

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

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
December 11, 2023

<i>Student</i> , ¹)	Case No.: 2023-0180
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 12/11/23
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
Office of the State Superintendent of)	Hearing Date (using Microsoft Teams):
Education (“OSSE”),)	11/30/23
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) due to OSSE’s failure to provide adequate transportation services. OSSE responded that transportation services had been provided and there was no denial of FAPE.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter A30, of the District of Columbia Municipal Regulations (“D.C.M.R.”).

Procedural History

Following the filing of the due process complaint on 9/20/23, the case was assigned to the undersigned on 9/21/23. Respondent filed a response on 10/2/23 and objected to portions of the complaint that purported to state a claim for systemic relief. OSSE filed a Partial Motion to Dismiss on 10/3/23 asserting lack of subject matter jurisdiction by Hearing

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics. Personal pronouns and other terms that would indicate Student’s gender are omitted.

Hearing Officer Determination

Case No. 2023-0180

Officers over systemic violations, which was briefed and granted by order of the undersigned on 10/9/23. In the absence of a resolution period in cases against OSSE, a final decision in this matter must be reached no later than 45 days after the due process complaint, as extended by 30-day and 7-day continuances, which require a Hearing Officer Determination (“HOD”) by 12/11/23.

A prehearing conference was held on the record on 10/27/23 and a Prehearing Order was issued that same day addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 11/30/23 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. OSSE was represented by *Respondent’s counsel*. Petitioner participated in the entire hearing.

On 10/26/23, Petitioner filed a Motion to Compel Respondent OSSE to Answer the Due Process Complaint and to Produce Documents, the parties agreed during the prehearing conference that documents and a more definitive response would be provided by Respondent no later than 11/3/23. At the 11/30/23 hearing, it came out that the promised documents and response had not been forthcoming, but the motion was not renewed and at this point Petitioner’s 10/26/23 Motion is hereby denied as moot.

Documents and Witnesses

Petitioner’s Disclosure, submitted on 11/8/23 with subsequent correction also dated 11/8/23, contained documents P1 through P53, all of which were admitted without timely objection. Respondent’s Disclosure, submitted on 11/8/23, contained documents R1 and R2, which were admitted into evidence without timely objection.²

Petitioner’s counsel presented 1 witness in Petitioner’s case-in-chief (*see Appendix A*):

1. Parent

Respondent’s counsel presented 1 witness in Respondent’s case (*see Appendix A*):

2. *Associate Director*

Petitioner’s counsel submitted no rebuttal evidence.

Issues and Relief Requested

² Citations herein to the parties’ documents are identical except that Petitioner’s documents begin with a “P,” while Respondent’s documents begin with an “R,” followed by the exhibit number and then a “p” (for page) and the Bates page number or numbers (which are numbered consecutively through to the end of the exhibits), with any leading zeros omitted.

Hearing Officer Determination

Case No. 2023-0180

The issue to be determined in this Hearing Officer Determination is:

Issue: Whether OSSE denied Student a FAPE by failing to provide consistent, reliable and appropriate transportation to Student, who is medically fragile, during the 2022/23 school year, Extended School Year (“ESY”) during the summer of 2023, and into the 2023/24 school year. (*Petitioner has the burden of persuasion on this issue.*)

The relief requested by Petitioner is:

1. A finding that Student has been denied a FAPE.
2. OSSE shall provide consistent, reliable and appropriate transportation to and from school pursuant to Student’s IEP.
3. OSSE shall reimburse Petitioner for the costs of transporting Student to and from school when OSSE failed to do so.
4. OSSE shall notify Student’s family of any changes to transportation, including changes to route, delays and cancellations.
5. OSSE shall authorize comprehensive independent educational evaluations (“IEEs”) of Student, including (a) vocational, (b) psychoeducational, (c) speech-language, (d) assistive technology, (e) occupational therapy, and (f) neuropsychological.
6. OSSE shall provide compensatory education for any denials of FAPE, including tutoring and related services from providers of Petitioner’s choice.³
7. Any other appropriate relief.

