

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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<b>Parent, on behalf of Student,<sup>1</sup></b>	)	
<b>Petitioner,</b>	)	
	)	<b>Hearing Date: 11/28/22</b>
v.	)	
	)	<b>Hearing Officer: Michael Lazan</b>
<b>District of Columbia Public Schools and</b>	)	
<b>Office of the State Superintendent of</b>	)	<b>Case No. 2022-0180</b>
<b>Education,</b>	)	
<b>Respondents.</b>	)	

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving an X-year-old student who is currently eligible for services as a student with a Traumatic Brain Injury. A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS”) and Office of the State Superintendent of Education (“OSSE”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on October 5, 2022. The Complaint was filed by the Student’s parent (“Petitioner”). On October 13, 2022, DCPS filed a response. On October 17, 2022, OSSE filed a response. A resolution meeting was held with DCPS only on October 17, 2022. The matter was not settled. The resolution period, for claims against DCPS only, expired on November 12, 2022.

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<sup>1</sup>Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

## **II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the IDEA, 20 U.S.C. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-A, Chapter 30.

## **III. Procedural History**

On October 13, 2022, DCPS moved for summary judgment. On October 18, 2022, OSSE filed opposition to the motion. An order denying the motion was issued on November 4, 2022. A prehearing conference was held on October 25, 2022. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for DCPS, appeared. Attorney C, counsel for OSSE, appeared. A Prehearing Conference Order summarizing the rules to be applied in the hearing and identifying the issues in the case was issued on November 1, 2022. On November 2, 2022, OSSE moved for a continuance, without objection. An order granting the motion was issued on November 4, 2022, extending the Hearing Officer Determination (“HOD”) due date for OSSE only to December 19, 2022. Hearings were held on June 16, 2022, and June 27, 2022.

The hearings were conducted through the Microsoft Teams videoconferencing platform, without objection. Petitioner was again represented by Attorney A, Esq. DCPS was again represented by Attorney B, Esq., as well as Attorney D, Esq. OSSE was again represented by Attorney C, Esq. This was a closed proceeding.

During the proceeding, Petitioner moved into evidence exhibits P-1 through P-10 without any objections being filed. DCPS sought to redact some of the handwritten references in exhibits P-4 and P-7, but these objections were overruled. Exhibits P-1

through P-10 were admitted. DCPS moved into evidence exhibits DCPS R-1, DCPS R-2, DCPS R-5, DCPS R-6, DCPS R-7, and DCPS R-13 through DCPS R-15, without objections. OSSE moved into evidence exhibits OSSE R-1 through OSSE R-7 without objections. After the presentation of Petitioner's case, DCPS moved for a directed verdict. This motion was denied on the record. Petitioner presented herself as a witness. DCPS presented as witnesses: Witness A, a DCPS teacher; Witness B, a Local Educational Agency ("LEA") representative; and Witness C, a resolution specialist. OSSE presented as witnesses: Witness D, an OSSE management analyst, and Witness E, the OSSE associate director for auditing and compliance. At the end of testimony, the parties provided closing statements.

#### **IV. Issues**

As identified in the Prehearing Conference Order and in the Complaint, the issues to be determined in this case are as follows:

**1. Did OSSE fail to implement the Student's Individualized Education Program ("IEP") for the 2022-2023 school year with respect to the Student's transportation? If so, did OSSE deny the Student a Free Appropriate Public Education ("FAPE")?**

**2. Did DCPS fail to implement the Student's IEP for the 2022-2023 school year with respect to the Student's transportation? If so, did DCPS deny the Student a FAPE?**

As relief, Petitioner is seeking transportation for the Student for the remainder of the 2022-2023 school year and reimbursement for the cost of transporting the Student to and from school since the start of the 2022-2023 school year. Petitioner is also seeking compensatory education for Extended School Year ("ESY") services that the Student missed because of transportation issues during the summer of 2022.

## **V. Findings of Fact**

1. The Student is an X-year-old who is eligible for services as a student with Traumatic Brain Injury. The Student's expressive and receptive language delays negatively impact his/her participation in the general education curriculum. Additionally, the Student's disability affects his/her progress in the general education curriculum due to his/her need for direct teaching and reteaching of concepts. The Student learns best in small groups and one-on-one teaching to facilitate and support his/her learning needs. DCPS R-4.

2. The Student has attended DCPS schools since 2015. Between 2015 and the 2021-2022 school year, the Student was transported to school from a childcare center because of Petitioner's schedule. Petitioner had to get to work at an early time. The Student's childcare center opened at 6:00 a.m., which allowed Petitioner to drop the Student at the childcare center and then go to work at 7:30 a.m. The childcare center, unlike other childcare centers, was relatively close to Petitioner's house. School for the Student started at approximately 9:00 a.m. Testimony of Petitioner.

