

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution

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OSSE
Office of Dispute Resolution
December 27, 2022

Confidential

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| Parent on behalf of Student¹ |) | Case No. 2022-0161 |
| |) | |
| Petitioner |) | Hearing Dates: December 1-2, 2022 |
| |) | |
| v. |) | Conducted by Video Conference |
| |) | |
| School A |) | |
| |) | |
| and |) | Date Issued: December 27, 2022 |
| |) | |
| Office of the State Superintendent of Education |) | |
| |) | |
| Respondents |) | Terry Michael Banks, Hearing Officer |

HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the mother of a X-year-old student (“Student”) attending School A, a local education agency (“LEA”). On September 2, 2022, Petitioner filed a due process complaint alleging that School A and the Office of the State Superintendent of Education (“OSSE”) failed to implement Student’s Individualized Education Program (“IEP”) IEP. On September 15, 2022, Petitioner filed an *Amended Complaint*, adding an allegation that School A had failed to provide Student an appropriate IEP in July 2022. On October 3, 2022, School A filed *[School A’s] Response to Complaint* (“*School A’s Response*”), denying that it had denied Student a free appropriate public education (“FAPE”) in any way. On October 3, 2022, OSSE filed *Office of the State Superintendent of Education’s Response to Administrative Due Process Complaint* (“*OSSE’s Response*”), denying that it had denied Student a FAPE in any way.

¹ Personally identifiable information is attached in the Appendix and must be removed prior to public distribution.

SUBJECT MATTER JURISDICTION

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Section 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-E, Chapter 30.

PROCEDURAL HISTORY

On September 2, 2022, Petitioner filed her *Complaint* alleging that School A and OSSE denied Student a FAPE by (1) failing to implement nursing services required in Student’s July 2022 IEP, and (2) failing to transport Student to school and to implement the transportation accommodations for the 2022-23 school year.

On September 8, 2022, Petitioner filed *Petitioner’s Motion to Consolidate* this matter with a separate case filed by School A. On September 21, 2021, I denied this motion as moot when, on September 20, 2022, School A withdrew its complaint in the other matter due to the identity of claims in this matter.

On September 15, 2022, Petitioner filed Petitioner’s *Motion to Amend the Complaint* and an *Amended Complaint* alleging that (1) School A failed to provide an appropriate IEP in July 2022, (2) [REDACTED] and OSSE failed to implement nursing services prescribed in the July 2022 IEP, and (3) [REDACTED] and OSSE failed to provide Student the “transportation accommodations” prescribed in the July 2022 IEP: assistance to get from and to her/his apartment door inside the apartment building, and a dedicated nurse on the bus. On September 21, 2022, I issued an order granting the *Motion to Amend the Complaint*.

On October 3, 2022, School A filed *School A’s Response*, denying that it had denied Student a FAPE in any way. On October 3, 2022, OSSE filed *OSSE’s Response*, denying that it had denied Student a FAPE in any way.

On October 3, 2022, School A also filed a *Partial Motion to Dismiss* (“*Motion*”), asserting that the transportation claims in the *Complaint* fail to state a claim for relief against School A because OSSE is responsible for the transportation of students with disabilities in the District of Columbia (“District”). On October 6, 2022, Petitioner filed *Ms. [REDACTED] Opposition to [REDACTED] Motion for Partial Dismissal* (“*Petitioner’s Opposition*”). On October 12, 2022, I issued an order granting the *Motion*.

The parties did not conduct a resolution meeting. A prehearing conference was conducted by video conference on October 19, 2022, and the Prehearing Order was issued on October 21, 2022. An *Amended Prehearing Order* was issued on October 26, 2022 to correct a typographical error. A *Second Amended Prehearing Order* was issued on November 2, 2022 to clarify that the October 12, 2022 *Order* did not address transportation accommodations.

On November 17, 2022, Petitioner filed *Petitioner’s Motion for Partial Summary Judgment* (“*Petitioner’s Motion*”). Petitioner requested summary judgment against OSSE for

failure to provide transportation and transportation accommodations prescribed in the IEP, “door-to-door assistance getting [Student] to and from his/her apartment to the bus.” Petitioner also requested summary judgment against School A for failure to provide the transportation accommodations. On November 22, 2022, [REDACTED] filed *[School A’s] Cross Motion and Opposition to Petitioner’s Motion for Partial Summary Judgment* (“*School A’s Cross Motion*”). School A argued that “Nothing in local law or policy or federal law distinguishes transportation ‘services’ from transportation ‘accommodations.’” Since the hearing officer had already determined that OSSE is responsible for Student’s transportation services, [REDACTED] argued, OSSE must also be held responsible for the transportation accommodations. On November 28, 2022, Petitioner filed *Petitioner’s Opposition to Respondent [REDACTED]’ Motion for Partial Summary Judgment*, arguing that there was no factual dispute that OSSE and School A failed to provide Student transportation services, reargued the issue resolved in the October 12th *Order* regarding School A’s responsibility to provide transportation, reiterated that she was entitled to summary judgment against OSSE for the failure to provide transportation services, and agreed with School A that caselaw supported OSSE’s obligation to assist Student to and from her/his apartment door and the bus. On November 29, 2022, I issued an *Order on Cross Motions for Summary Judgment* granting *Petitioner’s Motion* in part, and denying *School A’s Cross Motion*. The *Order* effectively held OSSE responsible for any denial of FAPE for the failure to provide Student bus transportation, and denied School A’s request that OSSE be held responsible for failure to provide transportation accommodations as moot; because OSSE had failed to provide bus transportation, transportation accommodations were precluded.

On November 18, 2022, Petitioner filed *Petitioner’s Motion to Compel OSSE’s Production of Record’s* (“*Motion to Compel*”): transportation records that Petitioner had requested of OSSE on October 14, 2022. On November 22, 2022, I issued an *Order* denying the *Motion to Compel*.

The due process hearing was conducted on December 1-2, 2022 by video conference. The hearing was closed to the public at Petitioner’s request. Respondent School A filed disclosures on November 23, 2022 containing a witness list of four witnesses and documents LEA1 through LEA44. On November 28, 2022, after the deadline for filing disclosures, School A filed Supplemental Exhibit LEA45. No objections were filed to School A’s exhibits, and School A’s Exhibits LEA1-LEA45 were admitted into evidence.² Petitioner also filed disclosures on November 23, 2022, containing a witness list of ten witnesses and documents P1 through P29. No objections were filed to Petitioner’s disclosures, and Petitioner’s Exhibits P1-P29 were offered and admitted into evidence. OSSE did not file a witness list or proposed exhibits. The parties agreed to thirteen stipulations with subparts that were filed during the first hour of the hearing.

