

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v.

NATIONAL COLLEGIATE PREPARATORY PCS
and
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION,

Respondents.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**¹

Student _____ presently attends a Charter School located in the District of Columbia. On October 24, 2013, Petitioner filed a Complaint against Respondents National Collegiate Preparatory Public Charter School (“NCP”) and Office of the State Superintendent of Education (“OSSE”). On October 28, 2013, OSSE filed a Motion to Dismiss. On November 5, 2013, NCP filed its Answer to the Complaint.

Petitioner and Respondent NCP concluded the Resolution Meeting process by participating in a resolution session on November 21, 2013. No agreement was reached, but the parties agreed not to prematurely end the 30-day resolution period. Therefore, the 45-day timeline began on November 24, 2013 and would have ended on January 7, 2014, but the hearing officer granted the Consent Motion for Continuance filed by all three parties, which extended the timeline and HOD due date to January 17, 2014.

On December 2, 2013, the hearing officer conducted a prehearing conference and determined, in a December 5, 2013 Prehearing Order, that the claims to be adjudicated, defenses asserted, and relief requested were as follows: ***Petitioner’s Claims:*** (i) Alleged failure to provide the related service of transportation pursuant to the IEP (with Petitioner contending that the periods from September 24 – November 1, 2013 and November 30 to February 1, 2012 are at issue).

NCCPS Defenses: (1) All allegations are denied; (ii) Student _____ had spotty attendance since beginning of SY 2013/14, but Petitioner never notified NCPPCS that it was due to transportation issues; (iii) the related service of transportation has been reinstated by OSSE as of 11/1/13 without any action on NCPPCS’s part; and (iv) NCPPCS was unaware that Student’s spotty Attendance at the end of SY 12/13 allegedly was due to transportation issues.

OSSE Defenses: (i) OSSE is the SEA, and therefore, is not the first-line director provider of education services; (ii) the LEA is responsible party in this matter; (iii) OSSE merely

¹ This section sets forth only the basic procedural history. Other events, including motions practice, may have taken place that are not listed here.

manages the bus operations for Students the LEA has indicated should receive transportation, and OSSE's responsibilities are not appropriate for resolution in this forum; and (iv) If OSSE is providing transportation but the student is not taking advantage of it, OSSE will cease providing the service until the LEA indicates it should be reactivated.

Relief Requested: (i) Compensatory education.

With their respective five-day disclosure letters, Petitioner disclosed twenty-one documents (Petitioner's Exhibits 1-21), NCP disclosed ten documents (Respondent's Exhibits 1-10), and OSSE disclosed eight documents (OSSE's Exhibits A-H).

The hearing officer convened the due process hearing on January 10, 2014, as scheduled.² At the outset, Petitioner withdrew from consideration any claim concerning transportation during SY 2012/13 in light of a February 20, 2013 Settlement Agreement. Thereafter, all disclosed documents were admitted without objection and the hearing officer received opening statements. Upon the conclusion of opening statements, the hearing officer noted that all parties clearly agreed that no transportation services were provided to Student from October 15 through October 30, 2013. Counsel for all three parties agreed with the hearing officer's observation, and Petitioner's counsel conceded that transportation services resumed on November 1, 2013. The hearing officer then received testimonial evidence from all parties, as well as closing statements, prior to concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

1. Did Respondents deny Student a FAPE by failing to provide Student with the related service of transportation pursuant to the IEP from September 24 – November 1, 2013?

FINDINGS OF FACT³

1. Student currently attends ninth grade at NCP.⁴
2. Student's November 6, 2012 Amended IEP, which was in effect during the period in question, was amended to add transportation services for Student. The IEP indicates that Student's primary disability is specific learning disability.⁵
3. OSSE, specifically OSSE-DOT, provides transportation for NCP's students. NCP notifies OSSE that a particular student needs transportation services by providing OSSE with a transportation form and inputting relevant data into an OSSE database. Once NCP

² Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

³ To the extent that the hearing officer has declined to 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, then 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.

⁴ See Complaint at 2; testimony of Parent.