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁴ are as follows:

³ Petitioner’s counsel was put on notice at the prehearing conference that at the due process hearing Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student’s alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was invited to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁴ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to

Hearing Officer Determination

Case No. 2023-0180

1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is *Age, Gender* and attends *School*.⁶ Student has a rare *genetic disorder* and suffers from global developmental delay, intellectual disability, epilepsy and ADHD.⁷ Student is largely nonverbal, cannot feel pain or hunger, thirst, or need for the toilet, and acts much like a 2-year-old.⁸ Nonetheless, Student is "one of the happiest and most loving kids you will ever meet" and is "kind, sweet, and generous."⁹

2. IEPs. Student has had IEPs for many years.¹⁰ Student's 10/18/22 IEP stated that Student's disability classification was Other Health Impairment, and provided 28.5 hours/week of specialized instruction outside general education, 60 minutes/week of speech-language pathology outside general education, 30 minutes/week of occupational therapy outside general education, 60 minutes/year of physical therapy consultation, and a dedicated aide 30 hours/week.¹¹ Student's 11/1/21 IEP provided the same services, except physical therapy consultation was 30 minutes/month.¹²

3. Student qualified for special education transportation in both the 10/18/22 and 11/1/21 IEPs.¹³ Student's IEP was amended on 6/9/22 to add a harness during bus transport.¹⁴ Student's IEP was amended on 7/6/21 to add ESY, which was from 6/28/21 to 7/23/21.¹⁵ Student's IEPs indicated that Student did not need special education transportation during ESY, although OSSE provided Student transportation during ESY without issue.¹⁶ School is on an 11-month calendar, with a School break in 2023 from 7/21/23 to 8/27/23.¹⁷

4. Transportation. Student experienced a great deal of delay on OSSE buses throughout the period alleged, including the week of 1/9/23.¹⁸ OSSE rerouted students and

base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁵ Parent.

⁶ P1p2.

⁷ P20p277; P39p447; Parent.

⁸ Parent; P16p241,246-47 (formal testing yielded overall developmental age of 1 year, 2 months).

⁹ P39p447; Parent; P1p7.

¹⁰ Parent.

¹¹ Parent; P1p2,13-14.

¹² P3p52,64,66.

¹³ P1p17; P3p70.

¹⁴ P2p29.

¹⁵ P4p75,98.

¹⁶ P1p17,20; P3p70; Respondent's counsel.

¹⁷ P13p219; P14p237 (break in August 2022).

¹⁸ Parent; P22p294.

Hearing Officer Determination

Case No. 2023-0180

buses starting on 1/9/23 in an effort to increase timeliness and efficiency, but that resulted in “significant delays” in the afternoon so School encouraged parents to pick up children and not rely on OSSE buses.¹⁹ School, as recommended by OSSE, encouraged alternate means of transportation, including “self-travel” (parents driving children), Uber/Lyft, and public transportation, including Kids Ride Free cards; Student could not use any of these except self-travel.²⁰

5. Parent often contacted OSSE to complain about bus problems picking up or dropping off Student, but the issues did not improve.²¹ Parent has often had to wait 45 minutes or longer to speak to OSSE representatives who lacked useful information.²² Parent continued to “beg and plead” for OSSE to improve bus transportation for Student and all who needed it.²³ OSSE asserted that much of the delay was caused by School’s delays, but School’s principal wrote parents on 2/17/23 stating that School continued to “navigate the challenges” presented by transportation that quarter and School was in regular contact with OSSE regarding “present concerns” and would update families as School got new information.²⁴

6. Parent sought to obtain transportation remedies by working with OSSE and the D.C. government, including the Mayor, emphasizing both the need for better service and better day-to-day communication about delays.²⁵ Parent proposed a detailed list of both short-term actions and long-term improvements that she circulated to OSSE and others seeking policy changes to improve the situation.²⁶

7. By 3/31/23, Parent was focused on trying to improve communication about specific delays on Student’s bus route.²⁷ Parent submitted testimony dated 4/5/23 to a D.C. Council hearing noting communication lapses by OSSE, including a February 2023 incident when the OSSE bus left Student at School because the bus lacked a latch for Student’s safety harness, but OSSE did not contact Parent, who only found out where Student was when School called.²⁸

8. Route Analysis (Afternoon). According to OSSE’s analysis of Student’s bus route, OSSE was late dropping off Student at home on every full day Student was on the bus, which totaled 194 days from 8/29/22 through 9/26/23, except 1 day (9/7/23) when Student

¹⁹ P21p288; P22p291-92.

²⁰ P24p297; Parent.

²¹ Parent.

²² P23p294-95.

²³ P25p300 (1/18/23).

²⁴ P11p183.

²⁵ P26p309-13; P27p315; P28p319-20; P29p324; P30p328; P31p336 (Parent “so frustrated and disappointed”); P32p350 (Mayor Bowser).

²⁶ P30p332-34; P32p347-48.

²⁷ P35p422-23,424-25 (Parent and other families are “tired and beat down” by the OSSE system).

²⁸ P39p449.