Petitioner presented as witnesses in chronological order: Witness A, Petitioner, and Witness B. Witness A was admitted as an expert in special education programming and compensatory education. Respondent School A presented as witnesses in chronological order: Witness C and Witness B. Witness B was admitted as an expert in special education. At the conclusion of testimony, the parties’ counsel gave oral closing arguments. The hearing officer authorized the parties to file authorities in support of their respective positions on or before

² School A’s counsel clarified that proposed Exhibits LEA10a and 10b were not included in the submitted disclosures. Petitioner objected to the admission of LEA45 at the hearing, but the objection was overruled due to Petitioner’s failure to file an objection to Respondent’s disclosure consistent with the requirements in the *Second Amended Prehearing Order*.

December 9, 2022. All parties filed lists of authorities on December 9, 2022.

ISSUES

As identified the *Second Amended Prehearing Order*, the issues to be determined in this case are as follows:

1. Whether [REDACTED] denied Student a FAPE by failing to develop an appropriate IEP in July 2022 with appropriate services at home including a dedicated nurse or aide.
2. Whether [REDACTED] and OSSE denied Student a FAPE by failing to implement nursing services required in Student's July 2022 IEP.
3. Whether [REDACTED] and OSSE denied Student a FAPE by failing to transport Student to school and to implement the transportation accommodations for the 2022-23 school year.

FINDINGS OF FACT

1. Student is X years old and is enrolled in grade E at School A for the 2022-23 school year.³
2. School A is an LEA.⁴
3. Student is classified as a student with multiple disabilities including a visual impairment and orthopedic impairment. Student is non-verbal, non-ambulatory and wheelchair dependent with limitations in all areas of functioning. S/he requires one-to-one assistance from a nurse throughout the day due to her/his complex medical needs.⁵
4. Student is tracheostomy dependent and requires a variety of medical equipment including:
 - a. G-tube (S/he relies on this to eat and take his/her medication because s/he cannot eat and swallow on her/his own. S/he does not eat through her/his mouth.);
 - b. Pulse oximeter, (Monitors heart rate and oxygen.);
 - c. Stander and feet braces (Helps with weight bearing on his/her legs to try to stand up a few times a day);
 - d. Gait trainer (This is a walker for physical therapy.);
 - e. Bilateral elbow splints (To help stretch out the bend in his/her left arm and elbow.);
 - f. Benik hand splints (To help keep hands in an open posture, because s/he tends to keep her/his hands balled up, helps stretch fingers.);

³ Stipulations, ¶1.

⁴ *Id.*, ¶11.

⁵ *Id.*, ¶ 2.

- g. A body suit (To help maintain posture and move his/her body around more effectively); and
- h. A suction machine is used to help suction out and clear up Student's oral, nasal and tracheal secretions due to her/his inability to clear her/his airway effectively. Student tends to get congested and is unable to give an effective cough to clear up any phlegm. The suction machine along with suction catheters help remove the phlegm from Student's airway and breathe effectively.⁶

5. On June 17, 2022, Attorney A, Petitioner's attorney, requested the following accommodations from School A for Student to access in-person learning: a dedicated nurse at school, a dedicated nurse on the bus "to help [Student] get from inside [his/her] home to the bus and the bus back to inside [her/his] home," and an additional dedicated bus aide "to help transition [Student] from inside [his/her] home to the bus and vice versa."⁷

6. On June 21, 2022, School A replied, indicating that they had contacted the OSSE Transportation Department ("DOT") concerning Petitioner's accommodation requests. DOT informed School A that "We can only escort the student from/to the outermost door of the building. The bus cannot transition a student to or from the apartment."⁸ Attorney A replied the next day, requesting an IEP meeting to discuss IEP amendments for transportation accommodations.⁹

7. On June 25, 2022, Attorney A requested that the following language be included in Student's IEP: "[Student] requires assistance to get from [his/her] apartment **unit** door to the bus and from the bus to [his/her] apartment **unit** door. This assistance includes being carried up and down stairs inside the apartment building as well as outside the apartment building."¹⁰

8. On July 26, 2022, a DOT investigator visited Petitioner at her apartment. The investigator informed Petitioner that DOT staff is not allowed to come into the apartment building and not allowed to lift or carry children.¹¹ There are five steps between Petitioner's apartment door and the rear access to the building, Petitioner's preferred egress point.¹² Student would need to be physically carried up and down these steps to and from his/her wheelchair.

9. On July 27, 2022, School A developed an Amended IEP for Student.¹³ The purpose of the amendment was to "Add the following language to transportation section under Behavioral Needs: [Student] requires assistance to get from [his/her] apartment door to the bus and from the bus to [his/her] apartment door. This assistance includes being carried up and down stairs, both inside and outside of the apartment building."¹⁴ The IEP team prescribed the following services:

⁶ *Id.*, ¶ 4.

⁷ Petitioners' Exhibits ("P:") 4 at page 2 (33). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., P4:2 (33).

⁸ *Id.*

⁹ *Id.* at 1 (32).

¹⁰ P4:17 (48), emphasis supplied in the text.

¹¹ *Id.* at 15 (46).

¹² Testimony of Petitioner.

¹³ P2:1 (2).

¹⁴ *Id.*

- a. 2 hours per month of specialized instruction outside of the general education setting (specifically for vision services);
- b. 10 hours per week of specialized instruction outside of the general education setting;
- c. 240 minutes per month of physical therapy outside of the general education setting;
- d. 240 minutes per month of occupational therapy outside of the general education setting;
- e. 240 minutes per month of speech-language pathology outside of the general education setting;
- f. 120 minutes per month of behavior support services consultation;
- g. 120 minutes per month of specialized instruction consultation.¹⁵

The Other Classroom Aids and Services provided included the following:

- a. [Student] attends [School A] virtually per medical exemption. [Student] logs on to virtual class with the special education teacher per specialized instruction hours outlined in the IEP. Upon return to in-person learning, [Student] will resume 22.5 hours of specialized instruction hours per week.
- b. The Dedicated Nurse Aide will be added back to the IEP upon [Student] resuming school in-person.
- c. If [Student] is required to remain home for an extended period due to medical needs, [Student] will receive homebound instruction and the team will develop a plan for continuation of services.¹⁶

The Least Restrictive Environment section provided that Student “requires specialized instruction outside of the general education setting with a dedicated nurse aide due to [his/her] complex medical needs.”¹⁷

The Transportation section provided the following:

- a. Nursing assistance: G-tube, tracheostomy care, oxygen administration;
- b. Medical Devices/Equipment: Oxygen Tank, Tracheotomy Tube, Feeding Tube, Suction;
- c. Monitoring Needed: Single Transport Bus and Nurse-Monitor Equipment;
- d. Behavior Intervention Needs: “[Student] requires assistance to get from [her/his] apartment unit door to the bus and from the bus to [her/his] apartment unit door. This assistance includes being carried up and down stairs inside the apartment building as well as outside the apartment building;”
- e. Specialized Equipment: Ramp Lift, transported in medical stroller; and
- f. Assistive Devices: Leg Orthopedic Brace; Wheelchair.¹⁸

10. During the 2021-2022 school year Student attended School A virtually per the OSSE COVID-19 Medical Consent & Certification for Distance Learning due to her/his complex medical

¹⁵ *Id.* at 20 (21); Stipulations, ¶ 5.

