

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

Parent on behalf of Student¹)	Case No. 2023-0249
)	
Petitioner)	Hearing Date: February 13, 2024
)	
v.)	Conducted by Video Conference
)	
Office of the State Superintendent of Education)	Date Issued: February 26, 2024
)	
Respondents)	Terry Michael Banks, Hearing Officer

AMENDED HEARING OFFICER DETERMINATION

INTRODUCTION

Petitioner is the parent of an X-year-old student (“Student”) attending School A. On December 19, 2023, Petitioner filed a Due Process Complaint alleging that the Office of the State Superintendent of Education (“OSSE”) failed consistently to provide transportation services to Student, individually, and systemically, to students similarly situated throughout the jurisdiction. On December 28, 2023, OSSE filed *Office of the State Superintendent of Education’s Response to Administrative Due Process Complaint* (“Response”) denying that it had denied Student a FAPE in any way.

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.

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

PROCEDURAL HISTORY

On December 19, 2023, Petitioner filed her *Complaint* alleging that OSSE failed to provide Student timely transportation services as provided in her/his IEP. Specifically, Petitioner asserted that OSSE's failures caused Student to miss 16 or more school days in school year 2021-22 and to be late on numerous days, 72 school days in school year 2022-23 and to be late on numerous days, and an undetermined number of school days and tardy days in school year 2023-24. The *Complaint* also alleged systemic violations, that OSSE failed to provide required transportation services to other similarly situated students throughout the District.

On December 28, 2023, OSSE filed its *Response*, denying that it had denied Student a FAPE in any way. That day, it also filed *Office of the State Superintendent of Education's Partial Motion to Dismiss the Complaint* ("*Motion*"). OSSE requested dismissal of Petitioner's claims as to systemic violations because the hearing officer lacked the authority to adjudicate systemic claims. On January 3, 2024, Petitioner filed *Petitioner's Opposition to Respondent's Partial Motion to Dismiss* ("*Opposition*"). Petitioner argued that the hearing officer had the authority to adjudicate such claims and that Petitioner had no other forum to address OSSE's pattern and practice of failing to provide appropriate special education transportation services. On January 21, 2024, I issued an order granting OSSE's *Motion*, dismissing the class claims.

The prehearing conference in this case was conducted on January 2, 2024 through video conference facilities. The *Prehearing Order* was issued later that day.

On January 3, 2024, Petitioner filed a *Motion to Compel Respondent to Answer the Due Process Complaint and Produce Documents* ("*Petitioner's Motion*"). Petitioner argued that OSSE failed to file a legally sufficient response to the *Complaint*. Petitioner also argued that OSSE is obligated to produce documents upon which Respondent relies in preparing its response "as demanded by the equities and traditional notions of fairness." While OSSE did not file a timely response to *Petitioner's Motion*, on January 11, 2024, it filed *Office of the State Superintendent of Education's Amended Response to Administrative Due Process Complaint* ("*Amended Response*"). In the *Amended Response*, OSSE provided a paragraph-by-paragraph response to the allegations in the *Complaint*. While it admitted responsibility for providing transportation services for special education students in the District, and that Student was eligible for transportation services, it denied that Student missed the number of days alleged in the *Complaint* due to transportation failures. On January 21, 2024, I issued an order denying the motion for a more complete response as moot. That order also denied Petitioner's discovery request, because unlike the federal rules of procedure, the rules governing IDEA hearings do not require the production of any documents more than five days before the scheduled hearing, and a party need only disclose documents upon which it intends to rely at the hearing. On January 21, 2024, I also issued an *Amended Prehearing Order* reflecting the issue to be addressed at the hearing.

The due process hearing was conducted on February 13, 2024 by video conference. The hearing was closed to the public at Petitioner's request. Petitioner filed disclosures on February 6, 2024 containing a witness list of two witnesses and documents P1 through P35. Respondent did not file objections to Petitioner's disclosures. Therefore, Petitioner's Exhibits P1- P35 were admitted into evidence. Respondent also filed disclosures on February 6, 2024, containing a

witness list of one witness and documents R1 through R6. Petitioner did not file an objection to OSSE’s disclosures. Therefore, OSSE’s Exhibits R1-R6 were admitted into evidence.

