

District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
March 03, 2023

Guardian, on behalf of Student,¹)	
)	
Petitioner,)	
)	Hearing Date: 2/17/23
v.)	
)	Hearing Officer: Michael Lazan
[REDACTED] Public Charter)	
School and Office of the State)	
Superintendent of Education,)	Case No. 2022-0212
)	
Respondents.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services as a student with Multiple Disabilities (Emotional Disturbance, Other Health Impairment). On December 6, 2022, a due process complaint (“Complaint”) was received by [REDACTED] Public Charter School ([REDACTED]), as the Local Educational Agency (“LEA”), and the Office of the State Superintendent of Education (“OSSE”), as the State Educational Agency (“SEA”), pursuant to the Individuals with Disabilities Education Act (“IDEA”). The Complaint was filed by the Student’s guardian (“Petitioner”). [REDACTED] filed a response on December 16, 2022. OSSE filed a response on December 16, 2022. No resolution meeting was held. The resolution period with respect to [REDACTED] expired on January 5, 2023.

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

II. Subject Matter Jurisdiction

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

III. Procedural History

A prehearing conference was held on January 18, 2023. Attorney A, Esq., Esq., counsel for Petitioner, appeared. Attorney B, Esq., and Attorney C, Esq., counsel for [REDACTED], appeared. Attorney D, Esq., counsel for OSSE, appeared. A prehearing conference order, summarizing the rules to be applied in the hearing and identifying the issues in the case, was issued on January 22, 2023.

On January 19, 2023, [REDACTED] and OSSE moved for an extension of the original timelines for the Hearing Officer Determination (“HOD”). An order granting the motion was issued on January 19, 2023, extending the HOD due date, with respect to OSSE, for forty-two days, and with respect to [REDACTED], for twelve days, to March 3, 2023.

[REDACTED] filed a motion for summary adjudication on January 25, 2023. OSSE opposed the motion on January 31, 2023. The motion was denied through an interim order dated February 13, 2022.

The hearing was conducted on February 17, 2023, through the Microsoft Teams videoconferencing platform, without objection. Petitioner was again represented by Attorney A, Esq. [REDACTED] was again represented by Attorney B, Esq., and Attorney C, Esq. OSSE was again represented by Attorney D, Esq. This was a closed proceeding. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-31 without

objection. [REDACTED] moved into evidence exhibits R-1² through R-20 without objection.

OSSE moved into evidence Exhibits R-1³ through R-4 without objection.

At the hearing, Petitioner presented the following witnesses: herself; and Witness A, a special education director at [REDACTED] (expert in IEP development and implementation for students in kindergarten through twelfth grade). [REDACTED] presented the following witnesses: Witness B, a special education assistant at [REDACTED]; and Witness A (recalled). OSSE presented the following witness: Witness C, an associate director for audit and compliance, OSSE Department of Transportation (“OSSE DOT”). The parties presented oral closing statements at the end of testimony on February 17, 2023.

IV. Issues

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

Did [REDACTED] and OSSE fail to implement the Student’s Individualized Education Program (“IEP”) for the 2022-2023 school year with respect to the Student’s transportation? If so, did [REDACTED] and OSSE deny the Student a Free Appropriate Public Education (“FAPE”)?

Petitioner contended that [REDACTED] and OSSE failed to provide the Student with private transportation or an aide, in contravention of the Student’s IEP. As relief, Petitioner seeks private transportation for the Student, with an aide, from home to school and school to home, for the 2022-2023 school year, together with compensatory education.

²To distinguish the exhibits of [REDACTED] the LEA, from the exhibits of OSSE, the SEA, references to the [REDACTED] exhibits in this HOD shall use the following format: [REDACTED] R-1, [REDACTED] R-2, etc.

³To distinguish the exhibits of OSSE, the SEA, from the exhibits of [REDACTED], the LEA, references to the OSSE exhibits in this HOD shall use the following format: OSSE R-1, OSSE R-2, etc.

