

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
1050 First Street, N.E., Washington, DC 20002
(202) 698-3819 www.osse.dc.gov

Parent, on behalf of Student,¹)	
Petitioner,)	
)	
v.)	Hearing Officer: Michael Lazan
)	Case No. 2023-0200
District of Columbia Public Schools and)	Hearing Date: 1/23/24
Office of the State Superintendent of)	
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. 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 10, 2023. The Complaint was filed by the Student’s parent (“Petitioner”). On October 19, 2023, DCPS filed a response. On October 23, 2023, OSSE filed a response. A resolution meeting was held on December 4, 2023. The matter did not settle,

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.

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

Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations (“DCMR”), Title 5-A, Chapter 30.

III. Procedural History

OSSE moved to dismiss on October 11, 2023. DCPS moved to dismiss on October 19, 2023. Petitioner opposed the OSSE motion on October 13, 2023. Petitioner opposed the DCPS motion on October 23, 2023. The motions were denied by a written order issued on November 8, 2023.

A prehearing conference took place through Microsoft Teams on December 17, 2023. Participating in the prehearing conference were Attorney A, Esq., attorney for Petitioner, Attorney B, Esq., attorney for DCPS, and Attorney C, Esq., attorney for OSSE). On December 21, 2023, a prehearing order was issued, summarizing the rules to be applied in the hearing and identifying the issues in the case.

There is no resolution period for claims against the State Educational Agency (“SEA”), which is OSSE. Therefore, on November 20, 2023, Petitioner moved for an extension of the Hearing Officer Determination (“HOD”) due date with respect to OSSE, from November 24, 2023, to February 7, 2024. The motion was granted without opposition by an order dated November 21, 2023.

Petitioner then filed a continuance motion on December 20, 2023, to synchronize the OSSE HOD timeline with the DCPS HOD timeline, which was then December 24, 2023. This motion was granted without opposition by an order dated December 22, 2023. The timelines with respect to DCPS were therefore extended to February 7, 2024.

The matter proceeded to trial on January 23, 2024. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. Appearing

were Attorney A, attorney for Petitioner, Attorney B, attorney for DCPS, and Attorney D, attorney for OSSE. After testimony and evidence, the parties presented oral closing statements. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-22 without objection. DCPS moved into evidence exhibits DCPS R-1 through DCPS R-10 without objection. OSSE moved into evidence exhibits OSSE R-1 through OSSE R-5 without objection. Petitioner presented as witnesses, in the following order: Witness A, an educational advocate (expert in special education and Individualized Educational Plan (“IEP”) programming); and herself. DCPS called as witnesses: Witness B, a special education teacher (expert in special education); and Witness C, a coordinator (expert in special education). OSSE called as witnesses: Witness D, a management analyst; and Witness E, Associate Director of Audit and Compliance.

IV. Issues

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

1. Did DCPS and/or OSSE deny the Student a Free Appropriate Public Education (“FAPE”) by failing to implement the Student’s IEP with respect to transportation services for the 2023-2024 school year?

Petitioner is seeking an order directing DCPS or OSSE to reimburse the parent for expenses incurred as a result of the alleged FAPE denial, directing all corresponding absences to be excused, directing the parties to provide the Student with compensatory education, and providing related relief.

V. Findings of Fact

1. The Student is an X-year-old who is currently eligible for services as a student with Intellectual Disability. The Student functions far below grade level in all

academic areas. In reading, the Student remains at or about the first-grade level despite many years of schooling. The Student, who is described as hard-working, struggles with phonics, decoding skills, reading fluency, and writing complex sentences. P-8.

2. An amended comprehensive psychological evaluation of the Student was the subject of a report dated November 10, 2021. The evaluator interviewed several of the Student's teachers. The Student's general education teacher said that s/he constantly needed redirection and assistance to complete and log in to simple tasks. The teacher said that the Student was academically on a kindergarten to first-grade level, which was "concerning." The Student's special education teacher described his/her ability to retain information as "very limited" and said that s/he was only learning basic math facts and was still a beginning reader. The psychological evaluation included cognitive and academic testing. The Student's Full-Scale IQ was measured at 72, at the 3rd percentile. The Student's academic functioning was in the extremely low range in all academic areas. P-8.

3. A psychological evaluation of the Student was conducted in or about December 2022. A corresponding report was written on December 29, 2022. The evaluator spoke to the Student's teachers, who indicated that the Student had difficulty with the curriculum. The Student's English language arts teacher indicated that the Student thrived in a quiet, small-group setting. The Student's world history and geography teacher said that s/he often just sat, notebook unopened, was extremely restless, verging on hyperactive, and often wandered around the classroom. Another teacher indicated that the Student would shut down and did not want to complete work. The teachers reported that the Student needed 1:1 support to complete classroom

assignments. Testing was conducted with respect to cognitive issues, academic issues, and behavioral issues through the Behavior Assessment Scales for Children (“BASC”) and the Connors-4, which indicated that the Student had issues with attention, focus, and listening. Academic testing showed that the Student was functioning in the low range, with scores in the very low range in reading comprehension. P-9.