¹⁶ P2:21 (22); Stipulations, ¶ 6.

¹⁷ P2:22 (23).

¹⁸ P2:24 (25); Stipulations, ¶ 10.

conditions. During the 2022-2023 school year, Student has not needed to remain at home due to a medical exemption or medical needs, with the exception of specific medical appointments. S/he attends virtually now because transportation services have not been provided to her/him.¹⁹

11. School A submitted a transportation request form (“TRF”) and the Amended IEP to OSSE DOT following the July 27, 2022 amendment; the TRF satisfied all of OSSE’s requirements to set up transportation for Student for the 2022-2023 school year.²⁰

12. On August 4, 2022, Attorney A, sent an email to Attorney E, School A’s attorney, inquiring as to the status of Student’s transportation accommodations.²¹ On August 8, 2022, OSSE informed School A that DOT policy precludes physically carrying a student onto or off of a bus.²² Later that day, Attorney E informed Attorney A that School A had requested DOT for an exception to its policy of not physically carrying students on and off busses, but OSSE had reiterated its position that “we cannot carry a student onto/off of the bus. As discussed, it goes against OSSE DOT policy and safety concerns.”²³ In response to Attorney A’s question regarding the hiring of a nurse for the bus, Attorney E replied, “[School A] has two potential candidates for the school day but neither are willing to ride the bus. It is looking like [School A] should be able to staff a nurse for the school day but OSSE will need to staff a separate nurse for the bus.”²⁴

13. On August 11, 2022, Attorney E notified Attorney A that School A intended to file a due process complaint against OSSE to compel OSSE to implement the transportation provisions of Student’s IEP.²⁵ School A filed that complaint on August 22, 2022; it withdrew the complaint on September 20, 2022 upon Petitioner’s filing of the instant *Complaint*.²⁶

14. Petitioner determined that Student’s first day of school for the 2022-2023 school year would be September 20, 2022.²⁷

15. On September 21, 2022, School A notified Attorney A that the dedicated nurse that it had recruited for Student in the classroom had declined the position.²⁸

16. OSSE did not provide bus transportation to Student on September 20, 2022 or thereafter, and had not begun not providing transportation as of the commencement of the hearing.²⁹

17. On September 30, 2022, DOT reiterated to School A its policy that “bus staff are

¹⁹ Stipulations, ¶¶ 7-9.

²⁰ *Id.*, ¶ 12.

²¹ P4:12 (43).

²² P15:1 (139).

²³ P4:12 (43). DOT reiterated this position, in response to another School A request for reconsideration, on September 30, 2022. P15:2 (140).

²⁴ *Id.* at 13 (44). See also P4:15 (46).

²⁵ School A’s Exhibit (“LEA”) 20 at pages 255. The exhibit number is followed by the electronic page number in the disclosure in parentheses, i.e., LEA20 (255).

²⁶ LEA22 (267); Case No. 2022-0153.

²⁷ P4:19 (50).

²⁸ LEA29 (332).

²⁹ P16:35 (175); testimony of Petitioner.

not permitted to carry a student onto/off the bus. In addition, we can only escort a student from/to the outermost door of a house or building.”³⁰

18. On October 3, 2022, School A informed Petitioner that in light of the lack of transportation for Student, it was attempting to locate an in-home tutor for Student.³¹ On October 11, 2002, Education Solutions notified School A that it had notified Petitioner of its ability to provide a tutor beginning that day, but Petitioner “wanted to verify things with the school and coordinate other services,” and agreed to start the next day.³²

19. On October 18, 2022, School A convened a multidisciplinary team (“MDT”) meeting “To review [Student’s] virtual instructional and Related Service schedule to be in place pending resolution of the transportation issues with OSSE.” The team agreed that School A would provide a 1:1 in-person tutor for three hours per day, five days per week, and a 1:1 in-person vision specialist each Wednesday for one hour. As Student requires support to receive virtual related services, the tutor was designated to provide that support.³³

20. On October 24, 2022, School A issued a Prior Written Notice (“PWN”), memorializing the agreements reached in the October 18, 2022 MDT meeting, to address homebound services for Student due to the lack of transportation. School A committed to provide 1:1 in-person instruction daily from 9:30 a.m. – 12:30 p.m., virtual related services (speech, occupational therapy, and physical therapy) with the support of the in-person instructor, in-person vision services for one hour per week, and the opportunity for virtual participation in read aloud with the class once a week.³⁴

21. Petitioner testified that Student began receiving three hours per day of in-home tutoring services on October 12, 2022 due to the lack of transportation. Student began receiving in-person vision services, and virtual physical therapy, occupational therapy, and speech-language therapy on October 24, 2022.³⁵

22. Witness A, Petitioner’s expert in special education programming and compensatory education, testified that due to the denials of FAPE by respondents, Student was entitled to receive compensatory education services in the following amounts: 83 hours of ABA tutoring, eight hours of physical therapy, 7.5 hours of occupational therapy, and six hours of speech and language therapy. He testified that his compensatory education plan was based on his experience as a special educator and special education consultant, including the development of

³⁰ LEA30 (334).

³¹ P4:23 (54).

³² *Id.* at 26 (57).

³³ LEA32 (339-340).

³⁴ P9:1 (81).

³⁵ *See also*, P3:3 (31).

approximately 40-50 compensatory education plans.³⁶ Witness A did not develop a written compensatory education plan. The services he recommended were based on Student having received no services from September 20 to October 11, 2022, and ten days between October 12 and November 27, 2022 with no tutoring,³⁷ and 13 days during that period with 2.5 to three hours of tutoring. The recommendation for compensatory related services was based on an hour for hour formulation as these services are provided one-on-one.