Petitioner presented as witnesses in chronological order: Petitioner and Witness A. Witness A was admitted as an expert in compensatory education. Respondent presented one witness, Witness B. At the conclusion of testimony, the parties’ counsel gave oral closing arguments.

ISSUES

As identified the *Complaint* and the *Amended Prehearing Order*, the issue to be determined in this case is as follows: whether OSSE failed to provide Student timely transportation services as provided in her/his Individualized Education Program (“IEP”). Specifically, Petitioner asserted that OSSE’s failures caused Student to miss 16 or more school days in school year 2021-22 and to be late on numerous days, 72 school days in school year 2022-23 and to be late on numerous days, and an undetermined number of school days and tardy days in school year 2023-24.

FINDINGS OF FACT

1. Student is X years old and is enrolled in grade J at School A for the 2023-24 school year.²

2. On March 3, 2020, when Student was in grade G at School B, DCPS conducted an IEP Annual Review meeting. Student was described as a student with a disability classification of Specific Learning Disability (“SLD”).³ The IEP team prescribed 20 hours per week of specialized instruction outside of general education, two hours per month of occupational therapy (“OT”) outside of general education, and four hours per month of behavioral support services (“BSS”) outside of general education.⁴ The team also prescribed extended year services (“ESY”) and transportation services.⁵

3. On September 23, 2020, when Student was in grade B, her/his beginning of the year (“BOY”) Reading Inventory score of 394 was at a grade E level, six grades below grade level. On May 19, 2021, her/his end of year (“EOY”) Reading Inventory score of 548 was at a grade F level, four grades below grade level.⁶

4. During the 2021-22 school year, when Student was in grade L at School C, Student’s first class started at 8:45 a.m.⁷

² Petitioner’s Exhibit (“P:”) 6 at page 126. The exhibit number is followed by the electronic page number in the disclosure, i.e., P6:126; Petitioner’s testimony.

³ P1:6.

⁴ *Id.* at 19.

⁵ *Id.* at 22.

⁶ P7:156-57.

⁷ P12:190.

5. On March 4, 2022, DCPS conducted an IEP Annual Review meeting.⁸ Student's services were unchanged from the March 2020 IEP.⁹ On May 4, DCPS amended the IEP to delete ESY.¹⁰

6. During the 2022-23 school year, when Student was in grade K at School D, Student's first class began at 9:00 a.m.¹¹

7. On April 13, 2023, DCPS conducted an IEP Annual Review meeting.¹² The IEP team prescribed 27.5 hours per week of specialized instruction outside of general education, two hours per month of OT services outside of general education, and four hours per month of BSS outside of general education.¹³ The Transportation section of the IEP reported that Student was attending School A "as a result of a letter of placement from DCPS."¹⁴ The Emotional, Social, and Behavioral Present Levels of Academic Achievement and Functional Performance ("PLOP") reported that Student's current grades were B's in World History and Algebra, and F's in Sociology, English, and Art. S/he had 25 total absences with 12 unexcused. "Based on records review and conversations with [Student], [s/he] is consistently absent from [his/her] Sociology and Art classes. It appears that [Student's] behavior is a form of avoidance as a result of generalized anxiety. [S/he] indicated that [s/he] does not enjoy being in big groups. In addition, [Student] has vocalized that [s/he] does not understand why non-core classes are essential."¹⁵ The Written Expression PLOP reported that Student had attended 52 of 124 days, "and this also has contributed to [her/his] not making adequate yearly progress."¹⁶ The Math PLOP reported that Student was currently failing. "[Student] is absent frequently and misses test dates. At present [s/he] is failing. On several occasions [s/he] has requested missed assignments and never returns them for grading."¹⁷ Student had been absent from Math 36 days.¹⁸

8. On July 28, 2023, DCPS amended Student's IEP to reflect the transfer to School A.¹⁹ The specialized instruction services were amended to 26 hours per week,²⁰ and ESY was reinstated.²¹ On August 10, 2023, DCPS amended the IEP again to add sixty minutes per month of OT consultation services and to update the goals and PLOPs.²²

9. On May 11, 2023, Petitioner called OSSE's Parent Resource Center at 8:46 a.m. to inform OSSE that the school bus did not arrive and that she had already taken Student to school.²³

⁸ P2:27.