Hearing Officer Determination

Case No. 2023-0180

was dropped off 8 minutes ahead of schedule.²⁹ Within this route analysis, OSSE indicated that Student was dropped off on schedule 6 other times, but the data provided is clear that Student was dropped off late on each of those days.³⁰ Student was late by significant amounts of time, with lateness of over an hour on 136 of the 194 days (70%).³¹ As for ride times getting home, the OSSE data indicated that Student rode the bus an hour or more 5 times.³² OSSE buses were delayed for long periods daily – generally 45-75 minutes – before students boarded and left School.³³

9. Route Analysis (Morning). The parties disputed whether the bus was on time if it arrived at school by the first bell at 8:30 AM, or was only on time if it arrived by 8:20 AM, which was OSSE's goal in order to get students off the bus and into their classrooms, but not the calculation used in the route analysis.³⁴ Further, OSSE erroneously indicated that the bus was not late when it was not even to School by 8:30 AM on 10/27/22 and 11/16/22.³⁵ Conversely, OSSE indicated the bus was late getting to School when it was not (by OSSE's definition) on 1/9/23, 4/24/23 and 7/10/23.³⁶

10. OSSE's route analysis of Student's 201 morning bus rides to School from 8/29/22 to 9/26/23 revealed that Student was picked up late at home 57 times (and early a couple of times), even applying OSSE's 30-minute window for picking up students (which is plus or minus 15 minutes from their scheduled time).³⁷ Student was late to school on 14 of the 201 days.³⁸ OSSE's morning route analysis had errors on 5/2/23 (stating the bus was on schedule when it was not) and 7/12/23 (stating bus was late when it was within the 30-minute window).³⁹ Parent was skeptical that OSSE's data and records were accurate throughout.⁴⁰

11. Impact. Long rides, such as 98 minutes riding home on 10/31/22 would cause Student to arrive very agitated from being in a safety harness and unable to move for so long, as well as urinating more than Student's diaper could hold.⁴¹ On 10/27/22, Student spent 52 minutes on the bus, arriving in an agitated state to School, where it took an hour to calm down.⁴² There was no food or drink on the bus and Student's diaper could not be

²⁹ R1p7-12.

³⁰ R1p12.

³¹ R1p7-12 (not counting anomalies of 13 hours).

³² R1p7-12.

³³ Associate Director; R1p7-12.

³⁴ R1p1-6; Associate Director.

³⁵ R1p2.

³⁶ R1p2,4,5.

³⁷ R1p1-6; Associate Director.

³⁸ R1p1-6.

³⁹ R1p4,5.

⁴⁰ Parent.

⁴¹ *Id.*

⁴² *Id.*

Hearing Officer Determination

Case No. 2023-0180

changed on the bus.⁴³ The bus being even 15 minutes late caused Student to be agitated and anxious, because routine is important to Student due to disabilities.⁴⁴ When late, Student missed social interactions at school and missed instruction from Student's dedicated aide, which included help with food and drink at breakfast.⁴⁵

12. Compensatory Education. Petitioner testified that compensatory education would be most useful during the summer, to avoid impacting family time, which could best be achieved by providing for Student to attend *Camp*, a program of up to 6 weeks in the summer.⁴⁶ Parent's counsel affirmed this option and that it would restore Student to the position Student should have been in but for the denial of FAPE.⁴⁷ OSSE concurred in Camp as appropriate compensatory education for Student in this case.⁴⁸ Further, the undersigned takes Administrative Notice that the mileage rate at which OSSE reimburses parents for "self-travel" is \$1.48/mile, according to the OSSE website, which totals \$126.98 for the 7.8 miles driven round trip to get Student to and from School on 11 occasions during the period at issue.⁴⁹

Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). *See Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (the IDEA "aims to ensure that every child has a meaningful opportunity to benefit from public education").

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017), quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L.Ed.2d 686 (1988). "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child." *Andrew F.*, 137 S. Ct. at 994,

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Parent; 12/4/23 Memorandum from Petitioner's counsel at 2.

⁴⁷ Petitioner's counsel.

⁴⁸ Respondent's counsel.

⁴⁹ *See*

https://osse.dc.gov/sites/default/files/dc/sites/osse/service_content/attachments/Reimburse%20Guide_Parent%20Transportation%20082523.pdf;

https://osse.dc.gov/sites/default/files/dc/sites/osse/service_content/attachments/Reimburse%20Form_Parent%20Transportation%20Certification%20Form%20-%20Updated%2008.25.23.pdf.

Hearing Officer Determination

Case No. 2023-0180

quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 181, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982).