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a student with Multiple Disabilities (Emotional Disturbance, Other Health Impairment). The Student's guardian is his/her grandmother, who has taken care of the Student since s/he was about three months old. The Student currently attends School A. The Student's LEA is

██████████. Testimony of Petitioner; Testimony of Witness A.

2. The Student functions well below grade level academically and struggles to cope with intense emotions, stay focused on non-preferred tasks, and form/maintain positive relationships with peers and adults. The Student requires redirection to get back on task or make more appropriate choices. The Student becomes physical and verbally aggressive when not given his/her way. ██████████-R-1-8.

3. When the Student travels on his/her school bus, s/he often engages in inappropriate behaviors, including being disrespectful, getting out of his/her seat, "messaging" with other children, jumping over seats, and putting herself/himself in danger. Testimony of Petitioner.

4. In the District of Columbia, LEAs are not authorized by OSSE to set up transportation-related contracts with private transportation providers. With respect to transportation, the LEA's main responsibility is to submit a "TRF" form to OSSE to provide the information that OSSE needs to set up a route for a student and then transport the student to and from school. Testimony of Witness A; Testimony of Witness B. On the first Monday in June each year, LEAs are required to provide TRF forms and calendar information to OSSE so that OSSE can arrange for student transportation. Testimony of Witness C.

5. An official OSSE document describing OSSE's transportation policies states that "OSSE DOT [Department of Transportation] 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." OSSE-R-1-3. This document also states: "It is the responsibility of the IEP Team to determine, on an individual basis, whether transportation is required to assist a student with a disability with accessing special education and related services, and if so, how the transportation services should be implemented. The intent behind special education transportation services is to ensure that children with disabilities receive transportation when it is necessary to enable the child to receive FAPE." OSSE-R-1-5. This document also states, with respect to TRF forms, that "(a)ll data and supporting documentation must be completed and accurately submitted at least seven (7) business days before the first day of school in order for transportation services to begin on the first day of school. Submissions with less notice than seven (7) business days before the first day of school will be processed on a rolling basis starting on the third day of the school year." This document also provides that "LEAs are responsible for reimbursement costs related to the provision of special education transportation services that arise out of court orders or HODs that determine that the LEA has failed in its obligation to provide FAPE. If a court order or HOD finds that the student has been denied FAPE by the LEA which is attributable to a failure by OSSE DOT to provide special education transportation services in accordance with the student's IEP, OSSE DOT will be responsible for reimbursing the transportation costs in accordance with the order or HOD." OSSE-R-1-12.

6. During the 2021-2022 school year, the Student attended School B. The Student had issues on his/her school bus, leading to three suspensions from School B for misbehavior on the bus. Testimony of Petitioner; Testimony of Witness A; P-6; P-7; P-8. Also, between September 16, 2021, and January 24, 2022, the Student was disciplined for misbehavior on buses, in writing, on eleven different days. On some of these days, the Student was disciplined in writing multiple times. P-9 through P-26; Testimony of Witness A.

7. In December 2021, a meeting was held to discuss the Student's issues on the bus. OSSE attended this meeting and was alerted to the need for private transportation for the Student. Testimony of Witness A; P-3-2.

8. On January 24, 2022, the Student was attacked on the school bus. The Student suffered an orbital bone fracture. An ambulance was called, and the Student had to go to the emergency room and see an eye specialist, who wanted to perform emergency surgery. Testimony of Petitioner.

9. The issue of private transportation for the Student was raised in a resolution meeting (not related to the instant case) between the parties on March 29, 2022. The parties discussed Petitioner's request for private transportation for the Student, with an aide, to and from school. OSSE stated it needed additional documentation in order to approve this request. OSSE indicated that it needed something like a doctor's letter or medical information to authorize private transportation services for the Student. Notwithstanding OSSE's position, the LEA and Petitioner agreed to amend the Student's IEP to explicitly require the bus aide and private transportation. P-3; Testimony of Witness A.