3. For the 2021-2022 school year, the Student attended School A, a DCPS public school. An IEP meeting was held for the Student on January 18, 2022. At this meeting, the IEP team discussed the Student's transportation arrangements for the 2022-2023 school year. The IEP team confirmed that the Student was eligible for special education transportation, including transportation for ESY services. The Student's special education teacher at School A asked Petitioner whether the Student was going to attend the same childcare center for the 2022-2023 school year. The teacher wanted to determine whether the Student's pick-up time or drop-off time would change. Petitioner

replied that the Student would attend the same childcare center for the 2022-2023 school year. Testimony of Petitioner; DCPS R-4.

4. The Student's current IEP, dated January 18, 2022, requires special education transportation services, including for ESY services. The IEP states that the special education transportation services are in category "ASP" and that the mode of transportation is a Department of Student Transportation ("DOT") vehicle. P-1-3, P-1-6.

5. For the summer of 2022, the Student was assigned to School B, a DCPS public school. There were issues picking the Student up at the childcare center to take him/her to School B for ESY services. Consequently, the Student did not receive ESY services for the first two weeks of the summer of 2022. Testimony of Petitioner.

6. For the 2022-2023 school year, the Student was again assigned to School A. On or about August 11, 2022, Petitioner provided DCPS with the name and address of the childcare center where the Student was to be picked up. Testimony of Petitioner. DCPS attempted to input this information in the computer system that it uses to process transportation requests. However, there was an issue with inputting this data into the computer system, which had been recently installed due to security issues with the old system. Petitioner complained to Witness B, who, on or about September 1, 2022, submitted a support "ticket" to OSSE indicating that there were issues with the Student's transportation arrangements for the year. Testimony of Petitioner; DCPS R-1 at 6.

7. OSSE investigated and found that the address supplied by Petitioner did not "show up" in the new computer system. OSSE recommended that DCPS try to input the data using an address that was near the childcare center. This also did not solve the problem. Testimony of Witness D.

8. On or about September 28, 2022, Petitioner received an email from Witness E from OSSE indicating that OSSE's policies had changed, and that the Student could not be picked up from the childcare center. DCPS R-1 at 8. The policy change was, at least in part, due to security issues for children. Testimony of Witness D. Petitioner has therefore been transporting the Student to school during the 2022-2023 school year. Testimony of Petitioner.

9. On October 3, 2022, Witness E investigated the issue further and determined that the LEA had to resubmit the "ticket" with a residential address to enable the request to be processed so that the Student's bus transportation could resume. Witness E explained that, according to OSSE policy, OSSE could provide transportation to a childcare center only if the Student received FAPE-related services at the childcare center. In that case, the LEA would have to provide the justification for the request and mention the type of services delivered at the center. Witness E also indicated that the services should be recommended in the Student's IEP. P-7-2; Testimony of Witness D.

10. According to the *Transportation Handbook for Parents and Guardians of Special Education Students*, published by OSSE, OSSE will provide one round trip from each student's residence in the District of Columbia to the student's attending school per school day. The student's address provided to OSSE shall match the address used to establish District of Columbia residency. OSSE will not change a student's route to accommodate the student or parent for personal reasons (e.g., accommodations of non-FAPE related childcare or one-time or sporadic changes in pick-up or drop-off locations for the student's or parent's convenience). Parents are responsible for making their own

arrangements for days that the student needs pick-up and drop-off services from locations other than the address on record with OSSE. R-7-104.

## **VI. Conclusions of Law**

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: “Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement” provided that “the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency.” D.C. Code Sect. 38-2571.03(6)(A)(i). Accordingly, on the issues in this case, relating to the alleged failure to implement the Student’s IEP, the burden of persuasion is on Petitioner.

**1. Did OSSE fail to implement the Student’s IEP for the 2022-2023 school year with respect to the Student’s transportation? If so, did OSSE deny the Student a FAPE?**

**2. Did DCPS fail to implement the Student’s IEP for the 2022-2023 school year with respect to the Student’s transportation? If so, did DCPS deny the Student a FAPE?**

The IEP is the “centerpiece” of IDEA. Honig v. Doe, 484 U.S. 305, 311 (1988). Once a student’s IEP is developed, the 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). The regulations implementing the IDEA state that transportation includes travel to and from school and between schools, travel in and

around school buildings, and specialized equipment (such as special or adapted buses, lifts, and ramps) if required to provide special transportation for a child with a disability. 34 C.F.R. Sect. 300.34 (c)(16).