⁵ Respondent's Exhibit 2.

provides OSSE with this notification, OSSE adds the student to its bus routes and the student begins receiving transportation services within 24-48 hours.⁶

4. After NCP notifies OSSE that a child needs transportation and gives the finalized IEP to the parent, NCP assumes that the child is being picked up by OSSE-DOT unless the parent calls to notify NCP otherwise. If a parent notifies NCP that a child is not being picked up, NCP tells the parent to call OSSE's parent call center and notify them of same. If that does not work, then NCP will call the parent call center or the transportation investigation department.⁷
5. Pursuant to OSSE-DOT's policies, if a student does not board the assigned bus for 5 consecutive days, OSSE-DOT suspends the student's transportation services. However, the parent can call the parent call center and have the services reinstated. It normally takes 3 business days to resume services, although services can be restarted the next day with a temporary pickup if the student's address has not changed. A parent can also call OSSE-DOT to report that a student missed his or her bus, and more often than not, OSSE will send the bus back out to the student's home that same day for a pickup.⁸
6. On eight consecutive school days from September 24 through October 3rd, OSSE sent a bus each morning to take Student to school. However, Student did not board the bus on any of those days. Instead, on September 24 and October 2 Parent informed the bus driver that Student was not going to school, on September 25 and 26 and on October 1 and 3 Student was a "no show," on September 27 the bus driver was informed that Student was suspended from school, and on September 30 Parent informed the bus driver that Student had taken the Metro.⁹
7. On the morning of October 4, 2013, OSSE did not make an attempt to pick up Student. Parent called OSSE's parent call center on the morning of October 7, 2013 at 7:50 am and asked that transportation services for Student be resumed on October 8. However, when OSSE sent a bus to pick up Student on the mornings of October 7, 8, 9 and 10, Student was a "no show." School was closed on October 11th and 14th. Thereafter, for the approximately two and a half week period extending from October 15 through October 30, OSSE suspended Student's bus service and made no attempt to pick her up.¹⁰
8. During the last week of October, Petitioner's educational advocate called OSSE's parent call center to request that OSSE resume providing bus services to Student, and OSSE agreed to do so.¹¹
9. OSSE resumed Student's transportation service on October 31. However, on both October 31 and November 1, Student was a "no show."¹²

⁶ Testimony of NCP SEC.

⁷ Testimony of NCP SEC.

⁸ Testimony of OSSE customer service representative; testimony of OSSE terminal manager.

⁹ OSSE's Exhibits B-C and H.

¹⁰ OSSE's Exhibits C, G at p.1, and H.

¹¹ Testimony of educational advocate.

¹² OSSE's Exhibit H.

CONCLUSIONS OF LAW

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

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner's claims, which will be grouped together to the extent that they are interrelated.

Under IDEA, a free appropriate public education ("FAPE") means special education and related services that, *inter alia*, are provided in conformity with an IEP. 34 C.F.R. § 300.17. In this regard "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.34.

"[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP 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." *Houston Independent School District v. Bobby R.*, 200 F.F.3d 341, 349 (5th Cir. 2000). The deviations from the IEP's stated requirements must be "material. *Id.* Hence, "failure to implement all services outlined in an IEP does not constitute a *per se* violation of IDEA." *Schoenbach v. District of Columbia*, 309 F. Supp. 2d 71, 83 n.10.

In the instant case, Petitioner contends that Respondents denied Student a FAPE by failing to provide her with the related service of transportation from September 24, 2013 through November 1, 2013 pursuant to her IEP. However, the evidence in this case reveals that the bus arrived to pick up Student every morning during the period at issue unless school was closed, except on the mornings of October 4 and October 15 through October 30, which constituted a total of 13 school days. The evidence further demonstrates that on the mornings at issue when the bus did arrive to pick up Student, which totaled 14 school days, Student primarily was a "no show," who failed to come outside and board the bus. Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proving a material failure to implement Student's IEP with respect to the related service of transportation, and therefore, Petitioner has failed to meet its burden of proof on this claim.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. All remaining claims and requests for relief in Petitioner's October 24, 2013 Complaint are **DENIED AND DISMISSED WITH PREJUDICE**.

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).

Date: 1/15/14

/s/ Kimm Massey

Kimm Massey, Esq.
Hearing Officer