

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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<b>Parent, on behalf of Student,<sup>1</sup></b>	)	
<b>Petitioner,</b>	)	<b>Case No.: 2019-0121</b>
	)	
v.	)	<b>Hearing Officer: Michael Lazan</b>
	)	
<b>District of Columbia Public Schools,</b>	)	<b>Dated: July 17, 2019</b>
<b>Respondent.<sup>2</sup></b>	)	

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case involving an X-year-old student who is currently eligible for services as a student with Multiple Disabilities (the “Student”). A Due Process Complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS” or “Respondent”) and Office of the State Superintendent of Education (“OSSE”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on May 3, 2019. The Complaint was filed by the parent of the Student (“Petitioner”). OSSE filed a response and motion to dismiss on May 14, 2019. DCPS filed a response on May 15, 2019. The resolution period expired on June 2, 2019.

**II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered,

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

<sup>2</sup> The Complaint was filed against both DCPS and OSSE as co-Respondents, but since OSSE’s motion to dismiss was granted, DCPS is now the sole Respondent.

pursuant to the Individuals with Disabilities Education Improvement Act (“IDEIA”), 20 U.S.C. Sect. 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.

### **III. Procedural History**

On May 17, 2019, Petitioner filed opposition papers to OSSE’s motion to dismiss. On June 6, 2019, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for DCPS, appeared. Attorney C, counsel for OSSE, appeared. A prehearing conference order was issued on June 13, 2019, summarizing the rules to be applied in this hearing and identifying the issues in the case. OSSE’s motion to dismiss was granted by interim order dated June 17, 2019, because DCPS is legally responsible for the Student’s transportation.<sup>3</sup>

A hearing date was originally scheduled for July 2, 2019. However, during a phone conference with DCPS, Petitioner and this Hearing Officer on June 25, 2019, the parties requested to submit a written stipulation of facts in lieu of testimony, since there were no material issues of fact to be decided in the case. This Hearing Officer agreed with the position of the parties. The hearing date was therefore cancelled. Petitioner submitted a waiver of the rights to present witnesses on or about June 27, 2019. The parties submitted a written stipulation of facts on July 2, 2019. The stipulation of facts contained seven documents, assigned letters a, b, c, d, e, f, and g. This stipulation is hereby admitted into evidence as Hearing Officer’s Exhibit 1. The exhibits to the

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<sup>3</sup> OSSE filed a motion on June 14, 2019, to continue the timelines of this case with respect to itself only. The order dismissing the action against OSSE should be construed as denying the motion to continue.

stipulation are hereby admitted as Joint exhibits a, b, c, d, e, f, and g. The parties presented written closing statements on July 7, 2019. The Hearing Officer Determination is due on July 17, 2019.

#### **IV. Issues**

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the Free and Appropriate Public Education (“FAPE”) issue to be determined in this case is as follows:

**Did OSSE and/or DCPS fail to implement the Student’s Individualized Education Programs (“IEPs”) that were effective in the 2018-2019 school year? If so, did OSSE and/or DCPS violate the principles in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007)? If so, did OSSE and/or DCPS deny the Student a FAPE?**

Petitioner argued that OSSE controls the busing of students in the District of Columbia, and that the Student’s nursing services on the bus did not satisfy the requirements of his/her IEPs. Petitioner contended, among other things, that the nurse on the bus did not react properly to the Student and triggered his/her allergies, and that the nurse sometimes did not show up at all. At the prehearing conference, Petitioner sought an amended IEP specifying the Student’s transportation requirements, as well as twenty-five hours of compensatory education and an order requiring private medical transportation by a company with expertise in transporting medically sensitive people.

#### **V. Findings of Fact**

1. The Student is an X-year-old with complex medical needs. The Student has been diagnosed with cerebral palsy, chronic lung disease, and severe asthma, among other medical issues, and requires the use of a wheelchair and a feeding tube. The Student attends School A in a full-time, self-contained special education classroom.

Because of respiratory issues, the Student must not be in close proximity to strong fragrances. The Student needs “close supervision” from experienced professionals when s/he is being transported to and from school. IHO-1, pars. 1, 2; Joint-g.

2. During the 2018-2019 school year, the Student received transportation through OSSE’s Division of Transportation. OSSE was responsible for transporting the Student back and forth from School A. IHO-1, par. 6.