“Failure to implement” claims may be brought if the LEA cannot “materially” implement an IEP. Turner v. District of Columbia, 952 F. Supp. 2d 31, 40–41 (D.D.C. 2013). In deciding if the failure was material, 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. Wilson v. District of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011); compare Catalan v. District of Columbia, 478 F. Supp. 2d 73 (D.D.C.2007) (since the student received consistent speech therapy, the failure to provide all of the required sessions was not a material deviation from the student’s IEP).

Petitioner’s main claim was that DCPS and OSSE refused to pick up and drop off the Student at the childcare center where the Student had been picked up and dropped off for several years. In response, both DCPS and OSSE pointed out that the IEP at issue, dated January 18, 2022, does not require that the Student be picked up or dropped off at the childcare center in question.

There is no dispute that the IEP does recommend that the Student receive special education transportation services, including for ESY services. However, this section of the IEP is light on details. The IEP states that the special education transportation services are in category “ASP” and that the mode of transportation is a DOT vehicle. But the IEP does *not* require that the Student be picked up or dropped off at the childcare center. The IEP does not even mention the childcare center, and there is no evidence that “ASP” has anything to do with pick-up or drop-off at the childcare center.



Petitioner argued that the Student had been picked up and dropped off at the childcare center for years, and that such an arrangement is important to her livelihood because she has an early morning work schedule. Petitioner testified, without any rebuttal, that this issue was discussed during the IEP meeting on January 18, 2022. According to Petitioner, she was asked whether the Student would attend the same childcare center for the 2022-2023 school year, for the purpose of determining whether the Student's pick-up or drop-off time would change. Petitioner replied that the Student would attend the same childcare center for the 2022-2023 school year.

The caselaw on this issue favors DCPS and OSSE. A similar issue was raised before a circuit court in one of the most cited cases on "failure to implement" claims pursuant to the IDEA. In Van Duyn ex rel Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 (9th Cir. 2007), the parents contended that, among other things, several elements of the student's behavior management plan were not implemented in the same way at the middle school as they were at the elementary school. The daily behavior card was not used as strictly as it had been before. Social stories were either never employed or improperly used. Additionally, the student was not told to go to the "quiet room" after all incidents of misbehavior, nor was the room adequately equipped until just before the administrative hearing. Even though the IEP included the behavior management plan, Id. at 815, the court found for the LEA. Though the court indicated that it did not "condone" the school district's failure to implement the behavior management plan, the court concluded that there was no material deviation from the IEP because the IEP did not clearly describe how the daily behavior card, social stories, and quiet room were to be used, nor did it require that they be used in the same way at the middle school.

Similarly, in Burilovich v. Board of Education of the Lincoln Consolidated Schools, 208 F.3d 560, 564 (6th Cir. 1999), the school district convened an IEP meeting and proposed a plan involving staff training by a particular trainer, Dr. Meinhold. While most of the meeting was taped, and the participants left with the understanding that Dr. Meinhold would begin training the staff the next week, the agreement was not incorporated into an IEP. The parents maintained that, despite the absence of a written document, the evidence showed that the school district did not intend its proposal to be tentative, effectively arguing that the doctrine of promissory estoppel applied to promises made by the school district. The circuit court rejected this argument, finding that “Congress created specific procedures under the IDEA for developing an IEP, which include a review process should a party such as plaintiffs be dissatisfied with the eventual IEP or the delay in creating one.” Id. at 568. The court specifically rejected the application of promissory estoppel to claims pursuant to the IDEA. Id.

Another such case is Oskowis v. Arizona Department of Education, No-CV-17-08215-PCT-JJT, 2020 WL 3396776 (June 19, 2020, D. Arizona), where the parent alleged that, during an IEP meeting, a special education teacher stated that *she* would provide a student with 1,080 minutes of instruction per week. Though this statement was not memorialized in an IEP, the parent argued that the IEP meeting established that the teacher, rather than a paraprofessional, would provide the instructional minutes at issue. In affirming the administrative law judge who found for the school district and allowed the paraprofessional to provide the services, the court found that “while the ALJ may have inartfully implied that the parties’ intentions or expectations dictate the meaning of student’s 2015–2016 IEP, extrinsic evidence is not admissible to change the IEP’s

meaning. See also P.B. by and through T.B. and Thorpe School Dist., No. 1:20-CV-03032-SAB, 2021 WL 6275114, at \*7 (E.D. Washington, March 29, 2021) (student received behavioral support services through an IEP during pre-school; the same pre-school IEP was in effect when the student transferred to elementary school; parents argued that the student should receive the same behavioral support services in elementary school, but the court rejected this argument, explaining that the services were not specifically mentioned in the IEP); G.B.L., et al, v. Bellevue Sch. Dist. No. 405, No. C12-427 TSZ, 2013 WL 594289, at \*3 (W.D. Wash. Feb. 15, 2013) (parents had discussions with the IEP team over the summer that the school district would conduct an assistive technology evaluation of the student, but the IEP did not contain a specific requirement for such an evaluation, leading a court to reject the parents' claims).

