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OSSE
Office of Dispute Resolution
December 11, 2014

Confidential

<p>Parent on Behalf of Student, Petitioner, ¹</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)[“LEA”]</p> <p>and</p> <p>Office of the State Superintendent of Education (“OSSE”)[“SEA”]</p> <p>Respondents.</p> <p>Date Issued: December 10, 2014</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: December 3, 2014</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 on December 3, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006. The parties submitted written closing arguments on December 8, 2014.

BACKGROUND AND PROCEDURAL HISTORY:

The student is _____ a private full-time special education school (“School A”). District of Columbia Public Schools (“DCPS”) is the student’s local education agency (“LEA”). The student is currently receiving special education and related services as a student with multiple disabilities (“MD”) pursuant to the IDEA.

The student’s current individualized educational program (“IEP”) dated January 29, 2014, and amended July 9, 2014, requires that the student receive 26.5 hours per week of specialized instruction outside of the general education setting and 60 minutes per week of behavioral supports also provided outside of general education. The IEP contains goals for math, reading, written expression and behavioral development as well as extended school year (“ESY”) services and transportation.

Petitioner asserts that although the student’s IEP prescribed ESY, no ESY services were provided to the student during the summer of 2014 as he failed to receive transportation services to attend ESY. Petitioner asserts that student was getting bus transportation to and from School A during school year (“SY”) 2013-2014 but the student was incorrectly slated for public transportation. Thus, OSSE, the state education agency (“SEA”) that operates the bus transportation service, did not provide the student bus transportation for him to attend ESY.

Petitioner asserts that on July 9, 2014, the student’s IEP was amended to provide for bus transportation and the DCPS progress monitor for School A resubmitted the transportation request to OSSE. Petitioner asserts that the transportation was still not provided and no alternative transportation was provided when for whatever reason bus transportation could not/did not take effect to transport the student to ESY. Petitioner filed a due process complaint against DCPS _____ seeking compensatory education for the services the student missed during ESY.

DCPS filed a timely response to the complaint on September 24, 2014. DCPS denied any alleged violation(s) or denial of a free appropriate public education (“FAPE”). DCPS asserted the student had attendance issues throughout SY 2013-2014 and was placed on an attendance contract. DCPS alleged the student was scheduled to attend ESY but failed to appear. DCPS also claimed that OSSE is responsible for providing transportation services to students and if there was a transportation issue Petitioner should have addressed the issue to OSSE.

A resolution meeting as to DCPS was held on October 27, 2014. The case was not resolved. The parties did not mutually agree to proceed to hearing. The 45-day period began on October 16, 2014, and originally ended [and the Hearing Officer's Determination ("HOD") was due] on November 30, 2014.

On October 28, 2014, Petitioner filed a separate due process complaint against OSSE (Case # 2014-0451) alleging the same violation(s) and claim(s) against OSSE as asserted against DCPS.

On October 29, 2014, a pre-hearing conference was held with Petitioner and DCPS only and a hearing date for Case # 2014-0407 was set for November 10, 2014.

On November 6, 2014, OSSE filed a response also styled as a motion to dismiss.² OSSE asserted in its response that it was not obligated to provide the student bus transportation based upon the transportation documentation (calling for public transportation) that DCPS provided OSSE. OSSE also asserted that it is not the "first-line provider" of special education and related services as the SEA. Thus, OSSE denied any violation and/or denial of a FAPE to the student.

On November 6, 2014, Petitioner filed a motion for continuance and extension of the HOD due date and joinder of the parties and issues. The original November 10, 2014, hearing date for the case against DCPS was used instead as pre-hearing/motion hearing for both cases.

The Hearing Officer went on the record on November 10, 2014, and granted Petitioner's motion and conducted a prehearing for all parties and issues. The Hearing Officer concluded the two cases would be heard simultaneously and resolved a single decision and order. The Hearing Officer granted Petitioner's motion for continuance/extension of the HOD due date on the record and the HOD due date was extended to December 10, 2014. The Hearing Officer issued pre-hearing order on November 24, 2014, outlining, inter alia, the issue to be adjudicated.

ISSUE:³

The issue adjudicated is:

Whether DCPS and/or OSSE denied the student a FAPE by failing to provide the student's transportation services during the summer of 2014 resulting in the student's ESY services not being provided.