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), *citing Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen 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." *Andrew F.*, 137 S. Ct. at 1001.

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights. *Brown v. Dist. of Columbia*, 179 F. Supp. 3d 15, 25-26 (D.D.C. 2016), *quoting N.S. ex rel. Stein v. Dist. of Columbia*, 709 F. Supp. 2d 57, 67 (D.D.C. 2010).

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a *prima facie* case. D.C. Code Ann. § 38-2571.03(6); *Z. B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

Issue: *Whether OSSE denied Student a FAPE by failing to provide consistent, reliable and appropriate transportation to Student, who is medically fragile, during the 2022/23 school year, ESY during the summer of 2023, and into the 2023/24 school year. (Petitioner has the burden of persuasion on this issue.)*

Hearing Officer Determination

Case No. 2023-0180

This case is entirely focused on the related service of school transportation. Related services must be provided if required to assist a student with a disability to benefit from special education. See 34 C.F.R. § 300.34(a). “The [IDEA] makes specific provision for services, like transportation, for example, that do no more than enable a child to be physically present in class.” *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 891, 104 S. Ct. 3371, 3376, 82 L. Ed. 2d 664 (1984) (citing 20 U.S.C. § 1401(17)). The definition of “transportation” clearly includes “[t]ravel to and from school and between schools....” 34 C.F.R. § 300.34(c)(16)(i). In this case, Student’s IEP unambiguously provided school transportation and the issue is simply whether Student’s IEPs were appropriately implemented. The undersigned concludes that Petitioner did meet her burden of persuasion on the issue of IEP implementation of transportation.

With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student’s IEP. See *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 144 (D.D.C. 2018); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student’s] IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), quoting *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), citing *Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). Notably, there is “no requirement that the child suffer educational harm in order to find a violation” in a failure to implement claim. *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

Here, OSSE does not dispute that Student was entitled to transportation as a related service pursuant to Student’s IEPs. Nor is there serious controversy over the extent of OSSE’s failure to provide timely and appropriate transportation to Student, who was medically fragile, which is quite frankly shocking. OSSE’s own analysis of its bus service for Student revealed that it was able to get Student home on time only once out of nearly 200 days. Nor was Student’s bus merely a few minutes late, as 70% of the time Student was dropped off more than an hour late (although ride times were generally shorter). While that would be unacceptable for any child, given Student’s serious disabilities and need for routine, even being 15 minutes late caused Student to be agitated and anxious. Student was strapped into a security harness limiting movement, without any food or drink. Nor could Student’s diaper be changed on the bus, sometimes resulting in leakage. OSSE’s efforts to blame afternoon delays on buses having to wait at School were not persuasive. The responsibility to provide Student consistent, reliable and appropriate transportation falls on OSSE, and there is no doubt that OSSE failed here.

Given OSSE’s inability to provide timely transportation for Student except on a single afternoon (out of 194 attempts), little more need be said. But briefly turning to the analysis of OSSE’s morning service, Student was picked up late at home 57 times out of 201 days, which was 28% of the period at issue, even applying OSSE’s 30-minute window for picking up students (plus or minus 15 minutes from their scheduled time). Student was

Hearing Officer Determination

Case No. 2023-0180

late to School on 14 days, using OSSE's definition for lateness in this litigation of arriving at School after the first bell at 8:30 AM, rather than considering children late if they arrive after 8:20 AM, which was OSSE's standard outside litigation in order to get students off the bus and into their classrooms by the first bell.

Even taking the OSSE route analysis documents at face value, there were several errors that call into question the veracity of the many hundreds of details, as Petitioner noted. OSSE failed to provide the underlying handwritten trip tickets to Petitioner to permit the foundational data to be double-checked. But given the significant degree by which OSSE failed to demonstrate appropriate transportation for Student, Petitioner clearly prevails even using OSSE's methodology and trusting its data. *See, e.g., Middleton*, 312 F. Supp. 3d at 145 (20% deviation from IEP requirements was material and could not be excused as *de minimis*); *Wade v. Dist. of Columbia*, 322 F. Supp. 3d 123, 133 (D.D.C. 2018) (27% deviation was material).