⁹ *Id.* at 40 and 43.

¹⁰ P3:53, 69.

¹¹ P13:193.

¹² P4:76.

¹³ *Id.* at 90.

¹⁴ *Id.* at 93.

¹⁵ *Id.* at 88.

¹⁶ *Id.* at 86.

¹⁷ *Id.* at 80.

¹⁸ *Id.* at 79.

¹⁹ P5:100.

²⁰ *Id.* at 113.

²¹ *Id.* at 117.

²² P6:127, 143.

²³ P23:265. Petitioner submitted five transcripts of her calls to the Resource Center.P21-P25. P23 was the only exhibit in which Petitioner clearly stated that the school bus had not arrived to take Student to school.

10. Through February 28, 2023, Student was absent 49 days, of which 36 were excused, and tardy 22 days, none of which were excused.²⁴

11. Student received the following 2022-23 year-end grades at School A: Computer Lab and Physical Education – A, English – B, Chemistry and World History – C, and Geometry – D+. None of the teacher comments mentioned Student’s attendance.²⁵

12. Petitioner testified that during the 2021-22 school year, the school bus did not come on a regular basis. It would also routinely bring Student home an hour late. Petitioner estimated that the bus did not come in the morning on twenty occasions. If her work schedule permitted, she would take Student to school if the bus did not arrive in the morning, and occasionally a family member would take her/him to school. The school bus did not bring Student home from school ten times. Either Petitioner or a family member had to pick her/him up on those occasions. Petitioner estimated that this occurred two to three times per week. Petitioner did not submit transportation reimbursement requests to OSSE because she could not get OSSE’s reimbursement webpage to respond. During the 2022-23 school year, Petitioner estimated that Student missed 70 school days due to the lack of school bus transportation. Petitioner estimated that she drove Student to school D two to three days each week. During the 2023-24 school year, Petitioner estimated that the school bus did not arrive to take Student to School on twenty days. Petitioner estimated that she drove Student to school D two to three days each week. Petitioner did not keep a record as to when she called OSSE about late or absent buses. She could not remember how many days the bus was late during the 2023-24 school year.²⁶

13. Witness A, Petitioner’s educational consultant, testified that during the 2021-22 school year, the school bus was late 156 days, based on an analysis of OSSE’s Route Analyses²⁷ conducted by Petitioner’s counsel for that school year in Petitioner’s Exhibit P30. Based on the March 4, 2022 IEP, Witness A noted that Student had 16 unexcused absences during the school year. For the 2022-23 school year, Witness A testified that during the 2022-23 school year, the bus was late 13 times and Student missed 72 days. Once Student transferred to School A in April 2023, the bus was late 22 days through December 2023. Witness A concluded that Student missed a total of 92 days: 16 + 72 plus four additional absences referenced in an IEP. The 92 days represents 18.4 school weeks. In addition, he assumed that Student missed one hour on each of the 191 days the bus was late. Assuming 20 hours per week of specialized instruction, this constitutes an additional 9.55 weeks missed, or a total of 28 weeks (18.4 weeks + 9.55 weeks). Again assuming 20 hours per week of specialized instruction, this amounts to 560 hours of lost specialized instruction. Based on this data, Witness A opined that Student should receive 187 hours of specialized tutoring, 28 hours of counseling, and 14 hours of OT services as compensatory education services. Witness A opined that 187 hours of tutoring would adequately compensate Student for the 560 hours of lost instruction. When I asked what the 1:3 ratio of tutoring to lost instruction was based on, Witness A testified that it was based on his years of experience and Student’s profile. The counseling and OT services were based on actual services lost on an hour-for-hour basis. Witness A conceded that he did not know if Student received BSS an OT on a one-to-one basis from providers rather than in a small group basis. He also conceded that he did not

²⁴ P14:195-97.

