

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
December 16, 2023

Parents, on behalf of Student,¹)	
)	
Petitioners,)	Hearing Dates: 12/4/23, 12/5/23,
)	12/6/23
v.)	
)	Hearing Officer: Michael Lazan
District of Columbia Public Schools and)	
Office of the State Superintendent of)	Case No. 2023-0191
Education,)	
)	
Respondents.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services as a student with Multiple Disabilities. A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS”) and Office of the State Superintendent of Education (“OSSE”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on October 2, 2023. The Complaint was filed by the Student’s parents (“Petitioners”). OSSE filed a response on October 16, 2023. DCPS filed a response on October 19, 2023.

A resolution meeting was held on October 11, 2023. The matter was not settled. The resolution period expired on November 1, 2023. The Hearing Officer Determination

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

(“HOD”) due date was set for December 16, 2023, pursuant to an order coordinating the timelines for Respondents.

II. Subject Matter Jurisdiction

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

III. Procedural History

A prehearing conference was held on November 15, 2023. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for DCPS, appeared. Attorney C, Esq., counsel for OSSE, appeared. A prehearing conference order summarizing the rules to be applied in the hearing and identifying the issues in the case was issued on November 22, 2023.

On November 13, 2023, a motion for a continuance to synchronize the state educational agency (“SEA”) timelines with the local educational agency (“LEA”) timelines was filed by Petitioners. This motion was granted by a hearing officer order dated November 15, 2023. The SEA timelines were extended to December 16, 2023.

On November 22, 2023, DCPS filed a motion to dismiss. DCPS contended that it is prevented by statute from providing transportation services in the District of Columbia, and that OSSE is the entity responsible for providing transportation as a related service in the District of Columbia. DCPS contended that Petitioners admitted this fact in the Complaint. DCPS contended that OSSE has promulgated its own rulemaking and policies for the implementation of transportation services, and that OSSE receives federal

funding for the transportation costs of implementing special transportation under the IDEA. DCPS argued that the SEA is therefore the only appropriate Respondent in a case, like this one, which involves transportation issues. DCPS contended that there is nothing in the IDEA that prevents the SEA from assuming responsibility for the direct provision of a Free Appropriate Public Education (“FAPE”) to children in the state, and that it is well established that the SEA may be responsible for IDEA violations when the SEA in some way “fails to comply with its duty to assure that the IDEA’s substantive requirements are implemented.”

Petitioners’ opposition to DCPS’s motion, filed on November 29, 2023, argued that from August 2, 2023, to the present, Petitioners have transported the Student to and from school, underscoring that, on August 23, 2023, Petitioners’ team provided an outside transportation service provider’s information to DCPS and OSSE for their review and approval for contracting and funding.

By an order issued on December 4, 2023, DCPS’s motion to dismiss was denied, in part because issues of fact remained to be developed in the case.

The hearing was conducted on December 4, 2023, December 5, 2023, and December 6, 2023, through the Microsoft Teams videoconferencing platform, without objection. Petitioners were again represented by Attorney A, Esq. DCPS was again represented by Attorney B, Esq. OSSE was again represented by Attorney C, Esq. This was a closed proceeding.

During the proceeding, Petitioners moved into evidence exhibits P-1 through P-66. Objections were sustained with respect to exhibits P-8, P-9, P-11, P-19, P-21, P-23, P-24, P-25, and P-43. Accordingly, exhibits P-1 through P-66 were admitted except for

exhibits P-8, P-9, P-11, P-19, P-21, P-23, P-24, P-25, and P-43. Petitioners presented as witnesses: Witness A, a project coordinator; Witness B, the owner and operator of Transport Company A; the Student's father ("Father"); Witness C, a bus driver; Witness D, a DCPS monitoring specialist; Witness E, the Director of DCPS's Non-Public Unit; Witness F, a behavioral specialist at School A; Witness G, a program manager on the OSSE Department of Transportation's safety and training team; and Witness H, Deputy Director of Administration at OSSE's Department of Transportation. The parties presented oral closing statements at the end of testimony on December 6, 2023.

IV. Issues

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

Did DCPS and/or OSSE deny the Student a FAPE from August 2, 2023, to present by failing to implement the Student's Individualized Education Program ("IEP") with respect to transportation services?