Here, as in the cases cited above, a parent is trying to enforce a provision that is not in the IEP. Petitioner appears to suggest that the rules of contract law can assist hearing officers in determining the terms of an IEP. However, an IEP is not a contract. The Van Duyn court expressly rejected a contention that state law breach-of-contract theories (such as those based on promissory estoppel or the parol evidence rule) could support the parents' position, pointing out that "the IEP is entirely a federal statutory creation, and courts have rejected efforts to frame challenges to IEPs as breach-of-contract claims." Id. at 820.

Language in the OSSE transportation handbook also favors the argument of DCPS and OSSE on this issue. The policy in the handbook states that OSSE will provide one round trip from each student's residence in the District of Columbia to the student's attending school per school day. The handbook states that "the student's address

provided to OSSE DOT shall match the address used to establish District of Columbia residency,” and that “OSSE DOT will not change a student’s route to accommodate the student or parent for personal reasons (e.g., accommodations of non-FAPE related childcare, one-time or sporadic changes in pick-up or drop-off locations for the student’s or parent’s convenience).” The handbook states further that “Parents are responsible for making their own arrangements for days that the student needs pickup and drop-off services from locations other than the address on record with OSSE DOT.”

Even if, *arguendo*, the January 18, 2022, IEP can be read to require that the Student’s pick-up and drop-off should be at the childcare center for the 2022-2023 school year, Petitioner submitted no on-point authority in support of her argument that DCPS’s and OSSE’s deviation from the IEP’s designated pick-up and drop-off locations was a material violation of the Student’s IEP. Indeed, where LEA scheduling decisions have been unsatisfactory to parents, school systems have not been required to yield to parental preferences. Los Angeles Unified Sch. Dist., 54 IDELR 140 (SEA CA 2010) (noting that although a mother disagreed with the district’s transportation schedule for her child with Attention Deficit Hyperactivity Disorder, the mother’s disagreement with the district’s transportation offer stemmed mainly from conflicts with her own schedule and childcare arrangements, which are not addressed or remedied under the IDEA). As a court in the District of Columbia has stated, transportation arrangements simply to provide convenience for a student’s parents are not required. District of Columbia v. Ramirez, 377 F. Supp. 2d 63, 70 (D.D.C. 2005).

Petitioner also contended that the Student was denied a FAPE because the Student was not transported to and from the childcare center for the first two weeks of ESY

during the summer of 2022. This issue was not mentioned at the prehearing conference or memorialized in the Prehearing Conference Order, which governs the issues in this case per the agreement of the parties. Moreover, the testimony on this issue was imprecise. The clearest testimony on this issue indicated that the bus driver had issues finding the childcare center during the first two weeks of ESY instruction in the summer of 2022. Petitioner also appeared to indicate that the problem occurred because the bus attendant would no longer leave the sight of the bus driver and enter the childcare center to find the Student, though there is nothing in the IEP that requires the attendant to enter the childcare center to find the Student. It is also somewhat unclear whether the issue relating to ESY transportation during the summer of 2022 was a function of Petitioner's difficulties with the requirement for parents to use a residential address for student transportation purposes. Therefore, this Hearing Officer must find that: 1) this Hearing Officer does not have jurisdiction over issues relating to ESY in light of the prehearing conference, where the delivery of ESY services was not contested; 2) Petitioner did not meet the burden to show that the Student was denied a FAPE because bus transportation was not provided to the Student during ESY instruction in the summer of 2022; and 3) Petitioner did not meet the burden to show that DCPS and OSSE failed to materially implement the Student's January 18, 2022, IEP for the 2022-2023 school year. Accordingly, all claims must be resolved in favor of DCPS and OSSE, and the case should be dismissed.

## **VII. Order**

As a result of the foregoing, the following is ordered:

1. This case is hereby dismissed with prejudice.

Hearing Officer Determination  
Michael Lazan, Hearing Officer  
Case # 2022-0180

Dated: December 19, 2022

Michael Lazan  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Attorney A, Esq.  
Attorney B, Esq.  
Attorney C, Esq.  
Attorney D, Esq.  
OSSE Division of Specialized Education  
[REDACTED]/DCPS  
[REDACTED]/DCPS

### **VIII. Notice of Appeal Rights**

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 days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. Sect 1415(i).

Dated: December 19, 2022

*Michael Lazan*  
Impartial Hearing Officer