² On November 10, 2014, Petitioner filed a response to OSSE's motion to dismiss. The Hearing Officer concluded that OSSE's response contained assertions and defenses that required presentation of evidence and facts remained in dispute and denied OSSE's motion to dismiss in the November 24, 2014, pre-hearing order.

³ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may 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.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 27; DCPS Exhibits 1 through 5 and OSSE Exhibits 1 through 5) that were all admitted into the record and are listed in Appendix A.⁴ Witnesses are listed in Appendix B.

FINDINGS OF FACT:⁵

1. The student is a special education student attending School A. The student began attending School A during SY 2013-2014. The student is currently receiving special education and related services as a student with a MD disability classification. (Parent's testimony, Petitioner's Exhibit 4-1)
2. During SY 2013-2014 the student received bus transportation to and from School A daily. (Parent's testimony)
3. The student has had significant attendance problems at School A and as a result was placed on an attendance intervention plan. (Petitioner's Exhibit 11)
4. The student's current IEP dated January 29, 2014, and amended on July 9, 2014, requires that the student receive 26.5 hours per week of specialized instruction outside of the general education setting and 60 minutes per week of behavioral supports also provided outside of general education. (Petitioner's Exhibit 4-7)
5. The IEP contains goals for math, reading, written expression and behavioral development as well as extended school year (ESY) services and transportation. The student's IEP prescribes the same services for ESY: 27.5 hours per week of specialized instruction and 60 minutes of behavioral support services outside general education. (Petitioner's Exhibit 4-3, 4-4, 4-5, 4-6, 4-10, 4-11, 4-12, 4-13)
6. OSSE manages the bus transportation services for DCPS special education students and relies upon DCPS and other LEAs to ensure that the LEA provides OSSE proper documentation of the mode of transportation services for each student by the LEA inputting the appropriate data into the OSSE transportation database. (Witness 4's testimony, OSSE Exhibit 4)

⁴Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

⁵ The evidence that is the source of the Finding of Fact ("FOF") 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 more than one party separately the Hearing Officer may only cite one party's exhibit.

7. On June 10, 2014, DCPS changed the student's mode of transportation in the OSSE transportation database from bus transportation for ESY to public transportation in error. (Witness 1's testimony, OSSE Exhibit 2-006, 2-007)
8. On July 1, 2014, when ESY was due to start the school bus did not show up at Petitioner's home to take the student to School A for ESY. The student's parent contacted the OSSE transportation call center and was informed that the transportation database indicated the student was to receive public transportation. The parent contacted School A and informed the school of the problem. School A later informed the parent that the error had been corrected. The parent was aware that the change back to bus transportation would take 3 to 5 business days. However, after 3 to 5 business days the bus transportation still did not resume. Consequently, the student did not attend ESY. (Parent's testimony)
9. Once School A staff realized the student was not in attendance for ESY and determined that the student's transportation services had been incorrectly changed from bus transportation to public transportation School A contacted DCPS about the error. Although the bus transportation is managed by OSSE, School A was aware that only the LEA (DCPS) could make a change in the student's transportation service to correct the error. (Witness 1's testimony)
10. School A and DCPS quickly amended the student's IEP on July 9, 2014, to correct the error and the DCPS representative entered a change into the SEDS database. However, the student's bus transportation never resumed during ESY. (Witness 1's testimony, Petitioner's Exhibit 4-1)
11. Although DCPS amended the student's IEP and made a change in the SEDS database, the DCPS representative did not complete the required change in the OSSE transportation database (TOTE). Consequently, bus transportation was never provided the student during the ESY period of summer 2014 and the student did not attend ESY as a result. (Witness 1's testimony, Witness 4's testimony, OSSE Exhibit 4-11)
12. During SY 2013-2014 the student had passing grades. The student has failed first quarter of the current school year because of his attendance. The student has had 16 unexcused absences during that period. (Witness 1's testimony, Petitioner Exhibits 13-1, 14-4)
13. The student often shows signs of regression and has had ESY on his IEP for years as a result. The student not attending ESY during summer 2014 has, in his parent's opinion, had some detrimental impact on the student. The student would benefit from tutoring. (Parent's testimony)
14. The parent's educational advocate proposed a compensatory education plan to compensate the student for the services he missed from ESY during summer 2014. The advocate recommended 69 hours of independent tutoring of 3 hours for the 23 days that Petitioner asserts the student would have attended ESY. The advocate in developing the compensatory education proposal reasoned that the student's missing ESY was a

significant cause toward his failing the first quarter of SY 2014-2015. ⁶ (Witness 2's testimony, Petitioner's Exhibit 22)

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. ⁷ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

⁶ Although Witness 2 theorized the student had similar absences in SY 2013-2014 and was able to receive passing grades, this Hearing Officer was unconvinced that the comparison was reasonable given Witness 1's testimony that the reason for the student's current failure is his absences. Witness 1's testimony in this regard was more credible given that she works closely with the student's School A teachers as the School Director.