3. The IEP in effect for the Student for most of the 2018-2019 school year was dated July 17, 2018. It required 26.5 hours per week of specialized instruction outside general education, with related services of one hour per week each for speech-language pathology, physical therapy, and occupational therapy, also outside general education. The Student was recommended for a twelve-month school year. The IEP required transportation services with a “DOT Vehicle” and noted in the “Special Education Transportation” section that the Student was allergic to perfume, had asthma, and needed a nurse during transport to monitor asthma symptoms. This section also indicated that the Student used a wheelchair and needed a ramp lift, required air conditioning and a ride time limit, and sometimes needed his/her glasses adjusted. IHO-1, pars. 3-5; Joint-a.

4. The IEP also required that a nurse be assigned to the Student’s bus. Accordingly, on a July 24, 2018, conference call, DCPS, Petitioner, and OSSE discussed the hiring of a nurse and other issues relating to the Student’s bus transportation. OSSE promised DCPS and Petitioner that it would conduct on-site safety trainings with bus staff to ensure that the Student’s transportation services would be appropriate. OSSE also promised Petitioner that she and the Student would have an opportunity to meet the

assigned nurse before the nurse started working with the Student. However, no on-site safety trainings were conducted with bus staff, and Petitioner and the Student did not meet the assigned nurse prior to the nurse's first day of work. IHO-1, pars. 9-10.

5. The Student started the 2018-2019 school year (exclusive of summer school) on August 27, 2018. OSSE failed to provide a nurse on the bus on August 27, 2018, and on the morning of August 29, 2018. On August 29, 2018, OSSE was alerted about its failure to comply with the IEP. IHO-1, pars. 11-12.

6. On August 30, 2018, Petitioner waited with the Student for the morning school bus for over an hour. When Petitioner inquired about the status of the bus, she was informed that the bus was late because OSSE was looking for a nurse for the Student. OSSE failed to provide any alternative transportation for the Student that day, and the Student did not go to school. IHO-1, par. 14.

7. On September 12, 2018, Petitioner smelled a strong, perfume-like fragrance coming from the Student's school bus. Shortly thereafter, Petitioner alerted OSSE that someone on the bus was wearing a strong fragrance. OSSE never responded to this alert. IHO-1, par. 15.

8. On October 1, 2018, the Student came home from school with his/her head "unsupported" on his/her wheelchair. IHO-1, par. 16.

9. On October 2, 2018, OSSE was alerted, by email, of the issues concerning the Student's transportation, including the use of fragrance on the bus and the failure to secure the Student's head on his/her wheelchair. IHO-1, par. 17.

10. On November 2, 2018, the Student's morning school bus was over an hour late. Petitioner did not receive notice that the bus would be late. The Student was unable to go to school because of this delay in transportation. IHO-1, par. 18.

11. On November 28, 2018, the Student arrived home with his/her shirt "soaked through" from saliva. On November 30, 2018, as the Student was being taken off the bus by staff, the Student "rolled into the street" because staff failed to appropriately handle his/her wheelchair. IHO-1, pars. 19-20.

12. On December 5, 2018, the Student's school bus did not arrive at his/her residence because there was no nurse available for the bus. The Student had to miss school on that day. On December 10, 2018, Petitioner participated in a phone call with OSSE representatives regarding her concerns over the Student's transportation to and from School A. Petitioner cited the incident where the Student's wheelchair rolled into the street, and told OSSE that bus staff continued to wear fragrances that the Student reacted to, even after Petitioner's own intervention. OSSE promised Petitioner that it would conduct an on-site safety training with the bus staff on how to interact with the Student. OSSE also promised to follow up with bus staff regarding the use of fragrances on the bus. IHO-1, pars. 21-23.

13. On December 12, 2018, the Student's bus attendant refused to disembark the bus to assist with the Student's wheelchair. The attendant also would not engage Petitioner in conversation. On January 8, 2019, OSSE failed to provide a nurse for the Student's bus ride to School A, and the Student missed school. On January 11, 2019, bus staff refused to engage Petitioner in conversation. On January 30, 2019, the Student's

school bus attendant shook the Student's wheelchair in a forceful manner. IHO-1, pars. 24-26, 28.