4. On June 1, 2023, DCPS authorized eighty compensatory tutoring hours for the Student at the rate of \$75.15 per hour, for a total of \$6,012.00. P-18. This authorization letter expired on September 30, 2023. The letter indicated that, if the services were not used by September 30, 2023, the parent could request an extension and DCPS would issue a revised authorization letter providing for any unused services that complied with “anti-deficiency laws.” P-18.

5. An amended IEP was written for the Student on July 7, 2023. The IEP increased the Student’s specialized instruction hours to twenty hours weekly. This IEP indicated that the Student demonstrated articulation and language delays which could impact his/her ability to access the general education, and that communication deficits affected the Student’s ability to understand directions and academic content. P-12.

6. The IEP indicated that, on the beginning-of-year i-Ready assessment from September 2022, the Student’s overall math score indicated that s/he was performing on a second-grade level in most areas of math, except for “measurement and data.” The IEP indicated that the Student would benefit from intensive intervention to strengthen his/her math abilities. The IEP indicated that the Student’s reading, pursuant to the most recent Reading Inventory score, was on a first-grade level in reading and comprehension, and that the Student would benefit from support that focused on strengthening his/her

phonics. The IEP indicated that the Student struggled with pronouncing words and would benefit from the support of a read-aloud and/or immersive reader, and that, due to deficits in working memory, the Student needed instructions to be simply stated and repeated clearly and visuals, such as pictures and videos, to support reading comprehension. P-12.

7. The IEP indicated that the Student was well-behaved. It stated that the Student was a hard worker and would try to engage in instruction even if s/he did not understand the instruction. The IEP indicated that the Student got along well with peers, but would request 1:1 support from a teacher. It stated that the Student would benefit from working in settings with the least number of distractions. P-12.

8. As of August 23, 2023, the Student had not been assigned a school for the 2023-2024 school year. P-15-169. Petitioner did not find out about the Student's school assignment from DCPS until August 28, 2023, through a letter. The letter from DCPS informed her that School B was the Student's location of service. There was nothing required of the Student or the parent in this letter, which said "(we) look forward to welcoming [the Student] to the new location." P-14-167.

9. No school bus came for the Student thereafter. Testimony of Petitioner. The transportation issues were a function of technical issues relating to the Student's transfer from School A, the Student's school for the 2022-2023 school year, to School B, the Student's school for the 2023-2024 school. Testimony of Witness C; DCPS R-5-5.

10. DCPS attempted to send OSSE a "TRF form" on or about September 6, 2023, requesting transportation for the Student to travel to and from School B, but was unable to. The Student continued to be technically enrolled at School A until at least

September 18, 2023. At about this time, the Student was not being picked up for school, which was reflected on the trip tickets. Testimony of Witness B.

11. Witness C tried to arrange for the Student's transportation to and from School B. Witness C sought to again submit a TRF form for School B to OSSE in order to arrange for the Student's bus service to and from School B. However, Witness C could not fill out the TRF form. When she tried to make edits, the entry space for the Student was gray. Witness C tried to contact people for days, including staff at OSSE and the parent. Witness C was eventually told by OSSE Coordinator A that the parent had to come to School B to "turn the system green" so that the Student would get unenrolled from School A. Testimony of Witness C.

12. On September 28, 2023, Petitioner contacted DCPS and inquired about the Student's transportation issues. She was told that the Student had not been able to start at School B because of technical issues relating to the change in transportation from School A to School B. Petitioner asked for an immediate update on the transportation issue and asked for a meeting. P-16-181.

13. DCPS did not send OSSE a TRF form allowing the Student to go to School B until October 11, 2023. P-17-188. The Student's transportation started at approximately that time. DCPS then sent Petitioner an independent services authorization for missed services for the equivalent of five hours of speech and language therapy and 140 hours of tutoring. This authorization was to correspond to the missed services between approximately August 28, 2023, and October 13, 2023. DCPS R-6.

14. On October 15, 2023, DCPS authorized five hours of compensatory speech and language services at \$124.73 per hour, for a total of \$623.65, and 140 hours

of tutoring at \$78.30 per hour, for a total of \$10,962.00. This authorization letter expires on September 30, 2024. DCPS indicated that, if the services are not used by September 30, 2024, the parent may request an extension and DCPS shall issue a revised authorization letter providing for any unused services that comply with “anti-deficiency laws.” P-19.

15. Since the Student’s transportation issues were resolved in mid-October, 2023, the Student has attended School B. The Student has received twenty hours per week of specialized instruction in an “SLS” classroom. When the Student was first able to go to School B, s/he was nervous and had a rough time. However, the Student is doing better this school year. Testimony of Petitioner.