While the difficulty of providing safe, timely and reliable bus service to Student and other children in need of transportation is daunting, that does not excuse OSSE from more than a *de minimis* failure to provide required transportation services. The undersigned concludes that OSSE's ongoing failures to provide consistent, reliable and appropriate transportation to Student are far more than *de minimis* and rise to a denial of FAPE due to preventing access to Student's education, resulting in remedies including an award of compensatory education, discussed next.⁵⁰

Remedies

Having analyzed and resolved the issue in this case, what remains is to consider suitable remedies, including an award of compensatory education, to make up for the denial

⁵⁰ Petitioner's counsel urged adoption of a range of policy issues designed to remedy transportation for Student (and others) during the due process hearing and in a subsequent 12/1/23 Memorandum in Support of Request for Injunctive Relief. However helpful those policies may be, it is the understanding of the undersigned that Hearing Officers are not permitted to change policy. *See R. A-G ex rel. R.B. v. Buffalo City Sch. Dist. Bd. of Educ.*, 2013 WL 3354424, at *7 (W.D.N.Y. July 3, 2013) *aff'd sub nom. R.A.G. ex rel. R.B. v. Buffalo City Sch. Dist. Bd. of Educ.*, 569 Fed. Appx. 41 (2d Cir. 2014) ("administrative hearing officers do not have the ability to alter already existing policies" *quoting S.W. by J.W. v. Warren*, 528 F. Supp. 2d 282, 294 (S.D.N.Y. 2007)).

The undersigned is also mindful of the need for appropriate deference in light of the Supreme Court's guidance in *Endrew F.*, 137 S. Ct. at 1001, that courts should not "substitute their own notions of sound educational policy for those of the school authorities which they review," *quoting Rowley*, 458 U.S. at 206. That is no doubt even more true of the intricacies of transportation planning and execution, where there are hundreds of buses performing an intricate ballet in an effort to move significant numbers of special education and other students to many locations throughout the city and the wider region safely and efficiently on a daily basis.

Hearing Officer Determination

Case No. 2023-0180

of FAPE found above. First, as an initial matter, OSSE is ordered to comply with Student's IEP and improve its transportation for Student going forward (which may well benefit other children as well), along with communication with Student's family about transportation changes. Second, Petitioner is awarded the cost of mileage for providing transportation to Student when OSSE did not, which amounted to a total of \$126.98 at the OSSE rate \$1.48/mile, which was not disputed by OSSE.

Petitioner also sought reimbursement from OSSE for the nontrivial costs of having babysitters available from the time Student was supposed to arrive home, even though Student was regularly dropped off late. However, as frustrating as the uncertainty of Student's arrival no doubt was to Parent, OSSE's late drop-off of Student did not cause Petitioner any loss, for she presumably would have needed babysitters for those hours and would not have paid any less if Student had been dropped off on time.

Further, Petitioner sought a full battery of 6 IEEs, even though she did not assert any connection between the need for evaluations and OSSE's transportation difficulties. When asked by the undersigned, Petitioner acknowledged that she had never sought evaluations for Student that had been refused. Accordingly, IEEs are not awarded as part of the remedy here.

In determining the scope of compensatory education for the denial of FAPE, there is often "difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position," *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. See *Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted). Further, with a failure to implement claim, as here, Petitioner need not even show that there was educational harm to Student. *James*, 194 F. Supp. 3d at 139.

Parent testified that Student receiving additional tutoring or related services would not be helpful as compensatory education during the 11-month school year at School. Instead, Parent urged Camp to be funded as compensatory education, which is available (with transportation) on a weekly basis for up to 6 weeks in the summer. During the hearing, OSSE stated it had no objection to Camp as compensatory education. With concurrence of the parties, the undersigned orders below reimbursement of up to 6 weeks of Camp for Student during the summer of 2024. Further, Petitioner's counsel affirmed that such compensatory education would restore Student to the position Student would have been in, but for the denial of FAPE.

This determination by the undersigned has been specifically tailored to address Student's unique needs as a matter of equity, as "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C.

Hearing Officer Determination

Case No. 2023-0180

2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

ORDER

Petitioner has prevailed on the sole issue in this case, as set forth above. Accordingly, **it is hereby ordered that:**

1. OSSE shall provide consistent, reliable and appropriate transportation to and from School pursuant to Student’s IEP, and notify Student’s family of any changes to Student’s transportation, including changes to route, delays and cancellations.
2. As compensatory education for the denial of FAPE found herein, OSSE shall (a) pay the cost or reimburse Petitioner for up to 6 weeks of Camp for Student during the summer of 2024 (at \$585/week), including transportation to Camp (at \$125/week) at Parent’s option; and (b) reimburse Petitioner a total of \$126.98 for 11 round trips taking Student to and from School.

Any and all other claims and requests for relief are **dismissed with prejudice.**

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

Counsel of Record (Appendix A, by email)
ODR (hearing.office@dc.gov)