10. On April 6, 2022, the IEP team agreed to amend the Student's IEP to add private transportation for the Student, with an aide. Testimony of Witness A; P-2. The IEP stated that "Due to multiple behavioral concerns and injury from an altercation, student will need to ride independently on a bus or private travel accommodations. Along with being independent on the bus student will also need a Dedicated Aide to be with [him/her] to ensure safe travels. Student has multiple behavioral issues on the bus where [s/he] has been both protagonist and antagonist in nature. The private independent travel with a Dedicated Aid will ensure safe travels for all." P-1-2. The parties understood this language to mean that the Student would be with an aide, but not with any peers, in a private vehicle while being transported to and from School A. Testimony of Petitioner.

11. OSSE had access to the Student's April 6, 2022, IEP. Testimony of Witness A. On September 9, 2022, the language about school transport with an aide was repeated in another IEP, which OSSE also had access to. OSSE-R-3-2; Testimony of Witness A.

12. For the 2022-2023 school year, classes at School A began in August, 2022. However, the Student was hospitalized at Hospital A at the time. Petitioner informed staff at School A of the Student's hospitalization. Testimony of Petitioner; Testimony of Witness A.

13. On September 6, 2022, Witness B from [REDACTED] filled out a TRF form for the Student (and other students) and tried to send the form to OSSE. However, the "system" did not accept the form. Testimony of Witness B. Another TRF form was sent to OSSE on behalf of the Student on September 27, 2022. This form was accepted by the

“system.” Witness B made a call(s) to confirm that the form was accepted. The Student was routed by OSSE on October 3, 2022. However, the Student was routed on a “regular” yellow school bus with other children. Testimony of Witness B; [REDACTED]-R-8-3-3. On October 5, 2022, Witness A contacted OSSE staff to try to secure private transportation for the Student. Testimony of Witness A; [REDACTED]-R-9.

14. The Student was being transferred back and forth from home to Hospital A until October 19, 2022, when s/he began to attend School A, which is a private school in Maryland. The Student was then transported to School A by the “regular” yellow school bus with other children, and without a 1:1 aide. Testimony of Petitioner; Testimony of Witness A. On November 2, 2022, Witness A tried to follow up with OSSE to obtain private transportation and an aide for the Student. P-14-1.

15. The Student has been late to school numerous times during the 2022-2023 school year. Petitioner has not received calls when the Student has arrived at school late. The Student has missed two days of school because of transportation issues. Testimony of Petitioner; P-4; P-5; R-13. The Student was involved in a fight with another student on the bus on January 3, 2023. P-29; P-30.

16. On the day before this case's hearing, OSSE sent a private vehicle to pick up the Student and take him/her to school. However, Petitioner did not allow the Student to be picked up because Petitioner did not trust the people inside the vehicle. The Student ended up taking the “regular” yellow school bus on that date. Testimony of Petitioner.

17. The Student has been biting him/herself lately. The Student’s school counselor has stated that this issue might have something to do with the Student’s

transportation issues. Testimony of Petitioner. The Student has been making progress on his/her IEP goals during the 2022-2023 school year. Testimony of Witness A.

18. In general, during the 2022-2023 school year, OSSE had had difficulty with requests for student transportation, especially requests for private transportation, because it is difficult to find available drivers. Testimony of Witness C.

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, on the sole issue in this case, which does not relate to the appropriateness of the design of the Student’s IEP or placement, the burden of persuasion is on Petitioner.

Did [REDACTED] and OSSE fail to implement the Student’s IEP for the 2022-2023 school year with respect to the Student’s transportation? If so, did [REDACTED] and OSSE deny the Student a FAPE?

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. Sect. 300.323(c)(2). “Failure to implement” claims may be

brought if an 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 board or other authorities 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 district’s school setting provided ten minutes less of specialized instruction per day than was required by the IEP).