As relief, Petitioners seek the following: an order that DCPS or OSSE shall immediately arrange for transportation services to be provided to the Student and/or immediately fund services through an outside medical transport service provider to take the Student to and from school with two trained aides; an order that DCPS/OSSE shall, per General Services Administration ("GSA") guidelines, reimburse Petitioners for mileage and any out-of-pocket expenses, such as tolls, they incurred in arranging interim transportation services for the Student; a finding that any Student absences that resulted from transportation failures should be excused; and an order stipulating that all meetings relating to the Student shall be convened through Petitioners' counsel.

V. Findings of Fact

1. The Student is an X-year-old who is eligible to receive special education and related services as a child with Multiple Disabilities. The Student is nonverbal, blind, and deaf in one ear with mild hearing loss in the other ear. The Student has displayed some American Sign Language (“ASL”) skills. To learn, the Student requires tactile manipulatives and ASL supports. Throughout the school day, the Student is exposed to pre-braille skills, such as reading his/her schedule and using top-to-bottom and left-to-right approaches. The Student uses real objects, manipulatives, and textures to access information. The Student is not currently ready for formal instruction in braille. P-20-234.

2. The Student has been diagnosed with chromosomal anomalies, microdeletion syndrome, microcephalus, retinal detachment, visual disturbances, sensorineural hearing loss in the left ear, and autistic disorder. The Student frequently displays serious self-injurious behaviors and aggressive noncompliant behaviors in school. These behaviors include biting, kicking, pinching, head-butting, pushing, removing all his/her garments, defecating and/or urinating outside the bathroom, and inappropriately using instructional and leisure materials. P-20-326.

3. When the Student misbehaves, the most important thing to do is not to comment on the behavior. During bus travel, it is important to keep the Student extremely busy with fidgets and to keep him/her secured to a seat with a safety vest. The Student is strong and s/he can injure adults. Testimony of Witness F.

4. During the 2021-2022 school year, the Student attended School A. In approximately March 2022, the school decided that it was not equipped to provide for the

Student's educational needs, keep him/her safe, or maintain the safety of other students put at risk by the Student's behavior issues. P-9. The Student did not attend school for the rest of the 2021-2022 school year, nor in the summer or fall of 2022. The Student began attending School B in December 2022. An IEP was written for the Student on January 11, 2023. The IEP recommended specialized transportation services and modifications with respect to the Student's transportation to and from school, to "address the student's needs." The IEP mentioned that the Student has unexpected, sporadic episodes of outbursts/non-compliance and must be supervised at all times by a dedicated aide; that the Student can become physically aggressive, destructive, and unsafe during travel (e.g., by opening windows, putting body parts out of windows, removing his/her harness, body suit, and pull-up on the bus, putting body parts on other students' seats, and tearing the bus wall to expose wiring); and that the Student must be supervised at all times on the bus to ensure safe transport. The IEP referenced "additional behaviors" that were indicated in the Student's then-current Behavior Intervention Plan ("BIP"), including attempted and actual occurrences of taking feces out of his/her pants or the toilet and rubbing the feces on his/her body or surrounding objects. The IEP required specialized equipment for the Student, including a special seatbelt, a safety harness, and a singlet. P-16. Transporting the Student to and from School B took approximately less than thirty minutes each way. Testimony of Witness G.

5. In February and March 2023, School A conducted a Functional Behavior Assessment ("FBA") of the Student and created a BIP for him/her. At that point, the Student was making limited progress and, among other behaviors, biting and hitting adult staff, climbing on tables or chairs, throwing objects, and opening windows to put body

parts outside. The FBA, issued on March 9, 2023, indicated that the Student's behaviors were least likely to occur during eating times and most likely to occur during school demand sequences and when many people were talking. However, the aggression did not appear to have any noticeable warning signs. The FBA said that the likely function of the Student's behaviors was escape from academic demands, attention from adults, and internal/automatic reinforcement. P-13-158. The BIP, issued on March 9, 2023, recommended that school staff use verbal redirection and provide alternative strategies to manage the Student's behavior appropriately. P-12.

6. The Student's IEP was amended on April 9, 2023. There was no change to the transportation mandate on this IEP. P-17. The Student was accepted at School C on April 26, 2023. P-45.

7. OSSE rules do not allow staff to touch students on a bus any more than a light tap. One aide was assigned to the Student on his/her bus. On or about August 1, 2023, after a series of incidents on the bus, including the Student destroying several bus seats and spreading feces in the bus, OSSE informed DCPS that, effective August 2, 2023, OSSE was suspending transportation services for the Student due to his/her behavior on the bus. OSSE does not allow non-OSSE personnel to ride on its buses, and medical transportation is not within OSSE's scope of services or expertise. OSSE does not currently have any options for medical transport. Testimony of Witness G. Since OSSE suspended the Student's transportation services, Petitioners have driven him/her to school on their own, incurring gas and toll expenses and putting their livelihoods in jeopardy. Petitioners physically restrain the Student in their car, hold his/her hands and arms, and make him/her wear a vest. The trip can take up to ninety minutes each way.