²⁵ P10:180-81.

²⁶ Petitioner’s testimony.

²⁷ Respondent’s Exhibits R2-R4.

independently review OSSE's Route Analyses.²⁸

14. Witness B was OSSE's Department of Transportation's Associate Director of Audit & Compliance. He testified as to how the Route Analyses in Respondent's Exhibits R2-R4 were developed from the "trip tickets" filled out by each bus driver for each morning and evening run in Respondent's Exhibits R4 and R5.²⁹

15. During the 2021-22 school year, the morning bus was late to Petitioner's home and Student did not ride 36 times, the bus was early or on time and Student did not ride 5 times, the bus was early or on time and Student rode 9 times, the bus was late and Student rode 44 times, and there were no or incomplete trip tickets on 67 days.³⁰

16. During the 2022-23 school year, Student was enrolled at School D until April 2023 when s/he transferred to School A. However, from August 29, 2022 until April 20, 2023, each of the disclosed trip tickets for the morning bus listed Student's school as School E. On April 20, 2023, the trip ticket correctly identified Student's morning destination as School A.³¹ Thus, Student did not ride the bus for the first 139 school days.³² For the remaining school days, the morning bus was late to Petitioner's home 16 times and Student did not ride the bus, the bus was early or on time 12 times and Student did not ride the bus, the bus made no attempt four times at the end of the school year (June 12-15), and the trip ticket was missing or incomplete 3 days.³³

17. During the 2023-24 school year through December 14, 2023, Student rode the morning bus only two times. The bus was late to Petitioner's home 7 times and Student did not ride the bus, the bus was late twice and Student rode the bus, the bus was early or on time 54 times and student did not ride the bus, and the bus made no attempt 6 days.³⁴

18. OSSE's reimbursement rate for missed transportation services is \$1.48 per mile.³⁵

19. The distance from Petitioner's home to School D is two miles.³⁶

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:

²⁸ Witness A's testimony.

²⁹ Witness B's testimony.

³⁰ Respondent's Exhibit ("R:") 2 at pages 6-11. The exhibit number is followed by the electronic page number in the disclosure, i.e., R2:6-11.

³¹ R6:1118-1691.

³² R3:18-22.

³³ *Id.* at 22-23.

³⁴ R4:30-32.

³⁵ P28:284.

³⁶ P32:338.

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.³⁷

The issues in this case do not involve the alleged failure of OSSE to provide an appropriate IEP or placement. Therefore, under District of Columbia law, Petitioner bears the burden of persuasion as to all issues presented.³⁸

Whether OSSE failed to provide Student timely transportation services as provided in her/his Individualized Education Program (“IEP”). Specifically, Petitioner asserts that OSSE’s failures caused Student to miss 16 or more school days in school year 2021-22 and to be late on numerous days, 72 school days in school year 2022-23 and to be late on numerous days, and an as yet undetermined number of school days and tardy days in school year 2023-24.

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.³⁹ 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.⁴⁰ 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.⁴¹ 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.⁴² 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.⁴³

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

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 §§

³⁷ D.C. Code Sect. 38-2571.03(6)(A)(i).

³⁸ *Schaffer v. Weast*, 546 U.S. 49 (2005).

³⁹ 20 U.S.C. §1412(a)(1)(A).

⁴⁰ 20 U.S.C. §1412(a)(11)(A).

⁴¹ 20 U.S.C. §1413(a)(1).

⁴² 20 U.S.C. §1413(g)(1)(B).

⁴³ 5-A DCMR §3001.1 and 3001.2.