23. Witness B testified that in a meeting on October 18, 2022, Petitioner agreed that as long as transportation was unavailable, School A would provide an in-person tutor and an in-person vision specialist. The tutor would assist Student with his/her virtual related services. Petitioner did not request any additional personnel in the home.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, and this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows: 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. The burden of persuasion shall be met by a preponderance of the evidence.³⁸

One of the issues in this case involves an alleged failure of School A to provide an appropriate IEP. Under District of Columbia law, School A has the burden of persuasion on this issue. Petitioner bears the burden as to all of the other issues presented.³⁹

³⁶ In an unrelated case the previous day, Case No. 2022-171, Witness A testified that he had developed only 25 such plans in the past.

³⁷ See also, LEA37 (383).

³⁸ D.C. Code Sect. 38-2571.03(6)(A)(i).

³⁹ *Schaffer v. Weast*, 546 U.S. 49 (2005).

Whether School A denied Student a FAPE by failing to develop an appropriate IEP in July 2022 with appropriate services at home including a dedicated nurse or aide.

The Supreme Court's first opportunity to interpret the predecessor to IDEA, The Education of the Handicapped Act ("EHA"), came in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.⁴⁰ The Court noted that the EHA did not require that states "maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'"⁴¹ Rather, the Court ruled that "Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child..."⁴² Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction... In addition, the IEP, and therefore the personalized instruction should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."⁴³

More recently, the Court considered the case of an autistic child under IDEA who, unlike the student in *Rowley* was not in a general education setting.⁴⁴ The Tenth Circuit had denied relief, interpreting *Rowley* "to mean that a child's IEP is adequate as long as it is calculated to confer an 'educational benefit [that is] merely... more than *de minimis*.'"⁴⁵ The Court rejected the Tenth Circuit's interpretation of the state's obligation under IDEA. Even if it is not reasonable to expect a child to achieve grade level performance,

... [h]is educational program must be appropriately ambitious in light of [his/her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives... It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.⁴⁶

In *Endrew*, the Supreme Court held that an IEP must be designed to produce more than minimal progress in a student's performance from year to year:

When all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly... awaiting the

⁴⁰ 458 U.S. 176, 187 (1982).

⁴¹ *Id.* at 189-90, 200

⁴² *Id.* at 200.

⁴³ *Id.* at 203-04.

⁴⁴ *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017).

⁴⁵ *Id.* at 997.

⁴⁶ *Id.* at 1000-01 (citations omitted).

time when they were old enough to drop out...’ The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”⁴⁷

It is uncontroverted that Student’s least restrictive environment⁴⁸ is a general education classroom with 10 hours of specialized instruction outside general education. It is also uncontroverted that the only reason that Student is not attending School A in-person is the failure to receive transportation services. Petitioner asserts that transportation difficulties were foreseeable when the IEP was developed on July 27, 2022, and Student’s IEP should have been amended to provide appropriate support until the transportation issue was resolved. School A argues that both parties expected that issue to be resolved by the beginning of the school year. Petitioner was represented by Attorney A during the development of the July 27, 2022 IEP, and School A asserts that Petitioner’s team agreed to the following language in the Other Classroom Aids and Services section of the IEP to address the need for homebound services: “If [Student] is required to remain home for an extended period due to medical needs, [Student] will receive homebound instruction and the team will develop a plan for continuation of services.”⁴⁹

School A’s argument fails for two reasons. First, the parties stipulated that Student “has not needed to remain home due to a medical exemption or medical needs, with the exception of specific medical appointments,” and s/he “attends virtually now because transportation services have not been provided to [REDACTED].”⁵⁰

Second, School A was informed on June 21, 2022, more than a month before it developed Student’s IEP, that the transportation accommodations relating to DOT entering Student’s apartment building and physically carrying him/her up and down a flight of stairs contravened DOT’s stated policy. When Attorney A was informed that day of OSSE’s position, she immediately requested a IEP meeting to include this accommodation in the IEP. On July 26th, the day before the IEP meeting, a DOT investigator reiterated its policy directly to Petitioner in a visit to her apartment. On August 8, 2022, responding to another query from School A, DOT reiterated that it would not grant an exception to its policy. Thus, long before the IEP was drafted, and shortly after it was delivered to DOT, School A was on notice that DOT staff would not enter Petitioner’s apartment building or physically carry Student. There was ample time between August 8th and the beginning of the school year to reconvene the IEP meeting and adopt the virtual learning plan that the parties finally agreed to on October 18, 2022. Therefore, I conclude that School A has failed to meet its burden of proving that it provided Student a FAPE by failing to provide Student an appropriate IEP before the beginning of the 2022-23 school year.

⁴⁷ 137 S.Ct. at 1000-01.

⁴⁸ 20 U.S.C §1412(a)(5)(A).

⁴⁹ P2:21 (22).

⁵⁰ Stipulations, ¶¶8-9.

Whether School A and OSSE denied Student a FAPE by failing to implement nursing services required in Student's July 2022 IEP.

OSSE is not the LEA and has no responsibility to provide nursing services in School A's facilities during the school day. OSSE's responsibility to provide nursing services to Student on the school bus will be addressed in the next section.

School A does not deny that it was unable to retain a nurse willing and able to serve Student's needs until October 11, 2022, and that nurse is no longer available. School A also does not dispute its obligation under the IEP to provide a nurse upon Student's return to the classroom. The agreement reached between School A and Petitioner on October 18, 2022 for homebound services included a daily tutor who would also facilitate virtual related services, and one hour per week of vision services. Thus, Petitioner concedes that homebound nursing services are not necessary.

Despite School A's failure to retain a nurse by the time Student was ready to begin the 2022-23 school year, those services could not have been provided due to OSSE's failure to provide Student transportation to school. Therefore, I conclude that Petitioner has failed to meet her burden of proving that School A denied Student a FAPE by failing to provide classroom or homebound nursing services.

Whether School A and OSSE denied Student a FAPE by failing to transport Student to school and to implement the transportation accommodations for the 2022-23 school year.

IDEA requires that states enforce policies and procedures to ensure that a free appropriate public education is available to all children in the states between the ages of three and twenty-one, inclusive, including children with disabilities who have been suspended or expelled from school.⁵¹ Each state's state educational agency ("SEA") is responsible for ensuring compliance with the statute, including all programs administered by any other state agency or local agency.⁵² Local educational agencies ("LEAs") are eligible for federal assistance if they have policies, procedures, and programs in effect that are consistent with the FAPE mandates of IDEA.⁵³ An SEA shall use the federal funds that would otherwise have been available to an LEA to provide FAPE if, *inter alia*, the LEA is unable to maintain programs that meet the requirements of IDEA.⁵⁴ District of Columbia regulations obligate LEAs to make FAPE available to each child with a disability, and specifically requires the District of Columbia Public Schools ("DCPS") to make FAPE available to all such students who are not enrolled in a public charter school LEA, private school, or religious school.⁵⁵

IDEA regulations provide that when an SEA provides services directly to students, it assumes the same obligations to provide FAPE as would an LEA:

⁵¹ 20 U.S.C. §1412(a)(1)(A).