⁷ 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.

ISSUE: Whether DCPS and/or OSSE denied the student a FAPE by failing to provide the student's transportation services during the summer of 2014, resulting in the student's ESY services not being provided.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student was denied a FAPE by DCPS inappropriately changing the student's transportation services from bus transportation to public transportation and not correcting the error in the OSSE transportation database. The Hearing Officer concludes that transportation was not provided due to any error on the part of OSSE and therefore dismisses the claim(s) against OSSE.

The evidence demonstrates that DCPS as the LEA was responsible for making a change in the student's transportation services and although an attempt was made to correct the error the correction was only made in the SEDS system and not also to the OSSE transportation database (TOTE). There was credible testimony by Witness 4 and based upon OSSE transportation policy documentation that any request for changes to a student's transportation is the LEA's responsibility and must be simultaneously made in both SEDS and TOTE. The evidence demonstrates that the error was that of DCPS in not making certain that the change in the student's mode of transportation was fully effectuated.⁸ As result of the student not being provided bus transportation as his IEP required the student missed the instruction and related services he was due for approximate four weeks of ESY.⁹ The failure to provide the student transportation services and thus ESY was a material failure to implement his IEP.

A material failure to implement a student's IEP constitutes a denial of a free appropriate public education. *Banks ex rel. D.B. v. District of Columbia*, 720 F. Supp. 2d 83, 88 (D.D.C. 2010). ("[A] material failure to implement an IEP violates the IDEA. 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."). "[C]ourts applying [this] standard 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." *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). What provisions are significant in an IEP should be determined in part based on "whether the IEP services that were provided actually conferred an educational benefit." *Bobby R.*, 200 F.3d at 349, n. 2.

The evidence demonstrates the student missed specialized instruction and related services for the four weeks of ESY.¹⁰ The Hearing Officer concludes that there was sufficient evidence that the

⁸ FOF #s 6, 7, 11

⁹ The Hearing Officer takes administrative notice that ESY was approximately 4 weeks during summer 2014.

¹⁰ FOF # 13

missed ESY services resulted in a material failure to implement the student's IEP and Petitioner's sustained the burden of demonstrating a denial of a FAPE to the student.

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.

Although the student's educational advocate testified that the student's academic performance has suffered as a result of not having ESY services and that 69 hours of tutoring is desired to compensate the student, the Hearing Officer was not convinced by this testimony. This testimony was based on the presumption that the student's current poor academic performance is because he missed ESY. However, the evidence demonstrates the student's current poor performance is due to his absences since SY 2014-2015 began. In addition, the proposed hours seek to compensate the student for nearly all the hours of instruction missed during ESY, hour for hour, without sufficient basis. Petitioner did not sufficiently demonstrate that the amount of compensatory services requested was warranted. The Hearing Officer concludes from the evidence that the student would benefit from tutoring; however, the requested amount is exorbitant. Consequently, the Hearing Officer reasons that the student should be compensated with an amount of tutoring to be used within a reasonable period that would provide him some progress toward recouping the services he missed during ESY.¹¹

ORDER:¹²

1. DCPS shall provide the student the following as compensatory education: 25 hours of independent during at the DCPS/OSSE rate to be used at a provider of Petitioner's choice. Petitioner must use this award by August 30, 2015.
2. As to OSSE (Case 2014-0451) the complaint is dismissed with prejudice.

¹¹ The Hearing Officer concludes that despite Petitioner's inability to establish appropriate compensatory education, to award nothing would be inequitable. (A party need not have a perfect case to be entitled to compensatory education. *Stanton v. D.C.* 680 F Supp. 201 (D.D.C. 2011). If a student is denied a FAPE a hearing officer may not "simply refuse" to grant a compensatory education award. *Henry v. D.C.* 55 IDELR (D.D.C. 2010))

¹² Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

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: December 10, 2014