300.201 and 300.202 and §§ 300.206 through 300.226 as if the agency were an LEA...⁴⁴

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.⁴⁵ 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."⁴⁶

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.⁴⁷

In furtherance of its obligation to provide transportation services to disabled students, OSSE promulgated its *Special Education Transportation Policy* ("*Policy*").⁴⁸ The *Policy* provides that the OSSE Division of Student Transportation ("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."⁴⁹ The *Policy* sets forth eligibility criteria for transportation services for which the LEA's IEP teams are tasked with determining for each child.⁵⁰ 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.⁵¹ LEAs are required to recertify each student's continued eligibility for transportation services twice a year.⁵² The *Policy* authorizes DOT to notify parents and 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 DOT does not receive a satisfactory response within seven days, it is authorized to notify the parent and LEA

⁴⁴ 34 C.F.R. §300.175.

⁴⁵ *Petties v. District of Columbia*, Civil Action No. 95-0148 (D.D.C. May 5, 2010).

⁴⁶ D.C. Code § 38-2901 (11B) and (12).

⁴⁷ D.C. Code § 38-2907.

⁴⁸ The *Policy* is published on OSSE's website:

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

⁴⁹ *Id.* at 3.

⁵⁰ *Id.* at 4-7.

⁵¹ *Id.* at 11.

⁵² *Id.* at 12.

of its intent to terminate services. If no satisfactory response is received within an additional three days, DOT is authorized to terminate services.⁵³

Student's IEP includes transportation services as a related service. OSSE concedes that it is responsible for providing transportation services to Student as a special education student eligible for transportation services.⁵⁴ 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, 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,⁵⁵ but there is no circumstance described in the *Policy* or District law that authorizes an LEA to provide transportation services.

2021-22 School Year

While DOT is responsible for both morning and afternoon transportation services, only the failure to provide services in the morning, getting children to school on time, has the potential for depriving them a FAPE. Petitioner testified that during the 2021-22 school year, the school bus did not come in the morning on twenty occasions and did not bring Student home from school ten times. Either Petitioner or a family member had to pick her/him up on those occasions. Petitioner estimated that this occurred two to three times per week, which is clearly inconsistent with her earlier testimony that it only occurred ten times during the school year.

Petitioner's counsel's analysis of OSSE's Route Analysis for the 2021-22 school year found that the morning bus was late 156 days. However, my analysis of the same Route Analysis revealed that the morning bus was late to Petitioner's home and Student did not ride 36 times, the bus was early or on time and Student did not ride 5 times, the bus was early or on time and Student rode the bus 9 times, the bus was late and Student rode 44 times, and there were no or incomplete trip tickets on 67 days. Petitioner did not provide Student's report card or attendance record for the 2021-22 school year. Either document would have established the number of days Student was actually absent or late during the school year, and the attendance record would have provided the exact dates Student was absent or late. Petitioner testified that she did not submit transportation reimbursement requests to OSSE because she could not get OSSE's reimbursement webpage to respond. Petitioner also provided no testimony or documentation of the dates she took Student to school when the bus did not arrive as scheduled, and she provided no testimony or documentation of the specific dates she brought Student home from School C in the afternoon.

2022-23 School Year

During the 2022-23 school year, Student never rode the school bus to School D or School A, the schools in which s/he was enrolled. Student was enrolled in School D until April 2023 when s/he transferred to School A. However, from August 29, 2022 until April 20, 2023, each of the DOT's trip tickets for the morning bus listed Student's school as School E. Thus, Student did not ride the bus to School D for the first 139 school days. For the remaining school days, the

⁵³ *Id.* at 9.

⁵⁴ *Amended Response*, ¶ 16.