⁵² 20 U.S.C. §1412(a)(11)(A).

⁵³ 20 U.S.C. §1413(a)(1).

⁵⁴ 20 U.S.C. §1413(g)(1)(B).

⁵⁵ 5-A DCMR §3001.1 and 3001.2.

If the SEA provides FAPE to children with disabilities, or provides direct services to these children, the agency must comply with any additional requirements of §§ 300.201 and 300.202 and §§ 300.206 through 300.226 as if the agency were an LEA...⁵⁶

Bus Transportation

On May 5, 2010, the federal district court issued an order transferring responsibility for conducting day-to-day operations of the local school system's Division of Transportation from a Transportation Administrator appointed by the court to the District of Columbia.⁵⁷ In its *Response* to the *Complaint*, OSSE admitted that it provides special education transportation services when transportation is appropriately identified and documented on IEPs as a related service.

Under District law, OSSE receives all the funding for transportation of disabled students, in the District and is charged with the responsibility for providing that transportation. “‘Special Education Compliance Funding’ means funds provided to public schools through the ‘Formula’ to support ... regulations regarding the provision of special education services to students with disabilities... For purposes of the Formula, transportation of students with disabilities and payment of tuition for private placements of children with disabilities are considered state level costs.”⁵⁸

The cost of transportation for students with disabilities, tuition payments for private placements for students with disabilities, and the cost of performing state education functions for the District of Columbia are not covered by the Formula and shall be allocated by the Mayor and Council to the Office of the State Superintendent of Education (“OSSE”) ... The OSSE, as the state education agency for the District of Columbia, shall perform all state education functions for public charter schools and for DCPS, which are local education agencies.⁵⁹

In furtherance of its obligation to provide transportation services to disabled students, OSSE promulgated its *Special Education Transportation Policy* (“*Policy*”).⁶⁰ The *Policy* provides that the OSSE Division of Student Transportation (“OSSE DOT”) “shall provide special education transportation services to students with disabilities when transportation is appropriately identified and documented on an IEP as a related service under the IDEA.”⁶¹ The *Policy* sets forth eligibility criteria for transportation services for which the LEA’s IEP teams are tasked with determining for each child.⁶² The *Policy* imposes on LEAs the responsibility to upload all documentation associated with special education transportation services into specified databases within five days of the eligibility determination.⁶³ LEAs are required to recertify each student’s continued eligibility for transportation services twice a year.⁶⁴ The *Policy* authorizes OSSE DOT to notify parents and

⁵⁶ 34 C.F.R. §300.175.

⁵⁷ *Petties v. District of Columbia*, Civil Action No. 95-0148 (D.D.C. May 5, 2010).

⁵⁸ D.C. Code § 38-2901 (11B) and (12).

⁵⁹ D.C. Code § 38-2907.

⁶⁰ LEA41;

<https://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/OSSE%20Transportation%20PolicyV07292014.pdf>.

⁶¹ LEA41 (411).

⁶² *Id.* at 413-15.

⁶³ *Id.* at 420.

⁶⁴ *Id.* at 421.

the LEA if a student misses three consecutive days of transportation and to request an explanation. The LEA is responsible for communicating with parents to resolve absence issues. If OSSE DOT does not receive a satisfactory response within seven days, it is authorized to notify the parent and LEA of its intent to terminate services. If no satisfactory response is received within an additional three days, OSSE DOT is authorized to terminate services.⁶⁵

Student's IEP includes transportation services as a related service.⁶⁶ OSSE concedes that it is responsible for providing transportation services to special education students in the District who are eligible for transportation services.⁶⁷ While OSSE imposes responsibilities on LEAs to determine students' eligibility for transportation services, once those determinations are made and the appropriate documentation is uploaded to designated databases, OSSE DOT provides the transportation services for all eligible disabled students in the jurisdiction. LEAs may be held responsible for any delays and expenses that result from failure to submit necessary data or documentation,⁶⁸ but there is no circumstance described in the *Policy* or District law that authorizes an LEA to provide transportation services. Nowhere in its *Response* does OSSE allege that School A failed in any way to specify Student's need for transportation on her/his IEP, erred in determining Student's eligibility for transportation services, failed to populate the appropriate databases, or violated any other obligation that would impair OSSE DOT's ability to provide services in any way.

For these reasons, on October 12, 2022, I issued an order granting School A's *Partial Motion to Dismiss* as to its obligation to provide transportation to Student. In the October 12, 2022 order, I indicated that "The *Motion* does not address the responsibility to provide a dedicated nurse on the bus for Student. Thus, this order does not address that issue. Until OSSE initiates transportation services for Student, this issue is moot." On October 31, 2022, Petitioner requested clarification as to which transportation claims remained for decision. On November 2, 2022, I issued a *Second Amended Prehearing Order* indicating in a footnote that "The October 12, 2022 order dismissed the claim against [School A], in the third Issue Presented below, for failing to provide transportation to Student. The issue of failing to provide transportation accommodations was not raised in the *Motion* or resolved in the order."

On November 17, 2022, Petitioner filed *Petitioner's Motion for Partial Summary Judgment* ("Petitioner's Motion"). Petitioner requested summary judgment against OSSE for failure to provide transportation and transportation accommodations prescribed in the IEP, "door-to-door assistance getting [Student] to and from [REDACTED] apartment to the bus," and a nurse to provide potential assistance with Student's G-tube, tracheostomy care, and administration of oxygen.⁶⁹ Petitioner also requested summary judgment against School A for failure to provide the transportation accommodations. On November 22, 2022, School A filed *[School A's] Cross Motion and Opposition to Petitioner's Motion for Partial Summary Judgment*. School A argued that "Nothing in local law or policy or federal law distinguishes transportation 'services' from transportation 'accommodations.'" On November 29, 2022, I issued an order granting that aspect of *Petitioner's Motion for Partial Summary Judgment* regarding OSSE's obligation to provide bus transportation to Student for the same reasons that I enunciated in the order of October 12, 2022.

⁶⁵ *Id.* at 418.

⁶⁶ P2:24 (25).

⁶⁷ *OSSE Response*, ¶ 4 at 2.