16. On December 7, 2023, DCPS authorized 216 hours of tutoring for the Student at the rate of \$78.30 per hour, for a total of \$16,912.80. This authorization letter expires on September 30, 2024, but if the services are not used by September 30, 2024, the parent may request an extension and DCPS shall issue a revised authorization letter providing for any unused services that comply with “anti-deficiency laws.” P-19.

17. Currently, the Student receives services pursuant to the tutoring that DCPS previously authorized. The instructors come to the Student’s house. Testimony of Petitioner.

VI. Conclusions of Law

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following: “Where there is a dispute about the appropriateness of the child’s individual educational program or

placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement,” provided that “the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency.” D.C. Code Sect. 38-2571.03(6)(A)(i). Accordingly, the burden of persuasion is on Petitioner.

1. Did DCPS and/or OSSE deny the Student a FAPE by failing to implement the Student’s IEP with respect to transportation services for the 2023-2024 school year?

After a student's IEP is developed, the school district “must ensure that...special education and related services are made available to the child in accordance with the child’s IEP.” 34 C.F.R. § 300.323(c)(2). “Failure to implement” claims may be brought if a local educational agency (“LEA”) cannot “materially” implement an IEP. Turner v. District of Columbia, 952 F. Supp. 2d 31, 40–41 (D.D.C. 2013). A parent challenging inadequate implementation of a student’s IEP must demonstrate that the school district failed to implement substantial or significant provisions of the IEP or that “deviations from the IEP’s stated requirements” were material. Catalan ex rel. E.C. v. District of Columbia, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). The parent “must show more than a *de minimis* failure to implement elements of the 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 the district's school setting provided ten minutes less of specialized instruction per day than was required by the IEP).

This approach affords LEAs some flexibility in implementing IEPs, but it still holds those agencies accountable for material failures. Houston Independent Sch. Dist. v. Bobby R., 200 F.3d 341, 349 (5th Cir. 2000); Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007) (“a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and [those] required by the child's IEP.”); see also S.S. ex rel. Shank v. Howard Rd. Acad., 585 F. Supp. 2d 56, 67–68 (D.D.C. 2008); Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 (D.D.C. 2011).

During closing arguments, the parties did not dispute that the Student's current IEP should be interpreted to require that the Student travel to and from school, that the Student's assigned school during the 2023-2024 school year is School B, and that the Student did not get transportation to and from School B until October 13, 2023. There is nothing in the record to show that the Student has attended any make-up sessions that correspond to the instruction missed during the 2023-2024 school year. DCPS suggested that there was little to no harm to the Student, who did not get to school at all during the period when no transportation services were provided. But this is a Student with significant special needs who needs consistency and structure to genuinely participate in school. Six or so weeks without school was harmful to the Student, who had difficulty transitioning to School B after transportation started in October 2023. Where transportation services are not provided for as little as three weeks, FAPE denial can result. Wilson, 770 F. Supp. 2d 270 at 274.

Moreover, proof of harm is not required under these circumstances. The “crucial measure” under the materiality standard is the “proportion of services mandated to those provided” and not the type of harm suffered by the student. Holman v. District of Columbia, 153 F. Supp. 3d 386, 393 (D.D.C. 2016). For six weeks, the Student did not get any services as all as a result of the transportation issues. Respondents presented no authority to suggest that this kind of month-plus transportation deficit can be excused or deemed to be *de minimis*.

DCPS argued that the parent also technically failed to withdraw the Student from School A until September 18, 2023, and never took the Student to School B’s physical location to arrange the Student’s transportation to and from School B. However, the Student had been assigned to School B through DCPS’s letter, which the parent received on August 28, 2023. That letter did not say anything about enrolling the Student in School B, or physically appearing at School B, in order to arrange for transportation for the Student to and from School B.

DCPS and OSSE also suggested that they did what they could to address the technical issues in the digital system that they use to process transportation requests, pointing out technical details such as the fact that the Student apparently had multiple “USI” numbers. However, the issue with the USI numbers in the system cannot be attributed to anyone but Respondents, who use this system all the time and should have known how to change the Student’s bus route. To the extent that DCPS and OSSE argued that they should not be held responsible for a technical glitch, an “impossibility defense” does not apply to federal grant programs like the IDEA. Brown v. District of Columbia, No. 1:17-CV-00348 (RDM) (GMH), 2019 WL 3423208, at *1 (D.D.C. July 8,

2019), at *16; Schiff v. District of Columbia, No. 18-CV-1382 (KBJ), 2019 WL 5683903, at *7 (D.D.C. Nov. 1, 2019).