⁵⁵ *Policy* at 11, n. 48, *supra*.

morning bus to School A was late to Petitioner's home 16 times and Student did not ride the bus, the bus was early or on time 12 times and Student did not ride the bus, the bus made no attempt four times at the end of the school year (June 12-15), and the trip ticket was missing or incomplete 3 days. Petitioner estimated that Student missed 70 school days due to the lack of school bus transportation. Petitioner estimated that she drove Student to school D two to three days each week. Student's partial Attendance History reveals that through February 27, 2023, the 111th school day of the year, s/he had 49 absences, 13 of which were unexcused, and 22 unexcused tardy days. Petitioner provided no testimony or documentation of the specific dates she took Student to school when the bus did not arrive as scheduled, and she provided no testimony or documentation of the dates she brought Student home from School C in the afternoon. Petitioner also did not explain why Student did not ride the bus to School A on the 12 days it was early or on time. However, since DOT's trip tickets reveal that it had the incorrect school for Student until April 20, 2023, the record establishes that Petitioner was able to get Student to School D on 72 of the first 111 school days.

As was previously discussed, the *Policy* requires the LEA to upload all documentation associated with special education transportation services into specified databases within five days of the eligibility determination. Thus, DCPS was required to provide DOT a Transportation Request Form ("TRF") for Student providing Student's address and school. OSSE did not offer the 2022-23 TRF into evidence and has never asserted in its *Response, Amended Response*, or in testimony, that DCPS notified DOT that Student was enrolled at School E for the 2022-23 school year.

2023-24 School Year

During the 2023-24 school year, Petitioner estimated that the school bus did not arrive to take Student to School on twenty days. Petitioner later estimated that she drove Student to school A two to three days each week. These statements are irreconcilable. There were seventeen school weeks prior to the Christmas break; if Petitioner took Student to school even twice a week, she would have done so 34 times despite her testimony that the bus failed to arrive only twenty times. Petitioner did not keep a record as to when she called OSSE about late or absent buses, and she could not remember how many days the bus was late during the 2023-24 school year. Based on DOT's Route Analysis, through December 14, 2023, the bus was late to Petitioner's home 7 times and Student did not ride the bus, the bus was late twice and Student rode the bus, the bus was early or on time 54 times and student did not ride the bus, and the bus made no attempt 6 days. As in the 2021-22 school year, Petitioner did not provide Student's report card or attendance record to establish the precise number of Student's absences and tardy days. Petitioner provided no testimony or documentation of the specific dates she took Student to school when the bus did not arrive as scheduled, and she provided no testimony or documentation of the dates she brought Student home from School A in the afternoon. Petitioner also did not explain why Student did not ride the bus on the 54 days the bus was early or on time.

Conclusion

Petitioner provided imprecise and inconsistent testimony as to Student's absences and tardy days during the three school years at issue. She provided no documentation of the days she took Student to school or brought him/her home from school, and no report cards or attendance records to establish the total absences and late days that could then be compared to DOT's Route

Analyses for school years 2021-22 and 2023-24. For the 2022-23 school year, the Attendance History, DOT's Route Analysis, and the May 11, 2023 telephone transcript support a finding that Petitioner provided Student's transportation for 72 round-trips during the first 111 school days and at least one additional trip to School A in May. However, there is no definitive record of Student's absences for the year, how many days Petitioner took him/her to school, and how many days Petitioner elected not to send him/her to school. There is not one email in the record documenting efforts on Petitioner's part over the three school years to notify School C, School D, School A, or DOT that the bus was not coming, was coming late, was coming to the wrong location, or was going to the wrong school. Petitioner provided transcripts of five calls she made to DOT about transportation over the three school years. Only the May 11, 2023 transcript includes a clear statement that the morning bus was late. During the 2023-24 school year, Student rode the bus to school only twice even though the bus was early or on time 54 times. Thus, Student's total number of absences for each of the years is not discernible from the record, and the record does not include credible proof of the number of days Petitioner provided Student's transportation to and from school except during a portion of the 2022-23 school year.