⁶⁸ LEA41 (420).

⁶⁹ P2:24 (25); Stipulations, ¶ 10.

However, I denied the parties' requests for summary disposition as to "transportation accommodations." Because OSSE had failed to provide bus transportation, transportation accommodations were also necessarily precluded:

It appears that it is the movants' position that whatever an LEA prescribes in an IEP in terms of "transportation accommodations" obligates OSSE to provide those services. As discussed in the previous paragraph, there is no cited federal or local statute, regulation, or caselaw to support that proposition. Since it is not necessary to resolve the responsibility for transportation accommodations to provide Student the relief Petitioner requests, both parties' motions will be denied on this issue as moot.

Transportation Accommodations: Physically Carrying Student Up and Down Stairs

IDEA defines related services as follows:

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.⁷⁰

The regulations define related services as follows:

Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.⁷¹

The regulations further define transportation as follows:

- (i) Travel to and from school and between schools;
- (ii) Travel in and around school buildings; and

⁷⁰ 20 U.S.C. §1401(26)(A).

⁷¹ 34 C.F.R. §300.34(a).

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.⁷²

The regulatory definition of transportation does not extend beyond bus service. The closest thing to “transportation accommodations” in the regulations, which Petitioner and School A assert are inherently subsumed within the definition of transportation, are “other supportive services.” However, all of the examples of supportive services in the regulation describe services to facilitate a student’s achieving access to the curriculum within the classroom.

The Department of Education’s Office of Special Education Programs concedes that IDEA does not address the issue of what, if anything, is required when school bus reaches his/her home in providing transportation as a related service.⁷³

OSSE relies on *Independent School District*.⁷⁴ There, the parents of a non-ambulatory student requested that the school transportation staff carry the student from the first upper level in a split-level home, down a flight of stairs and out to the bus and back up those stairs in the evening. The school district’s policy was not to go beyond the doorway into a house. The Minnesota State Educational Agency upheld the hearing officer’s ruling that the school district was “not responsible for providing transportation across the student’s home threshold nor inside the student’s home.”

The physical circumstances in *City School District of City of New York*,⁷⁵ also relied on by OSSE, are similar to those in the instant matter. There were five steps from the street to the entrance to the apartment building, and sixteen steps between the entrance to the building and the child’s second floor apartment. The issue was the school district’s obligation to carry the student, who was confined to a wheelchair, down two flights of stairs to her/his wheelchair and back up those stairs in the afternoon. As in the instant case, the parent was physically unable to carry the student up and down the steps. The school district’s position was that its obligation was limited to assisting the child to the front door of the apartment building. Although the child’s least restrictive environment was a general education classroom, ■ received home instruction due to the inability to get to the school bus. The ALJ concluded that transportation services did not include the physical carrying of the student inside his/her home.

In this case, the respondent has offered transportation from the curb in front of petitioner's apartment house. The additional service requested by petitioner would require the school district to enter a private building and carry the child up and down two flights of stairs. The school district would not be responsible for or able to ensure the safety of the premises. The general and special provisions requiring the transportation of handicapped pupils do not extend beyond the provision of transportation between home and school...

The statutes, regulations and cases cited by petitioner do not establish that either the Federal or State law requires transportation within the home or on the private property on which a student resides. The school district's obligation is consistently

⁷² 34 C.F.R. §300.34(c)(16).

⁷³ *Letter to Smith*, 211 IDELR 191 (1980).

⁷⁴ 17 IDELR 21 (SEA Minn. 1990).

⁷⁵ 508 IDELR 282 (SEA N.Y. 1986).

described as to provide transportation between the home and the school. As noted above, Federal regulations require transportation "to and from school" and "in and around school buildings," and require the use of specialized equipment as necessary, but they do not require transportation in and around the home or special assistance in getting to and from the school bus...

I note that respondent does provide "door-to-door" transportation for handicapped pupils, and that the phrase connotes a pick-up point at the home, and does not mean a literal pick-up of the child at the front door or within the building.

None of the cases relied on by Petitioner address what I consider to be the central issue: whether OSSE's obligation to provide bus transportation carries with it the obligation to physically carry Student up and down steps within his/her apartment building. *Endrew, Rowley, Boose v. District of Columbia*,⁷⁶ *Republic of Sudan v. Harrison*,⁷⁷ and *King v. Burwell*,⁷⁸ did not involve transportation. Nor did *Irving Independent School District v. Tatro*.⁷⁹ There, the student suffered from spina bifida that necessitated school personnel to perform clean intermittent catheterization ("CIC"). The court held that CIC constituted a supportive service within the definition of related services under the predecessor to IDEA, the Education of the Handicapped Act:

The Court of Appeals was clearly correct in holding that CIC is a "supportive servic[e]... required to assist a handicapped child to benefit from special education." It is clear on this record that, without having CIC services available during the school day, Amber cannot attend school and thereby "benefit from special education." CIC services therefore fall squarely within the definition of a "supportive service."⁸⁰

Earlier in its opinion, the court noted that CIC is a "simple" procedure "that may be performed in a few minutes by a layperson with less than an hour's training."⁸¹

As for cases involving transportation, Petitioner relies on *District of Columbia v. Ramirez*,⁸² which Petitioner and School A relied on in their cross motions for summary judgment. The *Ramirez* court upheld a hearing officer's ruling that required DCPS to assist a wheelchair-bound student to and from [REDACTED] apartment door inside an apartment building and the bus. In declining to rule on the issue of transportation accommodations prior to the hearing, I concluded and now reassert that *Ramirez* is distinguishable. First, *Ramirez* was issued in 2005. At that time, OSSE had not yet been established and DCPS was responsible for providing transportation for all children with disabilities in the District. Thus, there was no issue as to which agency was responsible for transportation or transportation accommodations. Second, a directive of the Superintendent of DCPS provided that "As determined through the IEP process, students with disabilities shall be picked up and dropped off either at the door of their residence, or at the curbside of their residence." DCPS' Transportation Guide also indicated that "[i]f your child is not

⁷⁶ 786 F.3d 1054, 1056 (2015).

⁷⁷ 139 S.Ct. 1048 (2019).

⁷⁸ 576 U.S. 473 (2015).

⁷⁹ 468 U.S. 883 (1984).

⁸⁰ *Id.* at 890.

⁸¹ *Id.* at 885.