Parenthetically, DCPS and OSSE also pointed to each other in regard to liability. In its motion to dismiss, DCPS argued, among other things, that it should not be liable for FAPE denial in transportation cases under the IDEA because OSSE, not DCPS, controls transportation services in the District of Columbia. However, as was pointed out in the order on the motion, in the District of Columbia, the LEA is charged with making a FAPE available to each child with a disability from age three to twenty-two. 5-A D.C.M.R. Sect. 3002.1. Accordingly, even though OSSE does manage transportation services for school-age students in the District of Columbia, there is federal caselaw suggesting that FAPE claims premised on a failure to deliver special education transportation can still be brought against DCPS on this basis. 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 student was denied transportation services by DCPS); Wilson, 770 F. Supp. 2d 270 (D.D.C. 2011) (court found that DCPS denied a student FAPE because transportation services were not provided to the student pursuant to the IEP).

OSSE argued that it did not know of the Student's transportation issues until it received the TRF form on October 11, 2023, effectively arguing that this problem was DCPS's fault entirely. However, Witness E suggested that OSSE did have notice of the problem by September 12, 2023, when a trip ticket said that the Student was not riding on the route to School B. Additionally, Witness C testified that she talked to OSSE Coordinator A about the Student's transportation issues in mid-September 2023. OSSE

Coordinator A advised that the problem was that the parent needed to “disenroll” the Student from School A, which the parent then did, to no avail. Moreover, both OSSE and DCPS have to bear at least some responsibility for the development and maintenance of their system that processes student transportation requests.²

Under the circumstances, this Hearing Officer finds that both DCPS and OSSE denied the Student a FAPE by failing to provide the Student with transportation services from the start of the 2023-2024 school year until October 13, 2024.

RELIEF

As relief, Petitioner seeks only compensatory education, through a summer program for children with disabilities. Petitioner no longer seeks the remainder of relief requested in the Complaint. 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.”

Hearing officers may award “educational services to be provided prospectively to compensate for a past deficient program.” Reid v. District of Columbia, 401 F.3d 516, 521-23 (D.C. Cir. 2005). The award must be reasonably calculated to provide the

² OSSE did not deny that it can be legally responsible for bus transportation for students in the District of Columbia, or that it could be liable for this Student’s bus transportation, were it at fault. In fact, the U.S. Department of Education’s Office of Special Education (“OSEP”) has ruled that hearing officers have the discretion to add an SEA as a party in an appropriate case. Letter to Anonymous, 69 IDELR 189, 117 LRP 2473 OSEP January 2, 2017).

educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. Id., 401 F.3d at 524; see also Friendship Edison Public Charter School v. Nesbitt, 532 F. Supp. 2d 121, 125 (D.D.C. 2008) (compensatory award must be based on a “qualitative, fact-intensive” inquiry used to craft an award “tailored to the unique needs of the disabled student”). A petitioner need not “have a perfect case” to be entitled to a compensatory education award. Stanton v. District of Columbia, 680 F. Supp. 201 (D.D.C. 2011).

Petitioner seeks a summer program at a non-public school or an organization that provides instruction in movement. Witness A testified in support of this proposal.

Witness A reasonably and persuasively testified that, since the Student already received tutoring, a special education summer camp would be more beneficial to him/her.

Petitioner proposed two programs. One is a summer program at School C, a non-public school, which is designed to help students discover their strengths, exercise their creativity, overcome academic difficulties, and prepare for the school year ahead. This program explores math, literature, technology, and art, among other things. The other program that Petitioner proposed is Program A, which consists of six sessions of a sixty-minute, private, 1:1 class about breathing, skeletal awareness, balance, and related areas.

This Hearing Officer finds that the School C program, which has an academic component and lasts four weeks, is an appropriate remedy for this FAPE denial. Witness A, an expert in special education, is right that this kind of summer program would be more helpful to the Student than would tutoring, which the Student is already entitled to. DCPS witnesses did not disagree with this testimony. During closing, DCPS argued that this kind of relief is counter to principles in Reid because the requested relief is not

targeted to IEP goals and would prevent the Student from getting extended school year services. However, there is no challenge to the quality of the summer program at School C, and the Reid court declared that a “flexible approach” to the compensatory education remedy is appropriate. In Reid, the court described compensatory education as “[t]he essence of equity jurisdiction” where the goal is “to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.” Id. (citing to Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944)). Under the circumstances, this Hearing Officer finds that Petitioner’s request for the summer program at School C is reasonably calculated, thoughtful, and fair, and that this request will enable the Student to recoup the skills that s/he lost during the first part of the 2023-2024 school year.

VII. Order

As a result of the foregoing:

1. The Student is awarded tuition at the summer program at School C, together with transportation to and from the program;
2. All other requests for relief are denied.

Dated: February 7, 2024

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
Attorney D, 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 USC Sect. 1415(i).

Dated: February 7, 2024

Michael Lazan
Impartial Hearing Officer