPE determined in this decision, within 10 business days of the date of this decision, OSSE shall issue funding authorization for the Petitioners to obtain for Student 36 hours of ABA therapy from a qualified ABA therapist and 36 hours of play therapy from a qualified mental health professional and
3. All other relief requested by Petitioners herein is denied.

Date: August 11, 2020

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

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).

Case No. 2020-0127
Hearing Officer Determination
August 11, 2020

cc: Counsel of Record
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