⁸² 377 F.Supp.2d 63 (2005).

waiting outside when the bus arrives, the attendant will... go to the door of your house *or apartment*, and assist your child as he/she boards the bus.”⁸³ The hearing officer in *Ramirez* cited DCPS’ Transportation Guide in ruling that it was “not unreasonable” for DCPS to provide an aide to assist the student to and from his/her apartment. The court upheld this ruling and indicated the importance of the existence of DCPS’ written policy: “In accordance with the Transportation Guide’s instruction that aides will leave the bus to assist students from the doors of their apartments (not their apartment *buildings*), it seems that where an IEP deems it necessary, plaintiff is not foreclosed from providing the services requested by defendants in this case.”⁸⁴ Here, OSSE has not adopted or published a policy similar to DCPS’ in *Ramirez*.

Petitioner cites *Anchorage School District v. N.S.*⁸⁵ There, the parents wanted to have their wheelchair-bound child pushed from the curb, to the house, and up a ramp to the front door. The school district expressed concerns related to physical safety of the driver. The district court ruled that door-to-door service was required to meet the student’s needs: “...[l]ike the student in *Ramirez*, N.S. cannot move independently. Transport only to the curb will preclude N.S. from reaping the benefits of services in [REDACTED] IEP. Without delivering N.S. to [REDACTED] door, ASD cannot fulfill the related service transportation obligation.”⁸⁶ While the court cited *Ramirez* favorably, it noted that at that time, DCPS “had a policy directive stating that door-to-door services would be provided through an IEP if necessary.”⁸⁷

Petitioner also relies on *Detroit Public Schools*, which also cited *Ramirez* for authority. While the factual recitation in *Detroit Public Schools* is limited, it appears that as it was in *Ramirez*, door-to-door service was the policy of the school district, but was not provided.⁸⁸ Thus, in *Ramirez* and *Detroit Public Schools*, the failure to provide door-to-door service violated the published policies of the school districts, and *Anchorage* did not involve entering a building or carrying a student.

School A relies on *Ramirez*, *Anchorage*, and cited *Hurry v. Jones*,⁸⁹ where the school district appealed an award of reimbursement to parents when the district failed to provide a quadriplegic student “door-to-door” transportation. The bus drivers deemed it unsafe to carry the student up and down “steep concrete steps” that led from [REDACTED] front door to the street. However, the district did not raise or brief the issue of their duty to carry the student up and down steps; the only issue before the court was reimbursement.⁹⁰ Nevertheless, a dissenting judge faulted the majority for enforcing the obligation on employees of the school district to carry the student up and down steps:

My brethren feel that because defendants did not attack it, the district court's interpretation is the law of the case. Before reaching that question, I must first consider whether the ruling was wrong. I believe it plainly so. If anything seems clear, it is that there is a difference in kind between a street level entrance from

⁸³ *Id.* at 66, emphasis provided in the text.

⁸⁴ *Id.* at 69.

⁸⁵ 2007 WL 8058163 (D.Alaska Nov. 8, 2007).

⁸⁶ *Id.* at 11.

⁸⁷ *Id.* at 10.

⁸⁸ 106 LRP 11724 (SEA Mich. 2007).

⁸⁹ 734 F.2d 879 (1st Cir. 1984).

⁹⁰ *Id.* at 883.

which, if need be, a physically handicapped child may be taken in a wheelchair, or otherwise safely guided by the bus attendant, and a door twelve dangerous steps up, requiring a special attendant, or possibly two, and the risk of a substantial claim for negligence if anything goes wrong. As defendants pointed out in their brief, what would be their liability if a 160 pound, already handicapped, child were to be dropped down twelve concrete steps? Nor can I believe, where the state's regulations do not require it, that the EAHCA requires the school department to remedy defects in the parents' housing, or provide extra assistance and run dangerous risks because of them.⁹¹

In *Franklin Township Board of Education*,⁹² the parent requested that the school bus pull into her driveway to limit the distance her child, who suffered from a seizure disorder, would have to walk to get to the bus. The parent was concerned that the 100-foot walk from the front door to the curb would trigger seizures. The administrative law judge concluded that the district's obligation to provide door-to-door transportation was satisfied if the bus remained parked at that curb. In *Harford County Public Schools*,⁹³ the developmentally delayed student was unable to negotiate unlocking ■ front door with a key; the parent requested that a bus attendant accompany the student to the front door and assist unlocking the door. The IEP team determined that the student lacked the necessary reasoning skills to unlock the door and required "adult supervision at drop-off." The hearing officer ordered the IEP to reconvene to determine whether the student required adult supervision when leaving the bus to receive a FAPE and, if so, to ensure that the student is provided this service at no cost to the parent.

The distinction between the requested "transportation accommodations" and supportive services is two-fold. First, while the regulations recognize and address supportive services, the regulatory definition of transportation does not contemplate any extraordinary personal services to be performed. The definition is limited to the equipment necessary to assist a child into a vehicle or the school building, and vehicular transportation between home and school. Second, physically carrying passengers is not a normal job function for a school bus driver. It is requested because Petitioner is no longer physically capable of carrying Student up and down the stairs in her apartment building to place Student in, or to lift and carry from, a wheelchair. Thus, to satisfy Petitioner's request, DOT would be required to provide a driver or an attendant both capable of, and willing to, physically carry Student up and down stairs inside Student's apartment building. On the contrary, all of the supportive services described in the regulation are routinely performed by school personnel to address the needs of students with disabilities. The Supreme Court in *Tatro* found CIC to be a supportive service, in part, because it was "simple" and could be learned by layman within an hour.

I am mindful of the rulings cited above that approved services that, if not provided, would have prevented the students from receiving a FAPE. However, there is no caselaw authorizing a hearing officer to order school personnel to lift and carry students inside their homes or apartment buildings. And the only cases requiring school personnel to enter a home or apartment building involved school districts whose published policies specifically offered that service. I am persuaded by the dissent in *Hurry* that ordering DOT staff to lift and carry students exceeds this hearing

⁹¹ *Id.* at 888.

⁹² 40 IDELR 142 (SEA N.J. 2003).

⁹³ 114 LRP 39986 (SEA Md. 2014).

officer's authority (again, the majority in *Hurry* addressed reimbursement, not the underlying reason for the reimbursement). While homebound service is not Student's least restrictive environment, s/he is receiving a FAPE consistent with the agreement reached between School A and Petitioner on October 18, 2022. For Student's sake, I trust that the appellate process is swift and welcome a review this decision.

The record does not reflect that there was any communication between OSSE and Petitioner after the DOT investigator's visit on July 26, 2022. At the very least, OSSE had an obligation to offer Petitioner transportation and assistance for Student from the front door of the apartment building to the bus. Because it did not do so, I conclude that Petitioner has met her burden of proving that OSSE denied Student a FAPE by failing to provide Student bus transportation to school since September 20, 2022.