14. On January 31, 2019, OSSE, DCPS, and Petitioner discussed OSSE's failure to comply with the requirements of the IEP in a phone call. Petitioner requested alternative transportation and expressed frustration with the continued use of fragrances by bus staff. Petitioner also expressed frustration with OSSE's inability to provide a nurse on the bus every day. IHO-1, pars. 29-30.

15. On or about February 8, 2019, the Student was provided with a new bus route, new bus driver, and new bus attendant. IHO-1, par. 32.

16. On February 27, 2019, the Student missed school because OSSE failed to provide a nurse for the Student's morning bus ride. IHO-1, par. 33.

17. On March 4, 2019, Petitioner asked OSSE for a status update on her request for alternative transportation. OSSE did not respond. IHO-1, par. 34.

18. On March 5, 2019, the Student did not arrive home until 5:20 p.m. because his/her school bus had to wait at School A for a nurse to arrive. On or about March 14, 2019, the Student came home with a blanket over his/her head. When Petitioner removed the blanket, she saw that the Student had vomit on his/her face and shirt. During the week of March 20, 2019, Petitioner noticed that some of the new bus staff were wearing fragrances. On March 28, 2019, the Student's school bus driver refused to disembark the bus to help load the Student's wheelchair during pickup. By the time the Student reached school, s/he was flush, wheezing, and developing a fever. The Student was then brought to the school nurse, and subsequently to Hospital A. IHO-1 pars. 35, 37, 38-41.

19. On April 1, 2019, OSSE denied Petitioner's request for alternative transportation. IHO-1, par 45.

20. On April 8, 2019, OSSE was unable to timely assign a nurse to the Student's bus in the morning and, as a result, the bus was late. On April 24, 2019, the Student's bus was in an accident and the Student did not arrive home until approximately 6:30 p.m. On April 29, 2019, OSSE was unable to assign a nurse to the Student's bus in the morning and the Student missed school that day. IHO-1, pars. 46-48.

21. On June 12, 2019, the Student's IEP was amended to add, in the "Special Education Transportation" section, that the Student had chronic lung disease, that no fragrances or scents were allowed on the Student's bus, that the Student's bus nurse had to be trained, that the nurse had to monitor the Student's respiratory symptoms, and that the Student was to get "private" transportation on a van. This section also indicated that the Student required a ramp and climate control due to the Student's respiratory problems, and that the Student needed close observation and a controlled environment per a recent medical letter. Finally, the section indicated that the Student had a ride time limit. IHO-1, par. 54; Joint-b.

## **VI. 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:



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.

See D.C. Code § 38-2571.03(6)(A)(i)

The sole issue in this case relates to the implementation of the Student’s July, 2018, IEP. This issue pertains to the appropriateness of the child’s educational placement as it relates to transportation. Since the Student’s placement is the focus of this issue, Respondent bears the burden of persuasion on this claim, provided that Petitioner presents a *prima facie* case.

**Did DCPS<sup>4</sup> fail to implement the Student’s IEPs that were effective in the 2018-2019 school year? If so, did DCPS violate the principles in cases like Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9<sup>th</sup> Cir. 2007)? If so, did DCPS deny the Student a FAPE?**

“Failure to implement” claims are actionable if a Local Education Agency (“LEA”) does not materially implement an IEP. A party alleging such a claim must show more than a *de minimis* failure, and must show that material or “substantial or significant” portions of the IEP could not be implemented. Savoy v. District of Columbia, 844 F. Supp. 2d 23 (D.D.C. 2012) (holding no failure to implement where school setting provided ten minutes less of specialized instruction per day than was in the IEP); see also Van Duyn ex rel. Van Duyn v. Baker School Cist. 5J, 502 F.3d 811 (9<sup>th</sup>

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<sup>4</sup> As noted previously, the original Complaint was filed against both DCPS and OSSE as co-Respondents; however, OSSE’s motion to dismiss was granted, leaving DCPS as sole Respondent. Thus, the issue cited under “Conclusions of Law” applies only to DCPS.

Cir. 2007). Courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld. Garmany v. Dist. of Columbia, 935 F. Supp. 2d 177, 181 (D.D.C. 2013).