DOT is certainly not blameless. As was discussed earlier, its own *Policy* requires DOT to notify the LEA and the parents after three consecutive school days of absence from the bus. The LEA is then responsible for communicating with the parents to resolve the ridership issues. After seven consecutive days of absence from the bus, DOT is authorized to notify the LEA and the parents that service will be terminated if it does not receive a satisfactory response within three days. Had DOT followed these procedures each year, perhaps the outcomes would have been different. However, in this case, Petitioner has the burden of persuasion. Therefore, I conclude that Petitioner is entitled to \$429.20 as reimbursement for school year 2022-23, the period of time that Student's Attendance History documented her/his attendance at School D while the trip tickets indicated his/her school to be School E.⁵⁶

RELIEF

For relief, Petitioner requested (1) an order requiring OSSE to provide consistent, reliable, and appropriate transportation in conformity with his/her IEP, (2) an order to require OSSE to authorize comprehensive independent education evaluations for Student including vocational, psychoeducational, speech-language, assistive technology, occupational therapy, and neuropsychological evaluations, (3) compensatory education including independent tutoring and related services, (4) reimbursement for the cost of transporting Student to and from school on days OSSE failed to provide services, (4) an order requiring OSSE to inform Petitioner of any changes to transportation including, but not limited to, changes in Student's route, delays, and cancellations, (5) an order requiring OSSE to develop and implement adequate and effective policies and procedures to provide Student and other students similarly situated with consistent, reliable, and safe transportation to and from school, (6) an order requiring OSSE to provide Student and other students similarly situated with reliable and appropriate transportation to and from school, (7) an order requiring OSSE to inform parents of students similarly situated to Student regarding any changes to transportation including, but not limited to, changes in students' routes, delays, and cancellations, (8) special education and (9) attorney's fees.

⁵⁶ \$1.48/mile x 2.0 miles x 72 round trips and one one-way trip to School D.

Compensatory Education 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.

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.⁵⁷

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.⁵⁸

Witness A's compensatory education services proposal is inadequate for two reasons. First, Witness A did not prepare a written proposal. Second, the factual basis of the proposal is flawed. Witness A testified that Student was entitled to 187 hours of s tutoring, 28 hours of counseling, and 14 hours of OT services as compensatory education services for having been deprived of 28 weeks (560 hours) of specialized instruction. However, the record does not provide a basis for concluding that OSSE is responsible for 28 weeks of Student's absences. The only school year for which there is even a partial attendance record is 2022-23. Through February 27, 2023, Student was absent 49 times, 13 of which were unexcused. There is no evidence as to whether bus transportation was the reason for the 49 absences. The record for that school year establishes only that Petitioner got Student to School D and home 72 days during the first 111 days of the school year, when DOT did not offer Student transportation to School D. DOT initiated services from Petitioner's home to School A in April 2023, Student still never rode the bus to School A that school year, even when the bus was early or on time. There are no attendance records for the other two school years in evidence. Setting aside whether Witness A's back-of-the-envelope analysis would have satisfied *Reid* were it factually accurate,⁵⁹ Petitioner failed to meet her burden of proving entitlement to compensatory education by failing to establish even a reasonable approximation of the number of days Student was absent during the three school years at issue,

⁵⁷ *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).

⁵⁸ *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).

⁵⁹ Witness A's proposal could not have met the *Reid* test even if Petitioner had established a reasonably accurate number of absences attributable to DOT. Under *Reid*, compensatory services must be designed to bring the student to the level s/he would have been but for the denial of FAPE. Witness A's proposal ignored the first prong of the requirement, to identify the educational loss Student suffered during the period of harm for which s/he is entitled to compensation. He also conceded that the amount of tutoring he proposed, one-third of the estimated lost hours of instruction, is based entirely on his opinion.

the number of days she provided transportation that DOT did not, or the subset of the total number of absences for which OSSE could be held responsible.

ORDER

Upon consideration of the *Complaint*, the *Amended Response*, the exhibits admitted into evidence, the testimony of the witnesses during the hearing, and the parties' closing arguments, it is hereby

ORDERED, that within fifteen (15) business days of the issuance of this order, OSSE shall reimburse Petitioner \$429.20 for its failure to provide Student transportation services during the 2022-23 school year.

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: February 26, 2024

Copies to: Attorneys A-H
OSSE Office of Dispute Resolution