Testimony of Father. On August 23, 2023, Petitioners found their own medical transportation provider, Provider A, and referred this provider's name to OSSE and DCPS. Testimony of Witness A; Testimony of Father; Testimony of Witness G.

8. It has been extremely difficult to find a placement for the Student, given his/her needs. For the 2023-2024 school year, the Student attends School C. Despite his/her challenges, all reports from the school indicate that their program is a success, with the Student making gains in life skills. School C assigns two "intervenors" to the Student at all times to insure that s/he attends to task. School C has also been able to support the Student on relatively short bus trips. The school provides aides who constantly engage with the Student during the bus ride and know how to avoid triggering him/her. Testimony of Witness F; Testimony of Witness A.

9. On or about September 18, 2023, DCPS requested that bus service for the Student resume on a trial basis. OSSE declined this request. Testimony of Witness G; Testimony of Witness D; Testimony of Witness E.

10. The Student's IEP was again amended on September 26, 2023, by School B. The transportation section of this IEP was amended to include the need for medical transportation and other supports. The IEP states, in bold, that due to multiple unsuccessful transportation attempts, leading to OSSE suspending the Student's bus transportation, the IEP team agreed that the Student required medical transport to access a FAPE. This transport was to include: the use of a safety vest and other supportive equipment as needed; staff appropriately trained to monitor, redirect, and safely support the Student in transit; and a flexible, progressive range of secured seating options that would ensure the safety and security of the Student in transit, so that s/he could not harm

him/herself, others, or damage any transportation vehicles or equipment. The IEP also indicated that the Student required constant communication, praise, close proximity of a monitor, and sensory objects and/or auditory supports, such as audiobooks or music, to ensure a safe, secure ride to and from school. P-21-389.

11. Provider A is a twenty-four-hours-a-day, seven-days-a-week, medical transportation service. The company specializes in ambulatory and stretcher services. Provider A provides experienced, professional drivers, at least two attendants, a buckle and/or three-point harness system to keep passengers in place, and a camera system that runs throughout trips. Provider A's transport vehicle has special equipment to assist people such as the Student. The proposed services for the Student cost \$950 daily, a rate that is standard in the industry. Testimony of Witness B.

12. Pursuant to OSSE rules, any time a contractor must be paid to provide an ongoing service, OSSE must initiate a procurement process that enables any qualified vendor to bid for the job. OSSE is currently going through the procurement process to try to find a medical transport service for the Student. There is no expectation that this process will conclude during the 2023-2024 school year. Testimony of Witness H.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: "Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or

proposed program or placement” provided that “the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency.” D.C. Code Sect. 38-2571.03

(6)(A)(i). On the issue in this case, which does not directly relate to the appropriateness of the Student’s IEP and placement, the burden of persuasion is accordingly on Petitioners.

Did DCPS and/or OSSE deny the Student a FAPE from August 2, 2023, to present by failing to implement the Student’s IEP with respect to transportation services?

“Failure to implement” claims may be brought if the LEA cannot “materially” implement an IEP. A party alleging such a claim “must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” Beckwith v. District of Columbia, 208 F. Supp. 3d 34, 39 (D.D.C. 2016) (citing to Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000)); Savoy v. District of Columbia, 844 F. Supp. 2d 23 (D.D.C. 2012) (holding no failure to implement where district’s school setting provided ten minutes less of specialized instruction per day than was required by the IEP); Van Duyn ex rel. Van Duyn v. Baker School Dist. 5J, 502 F.3d 811 (9th Cir. 2007).

Neither OSSE nor DCPS have provided the Student with any transportation services during the current school year. OSSE contended that the failure to implement was immaterial. However, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided. Garmany v. Dist. of Columbia, 935 F. Supp. 2d 177, 181 (D.D.C. 2013). The failure to provide any

transportation services for the Student during the 2023-2024 school year means that zero percent of those transportation services have been provided. DCPS suggested that there was no showing of harm to the Student, but a parent does not have to prove harm to prevail on a claim that a school district failed to materially implement an IEP. Turner v. District of Columbia, 952 F. Supp. 2d 31, 40 (D.D.C. 2013). In Turner, for instance, DCPS was held to have denied a student a FAPE because no transportation services were provided during extended school year (“ESY”) instruction. Compare Catalan v. District of Columbia, 478 F. Supp. 2d 73 (D.D.C.2007) (because a student received consistent speech therapy, the failure to provide all of the required sessions was not a material deviation from that student’s IEP).