Transportation Accommodations: Nursing Assistance on the Bus

When OSSE initially published its transportation *Policy* on November 6, 2013, it assumed responsibility for related service providers on the bus:

The initial Policy proposed that LEAs be responsible for employment and cost of related service providers on the bus. In the final policy, OSSE-DOT will continue to employ and pay for related service providers on the bus, to give LEAs time to develop their capacity to provide these services.⁹⁴

OSSE submitted no disclosures and offered no testimony. In its post-hearing submission of authorities, OSSE cited no updated published policies that supersede the policies enunciated in the November 6, 2013 policy statement. Therefore, I conclude that OSSE is responsible for providing the nurse to assist Student on the school bus.

RELIEF

For relief, Petitioner requests, *inter alia*, (1) an order requiring [REDACTED] to convene an IEP meeting to develop an appropriate IEP consistent with the HOD, (2) compensation to the parent for services she rendered to enable Student to participate in virtual instruction, (3) an order requiring OSSE and School A to implement Student's nursing services and transportation services, interventions, accommodations, specialized instruction and other related services as prescribed in the IEP, (4) compensatory education services or a compensatory education study to determine an appropriate award of compensatory education services, and (5) attorneys' fees. During her opening statement, Petitioner's counsel withdrew any claim for compensatory education services for School A's failure to provide an in-home aide for Student, because Witness A's compensatory education proposal addresses all of Student's missed services.

Petitioner has the burden of establishing entitlement to any requested relief, including the type and amount of compensatory education services that would compensate the student for the services that were allegedly denied. Absent such a showing, any award by the Hearing Officer would be arbitrary.

⁹⁴ LEA41 (407).

Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments... In every case, however, 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.⁹⁵

Thus, Petitioner must show (1) what educational harm Student suffered as a result of the alleged denial of FAPE, (2) what type and amount of compensatory services Student requires to put her/him in the position s/he would be had there been no denial of FAPE, and (3) the assessments or educational, psychological, or scientific studies that support the type and amount of services requested.⁹⁶

At the hearing, Petitioner's counsel stated that they were seeking compensatory education services through November 27, 2022. Witness A's compensatory education services proposal is flawed for a number of reasons. First, Witness A did not submit a written proposal.

Second, the factual basis of the proposal was imprecise. Witness A testified that Student missed 22 days of instruction between September 20 and October 11, 2022, but there were only fifteen school days during that period of time. For the period October 12 to November 27, 2022, Witness A testified that Student had no tutoring support for ten days and 2.5 to three hours of tutoring support for thirteen; there was no testimony about the remaining seven school days during that 30-school day period. Thus, the testimony of Petitioner and Witness A supports that Student received no instruction for 25 school days between September 20 and November 27, 2022.

Third, if the record supports that Student received no instruction for 25 school days, this equates to 150 hours of missed classroom time. Witness A testified that one-on-one tutoring is more "potent" for a student than instruction in a classroom setting, and he opined that one-half hour of tutoring would be appropriate for every hour of classroom time missed. However, in an unrelated case the previous day in which I presided,⁹⁷ Witness A submitted a written proposal in which the ratio was 22.5 minutes of tutoring for each hour missed. Witness A was unable to explain the discrepancy or to explain how Student's disabilities affected his/her ability to learn, or how Witness A's ratio would change based upon a child's unique ability to process information. For example, the ratio should not be the same for children with low IQ, average IQ, above average IQ, learning disabled, hearing impaired, visually impaired, autistic, etc. One size should not fit all.

Fourth, Witness A also recommended Applied Behavior Analysis ("ABA") tutoring. However, ABA therapy is normally prescribed for autistic students. Student carries no autism diagnosis or classification; s/he is classified with visual and orthopedic impairments. His/her IEP prescribes only ten hours per week of specialized academic instruction, no direct behavioral supports, and includes no mention of the need for ABA therapy.

⁹⁵ *Reid v. District of Columbia*, 401 F.3d 516, 524, (D.C. Cir. 2005). *See also, B.D. v. District of Columbia*, 817 F.3d 792, 799-800 (D.C. Cir. 2016).

⁹⁶ *See, Gill v. District of Columbia*, 751 F.Supp.2d 104, 111-12 (D.D.C. 2010) (petitioners offered neither reasoning nor factual findings to support the appropriateness of their proposed compensatory education plan).

⁹⁷ Case No. 2022-0171.

Fifth, although Student's IEP prescribes one hour per week each for physical, occupational, and speech services, Witness A's plan recommends eight hours of compensatory PT services, 7.5 hours of OT services, and six hours of S/L services. However, Petitioner testified that Student began receiving virtual related services on October 24, 2022, and Student had one OT session prior to that date. Thus, Student missed related services for same amount of time that s/he missed instruction and tutoring, twenty-five school days. Witness A's related services proposal for each related service exceeds the five hours of services to which Student was entitled for the five school weeks that were missed.

ORDER

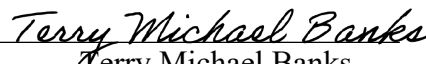
Upon consideration of the *Amended Complaint*, the responses filed by the respondents, the pleadings filed regarding the *Motion*, the cross-motions for summary judgment, the exhibits admitted into evidence, the testimony of the witnesses during the hearing, the parties' closing arguments, and the authorities relied on by the parties, it is hereby

ORDERED, that OSSE shall fund seventy-five (75) hours of independent tutoring in math, reading, and writing by providers with experience with children with severe visual and communication impairments, five hours each of speech therapy and physical therapy, and four hours of occupational therapy for Student.

IT IS FURTHER ORDERED, that OSSE shall immediately offer Student bus transportation with a dedicated nurse and assistance to the front door of his/her apartment building. In the event Petitioner declines this offer, School A will continue to provide the homebound services set forth in its Prior Written Notice of October 24, 2022. In the event Petitioner accepts the offer, School A shall provide the dedicated nurse prescribed in the July 27, 2022 IEP.

APPEAL RIGHTS

This decision is final except that either party aggrieved by the decision of the Impartial Hearing Officer shall have ninety (90) days from the date this decision is issued to file a civil action, with respect to the issues presented in the due process hearing, in a district court of the United States or the Superior Court of the District of Columbia as provided in 34 C.F.R. §303.448 (b).


Terry Michael Banks
Hearing Officer

Date: December 27, 2022

Copies to: Attorney A
Attorney B
Attorney C
Attorney D
Attorney E
OSSE Office of Dispute Resolution
OSSE Division of Specialized Education
[REDACTED]/DCPS
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