This approach affords local agencies 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, with an

aide, in a “private transportation” vehicle. The parties also did not dispute that the Student was never provided with a private transportation vehicle, or an aide, until the day before this case's hearing. [REDACTED] and OSSE both suggested that there was little to no harm to the Student as a result of the failure to implement the transportation requirements of the IEP. However, proof of harm is not required under these circumstances. A material deviation from the prescribed IEP is *per se* harmful under IDEA. 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).

Moreover, the record suggests that the Student must have been harmed by the failure to provide him/her with private transportation and an aide. The Student has consistently engaged in highly inappropriate conduct on the bus, such as being disrespectful, getting out of his/her seat, “messaging” with other children, jumping over seats, and putting herself/himself in danger. A video recording of a wild, violent fight that the Student was involved in, on a school bus, vividly illustrated the seriousness of this kind of behavior. Though OSSE said that the Student has not had the same kind of behavioral problems on the school bus this year, the fight that was recorded on video occurred in January 2023. If [REDACTED] and OSSE are suggesting that a disabled student can simply shrug off behavioral incidents like these and then be ready to learn at school, this Hearing Officer disagrees. A violent incident at the start of the day that involves any person, much less a child with special needs, will likely affect that person during their work or school day. The failure to provide the Student with private transportation and an aide has to be considered both “substantial” and “significant.” The Student was therefore

denied a FAPE when s/he was not provided with appropriate private transportation, with an aide, to and from school from October 19, 2022, to February 16, 2023.

One of the main issues during closing arguments was whether [REDACTED], OSSE, or both [REDACTED] and OSSE should be held responsible for the Student's FAPE denial. 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. 5A D.C.M.R. Sect. 3002.1. This legal requirement exists even if the LEA recommends services to be provided by third parties, such as other governmental entities or private providers. Letter to Garvin, 30 IDELR 609 (OSEP Letter 1998). Accordingly, there is federal caselaw suggesting that FAPE claims premised on a failure to deliver special education transportation in the District of Columbia can be brought against an LEA. Hill v. District of Columbia, No. 14-CV-1893 (GMH), 2016 WL 4506972, at *24 (D.D.C. Aug. 26, 2016) (court made substantive determinations on claims that student was denied transportation services by DCPS).

[REDACTED] argued that it should not be held liable, pointing out that it complied with all rules and laws that relate to the transportation issues in this case. [REDACTED] argued that it provided OSSE with the TRF forms well before the Student was to attend school, that the TRF forms were completed properly, and that it is unfair for [REDACTED] to be held liable for OSSE's failures. [REDACTED] said that OSSE is responsible for student transportation services in the District of Columbia, not [REDACTED] or any other LEA. [REDACTED] referenced 34 C.F.R. Sect. 300.175, which, according to [REDACTED], provides that an SEA may take over responsibility from an LEA for providing services, and that the SEA bears the legal obligation to provide students with a FAPE.

34 C.F.R. Sect. 300.175 states:

If the SEA provides FAPE to children with disabilities, or provides direct services to these children, the agency -

- (a) Must comply with any additional requirements of §§ 300.201 and 300.202 and §§ 300.206 through 300.226 as if the agency were an LEA; and
- (b) May use amounts that are otherwise available to the agency under Part B of the Act to serve those children without regard to § 300.202(b) (relating to excess costs).

34 C.F.R. Sect. 300.175(a) does not state, or even clearly suggest, that an LEA is relieved of its federal legal responsibility to provide a FAPE to students when an SEA provides direct services. Nor do Sects. 300.201, 300.202, and 300.206 through 300.226 state or clearly suggest that that an LEA is to be relieved of its federal legal responsibility to provide a FAPE to students under these circumstances. Nor has any court interpreted 34 C.F.R. Sect. 300.175(a) in such a way. Indeed, there is almost no reported federal caselaw where 34 C.F.R. Sect. 300.175 has been cited by a court.

██████ also cited to a section of the District of Columbia Code that allocates transportation funding to OSSE. 38 D.C. Code Sect. 2907(a) states:

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”), or to another agency as considered appropriate by the Mayor, in addition to the amount generated by the Formula.