The Student's July, 2018, IEP indicated in its "Special Education Transportation" section that the Student was allergic to perfume, had asthma, and needed a nurse during transport to monitor asthma symptoms. The parties have stipulated that OSSE's staff wore strong fragrances on the school bus throughout the school year. Additionally, the parties have stipulated that, repeatedly, OSSE was unable to arrange for a nurse on the school bus. The transportation difficulties had a material impact on the Student, who missed a significant amount of school time and was subjected to mistreatment by OSSE staff, resulting in a trip to a hospital on one occasion. DCPS did not disagree with Petitioner's argument that the Student's issues with his/her bus service were material enough to constitute FAPE denial.

Indeed, DCPS did not present a case except to assert that OSSE is lawfully responsible for any FAPE denial relating to the Student's transportation services. This was DCPS's position during OSSE's motion to dismiss. However, OSSE's motion was granted because, as fully discussed in the order dismissing OSSE from the action, DCPS is legally responsible for the Student's transportation to and from School A per federal statutory and regulatory requirements. This Hearing Officer acknowledges that Petitioner and DCPS have taken exception to that order. But the applicable IDEA provisions at 20 U.S.C. 1413(g), and the caselaw, establish that the State Educational Agency should not be held liable in regard to transportation issues where the LEA is operative and able to

establish and maintain programs to provide students with a FAPE.<sup>5</sup> Therefore, this Hearing Officer is constrained to find that DCPS has denied the Student a FAPE by failing to implement the Student’s IEP’s transportation requirements during the 2018-2019 school year.

## **VII. Remedy**

When school districts deny students a FAPE, courts have wide discretion to insure 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.” The ordinary meaning of these words confer broad discretion on the court.” School Committee of the Town of Burlington v. Dep’t of Education, Massachusetts, 471 U.S. 359, 371 (1985).

During closing argument, Petitioner indicated that she is seeking only full implementation of the current IEP. Petitioner is not seeking any of the other relief that was mentioned at the prehearing conference. There was no objection to the request for this relief, which is clearly appropriate. This Hearing Officer will therefore order full implementation of the IEP’s “Special Education Transportation” section as a remedy to the finding of FAPE denial in this case.

## **VIII. Order**

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<sup>5</sup> 20 USC Sect. 1413(g) establishes exceptions to the general rule that the LEA must be liable for the failure to provide Students with a FAPE: A) if the LEA has not provided the information needed to establish the eligibility of such local educational agency or State agency under this section; B) if the LEA is unable to establish and maintain programs of free appropriate public education; C) if the LEA is unable or unwilling to be consolidated with one or more local educational agencies in order to establish and maintain programs; or D) if the LEA has one or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of such children. Subsections A, B, and D of this section clearly do not apply to the facts of this case, and the parties did not so argue. Subsection B, which relates to the LEA’s inability to provide students with a FAPE, also does not apply. This subsection anticipates the unusual situation where the LEA no longer functions and cannot provide the relief that is requested in the complaint. Cf. Wilson v. District of Columbia, 770 F. Supp.2d 270 (D.D.C. 2011)(DCPS denied a student FAPE because transportation services were not provided to the student pursuant to the IEP).

As a result of the foregoing:

1. DCPS, through OSSE, shall immediately provide the Student with a private van to take him/her to and from School A;
2. Such van shall not transport any other students;
3. No persons entering the vehicle, including the driver, shall wear any fragrance or scent, including colognes, perfumes, and other strong smelling cosmetics, or any other substance that has a distinct smell;
4. A licensed and qualified private nurse shall be assigned to the Student in the van, and shall be present every time the Student is in the van;
5. The Student's nurse shall closely observe the Student while they are in the van together;
6. The van shall be equipped with a ramp so the Student can be transported appropriately to and from the vehicle;
7. The van shall be equipped with climate control functions, including air conditioning and heating capability; and
8. The Student's bus ride must be completed within his/her "ride time limit."

Dated: July 17, 2019

*Michael Lazan*  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Petitioner's Representative: Attorney A, Esq.  
Respondent's Representative: Attorney B, Esq.  
OSSE Division of Specialized Education  
[REDACTED]/DCPS  
[REDACTED]/DCPS

### **IX. 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 (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: July 17, 2019

*Michael Lazan*

Impartial Hearing Officer