OSSE argued that its position was supported by a recent case involving transportation, Pierre-Noel on behalf of K.N. v. Bridges Pub. Charter Sch., No. 1:23-CV-00070 (TNM), 2023 WL 2809175, at *1 (D.D.C. Apr. 6, 2023). However, this case was about transporting a student to and from the bus, not to and from school. Unlike in Pierre-Noel, there is no dispute in this record that OSSE and DCPS cannot implement the Student’s IEP by providing him/her with appropriate transportation to and from school.

DCPS argued that it did all it could do to address the Student’s transportation issues, and that it should not be deemed liable as a result. But in the District of Columbia, the LEA is charged with making a FAPE available to each child with a disability from age three to age twenty-two. 5A D.C.M.R. Sect. 3002.1. This legal requirement exists even if the LEA recommends services to be provided by third parties, such as other governmental entities or private providers. Letter to Garvin, 30 IDELR 609 (OSEP Letter 1998). Accordingly, federal caselaw suggests that FAPE claims premised

on a failure to deliver special education transportation in the District of Columbia can be brought against the LEA. Hill v. District of Columbia, No. 14-CV-1893 (GMH), 2016 WL 4506972, at *24 (D.D.C. Aug. 26, 2016) (court made substantive determinations on claims that a student was denied transportation services by DCPS).

Moreover, DCPS could have done more to arrange the Student's transportation services during the 2023-2024 school year, including contract with Provider A to provide appropriate transportation services for the Student. DCPS argued that OSSE is the only party liable in this case, pursuant to 34 C.F.R. Sect. 300.175, which states that if the SEA provides a FAPE to children with disabilities, or provides direct services to these children, the agency can be held liable under the IDEA. 34 C.F.R. Sect 300.227(a)(ii). However, 34 C.F.R. Sect. 300.175(a) does not state that the LEA is relieved of its federal legal responsibility to provide a FAPE to when the SEA provides direct services. This Hearing Officer finds that both Respondents denied the Student a FAPE by failing to implement the transportation services mandated by the Student's 2023-2024 IEPs.

RELIEF

As relief, Petitioners seek reimbursement for private transportation costs incurred and transportation for the Student from home to school and from school to home for the remainder of the 2023-2024 school year. When school districts deny students a FAPE, courts have wide discretion to ensure that students receive a FAPE going forward. As the Supreme Court stated, the statute directs the Court to "grant such relief as [it] determines is appropriate." School Committee of the Town of Burlington v. Dep't of Education, Massachusetts, 471 U.S. 359, 371 (1985). The ordinary meaning of these words confers

broad discretion on a hearing officer, since the type of relief is not further specified, except that it must be “appropriate.”

Though the cost of Provider A’s transportation services is high, the record makes it clear that the parties and this Hearing Officer have no other choice but to arrange for the Student’s transportation to and from School C for the remainder of the 2023-2024 school year. No other proposal was suggested or even hinted at by OSSE, DCPS, or Petitioners. Respondents did not take the position that Petitioners must wait for OSSE’s transportation procurement process to conclude before the Student receives transportation to and from school, nor did Respondents take the position that the expense for Provider A’s transportation services is so great that it is unfair to the agencies. Moreover, Respondents did not dispute the ability of Provider A to provide the transportation services required by the Student. Finally, neither OSSE nor DCPS clearly objected to Petitioners’ reasonable request for reimbursement for the mileage and toll costs they incurred due to Respondents’ failure to provide the Student with transportation services.

VII. Order

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

1. For the remainder of the 2023-2024 school year, Respondents shall make all necessary arrangements to pay for Provider A to pick up the Student every school day for travel between the Student’s home and School C, at the rate of \$950 per day;
2. Upon presentation of proof of payment, Respondents shall reimburse Petitioners for all mileage costs (at the then-current federal mileage rate) and all toll expenses incurred by Petitioners as a result of them transporting the Student to and from School C during the 2023-2024 school year;

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3. All other requests for relief are denied.

Dated: December 16, 2023

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
Attorney C, Esq.

VIII. Notice of Appeal Rights

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

Dated: December 16, 2023

Michael Lazan
Impartial Hearing Officer