██████ argued that it should not be held liable for transportation services if it does not receive money to provide those services. While one can see ██████’s point, and while one of this Hearing Officer’s respected colleagues agrees with ██████ that LEAs should generally be relieved of their legal responsibility for transportation issues in the District of Columbia, again there is nothing in this section of the D.C. Code that addresses the

LEA's responsibilities under the federal IDEA law. In fact, this section does not mention anything about IDEA due process complaints; it is effectively a funding statute.

Parenthetically, OSSE argued that [REDACTED] was to blame for the transportation failure here, indicating that [REDACTED] should have presented OSSE with a TRF form for the Student (including language describing the mode of transportation) before the start of the 2022-2023 school year. OSSE referenced the OSSE policy in exhibit OSSE R-1-12, which states that "(a)ll data and supporting documentation must be completed and accurately submitted at least seven (7) business days before the first day of school in order for transportation services to begin on the first day of school." Witness C's contentions were more procedural than substantive. As [REDACTED] pointed out, OSSE received all the information it needed from the LEA to provide the Student with transportation on the Student's first day of school on October 19, 2022. In fact, transportation was provided for the Student by OSSE on October 19, 2022. Moreover, the record makes clear that [REDACTED] presented OSSE with the TRF form well in advance of the Student's first day of attendance at School A. The problem was that OSSE arranged for the wrong kind of transportation services for the Student, a problem that was not fixed until one day before this case's hearing. The record indicates that the delay in complying with the IEP resulted from OSSE's insistence on medical documentation before implementing the Student's IEP, and from OSSE's inability to find drivers who were available to transport the Student to and from school.

As a result of the foregoing, this Hearing Officer finds that Respondents denied the Student a FAPE by failing to implement the transportation services mandated by the Student's September 9, 2022, IEP.

RELIEF

As relief, Petitioner seeks private transportation for the Student from home to school and school to home for the remainder of the 2022-2023 school year, as well as compensatory education. 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.”

Because Respondents have been found to have denied the Student a FAPE because of their failure to implement the Student’s IEP, this Hearing Officer has the authority to order Respondents to transport the Student to and from school with private transportation, and an aide, during the remainder of the 2022-2023 school year.

Regarding compensatory education, 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). 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. Id., 401 F.3d at 524.

Still, 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).

Indeed, courts in this circuit have held that, if a student is denied a FAPE, a hearing officer may not “simply refuse” to grant compensatory education. Henry v. District of Columbia, 750 F. Supp. 2d 94, 99 (D.D.C. 2010).

Respondents argued that the Student suffered no harm as a result of the failure to provide appropriate bus services. Though Petitioner did not present a witness to support her compensatory education claim and did not present a compensatory education plan at the hearing, this Hearing Officer agrees with Petitioner that compensatory education should be awarded in this case. The failure to provide the Student with private transportation and an aide has led to at least one violent incident involving the Student, and the record suggests that the Student’s difficulties with transportation affect him/her after s/he leaves the bus. Under the circumstances of this case, this Hearing Officer finds that twenty-five hours of tutoring by a certified special education teacher should sufficiently “make up” for the disruption that the Student has suffered over the past several months.

VII. Order

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

1. For the remainder of the 2022-2023 school year, Respondents shall arrange for a private transportation provider, together with an aide, to pick up the Student for travel to and from School A on every school day;
2. Respondents shall pay for twenty-five hours of tutoring for the Student, by a certified special education teacher, at a reasonable and customary rate in the community;
3. All other requests for relief are denied.

Hearing Officer Determination
Michael Lazan, Hearing Officer
Case # 2022-0212

Dated: March 3, 2023

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
Attorney C, Esq.
Attorney D. Esq.
OSSE Division of Specialized Education

VIII. Notice of Appeal Rights

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

Dated: March 3, 2023

Michael Lazan
Impartial Hearing Officer