

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
1050 First Street, N.E., Third Floor
Washington, D.C. 20002

OSSE
Office of Dispute Resolution
November 05, 2019

<i>Student</i> , ¹)	Case No.: 2019-0232
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 11/5/19
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 10/25/19
("DCPS") and Office of the State)	ODR Hearing Room: 423
Superintendent of Education ("OSSE"),)	
Respondents.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student's Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") because Student was not provided necessary transportation for the first 2 weeks of school. DCPS responded that it requested bus service and corrected Student's address; OSSE explained that it cannot expedite address changes due to the complexity of the transportation system.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

Following the filing of the due process complaint on 9/11/19, the case was assigned to the undersigned on 9/12/19. Respondents DCPS and OSSE each filed a timely response on 9/20/19, and did not challenge jurisdiction. A resolution meeting with DCPS was not

¹ Personally identifiable information is provided in Appendix A, including terms initially set forth in italics.

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held. The 30-day resolution period for Petitioner and DCPS ended on 10/11/19. A final decision in this matter must be reached as to DCPS no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 11/25/19. No resolution period is provided in the IDEA regulations for OSSE, so the 45 days for a final decision as to OSSE began to run with the filing of the due process complaint, which was extended by a 30-day continuance granted by the undersigned on 10/12/19 to put OSSE on the same timeline as DCPS, so an HOD is required as to OSSE on 11/25/19 as well.

When this case was filed on 9/11/19, Petitioner moved to expedite the matter in order to ensure Student was able to attend school promptly, although Petitioner’s counsel acknowledged that this was a non-discipline issue. The undersigned denied Petitioner’s motion based on the rules for expedited hearings set forth in § 708 of the *Standard Operating Procedures Manual (2018)* of the Office of Dispute Resolution. Expedited hearings are required only for disciplinary issues (or if the LEA believes the current placement would result in injury). Nonetheless, the undersigned sought to move forward as quickly as possible with a due process hearing on the first date available for the 3 parties and held a preliminary prehearing conference on the record on 9/19/19 to ensure that any problems had been surmounted and that Student was in fact receiving transportation to be able to get to school, without waiting for a due process hearing whether expedited or not.

Following a second prehearing conference on 10/7/19 and issuance of the Prehearing Order that same day, the due process hearing took place on 10/25/19 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent DCPS’s counsel*. OSSE was represented by *Respondent OSSE’s counsel*. Petitioner participated in the entire hearing.

Petitioner’s Disclosures, submitted on 10/22/19, contained a short pleading and documents P1 through P32, which were admitted into evidence without objection. Petitioner submitted Supplemental Disclosures on 10/23/19, which contained a short pleading and documents P33 through P36, which were also admitted into evidence without objection.

Respondent DCPS’s Disclosures, submitted on 10/22/19, contained a cover letter and documents R1 through R28, of which only R13, R14, R16, R18, R20, R21, R22, R24, R27 and R28 were offered into evidence and were admitted into evidence without objection. Respondent OSSE’s Disclosures, submitted on 10/23/19, contained a cover letter and contained documents O1 through O6, which were admitted into evidence without objection.²

² References herein to Petitioner’s documents or Respondent OSSE’s documents are indicated by a “P” or “O” respectively, followed by the exhibit number, a hyphen, and the exhibit page (or pages, separated by commas), omitting any leading zeros. By contrast, Respondent DCPS’s documents are consecutively page numbered throughout, so are

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Petitioner's counsel presented 2 witnesses in Petitioner's case-in-chief (*see* Appendix A):

1. Parent
2. *Special Education Advocate* (qualified over objection as an expert in Compensatory Education)

DCPS's counsel presented 1 witness in DCPS's case (*see* Appendix A): *DCPS Placement Specialist* (qualified over objection as an expert in Appropriate Special Education Programming and Placement).

OSSE's counsel presented 1 witness in OSSE's case (*see* Appendix A): *OSSE Associate Director of Audit and Compliance* ("OSSE Associate Director").

Petitioner's counsel presented Parent as the sole rebuttal witness.

The sole issue to be determined in this Hearing Officer Determination is:

Issue: Whether Respondents denied Student a FAPE by failing to provide transportation to and from school since 9/4/19, the beginning of the 2019/20 school year, through 9/18/19, and as a result Student was not able to attend school at Student's nonpublic placement. *Petitioner has the burden of persuasion on this issue.*

The relief requested by Petitioner is:

1. A finding that Respondents denied Student a FAPE.
2. Respondents shall provide Student appropriate transportation services.
3. Respondents shall fund or provide compensatory education to Student for any denial of FAPE or, in the alternative, Respondents shall fund a compensatory education study to determine an appropriate award for Student.³

referenced by an "R" followed by the exhibit number, followed immediately by a "p" (for page) and the page number(s), omitting any leading zeros.

³ At the prehearing conference, Petitioner was encouraged to introduce evidence supporting any requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondents were encouraged to be prepared at the due process hearing to introduce evidence responding to the requested compensatory education in the event a denial of FAPE was found.

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Findings of Fact

After considering all the evidence, as well as the arguments of all counsel, the Findings of Fact⁴ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is Age, Gender, and was set to begin at *Nonpublic School* in suburban Maryland on 9/4/19, after being at *Residential Facility* for two years.⁶ DCPS and DCPS Placement Specialist knew that Student did not live with Parent and were aware of *Student's Address* from 5/31/19.⁷

2. Student is severely disabled due to Autism Spectrum Disorder, known as Autism in the IDEA, which is Student's IEP disability category.⁸ Student's current IEP dated 11/14/18 provides 28.5 hours/week of specialized instruction outside general education, along with 30 minutes/week of Occupational Therapy ("OT") outside general education, 30 minutes/week of Speech-Language Pathology outside general education, 30 minutes/week of Orientation and Mobility inside general education, and 1 hour/week of Behavioral Support Services ("BSS") consultation services.⁹

3. Academically, Student is counting numbers 1-10 in math, is able to identify most letters of the alphabet in reading, is able to form all letters of the alphabet in writing; and is able to feed self with minimal spillage and use the toilet independently.¹⁰ Student's behaviors include aggression, self-injury, and non-compliance; Student continues to have difficulty with biting, hitting, and spitting.¹¹

4. DCPS Placement Specialist emailed Parent on 7/30/19 to confirm that Student had been accepted at Nonpublic School with a start date of 9/4/19.¹² Student lives at Student's Address and needs bus transportation to get to Nonpublic School in suburban Maryland; transportation is included on Student's 11/14/18 IEP.¹³ On 8/15/19, Parent sought to set up

⁴ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. 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, 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.

⁵ Parent.

⁶ Parent; DCPS Placement Specialist; P4-1.

⁷ Parent; DCPS Placement Specialist.

⁸ P4; P1.

⁹ P4-1,13.

¹⁰ P4-3,5,6,8.

¹¹ P4-10.

¹² P12-1.

¹³ Parent; DCPS Placement Specialist; P4-18.

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a meeting with DCPS to make sure everything was set for Student to begin on 9/4/19 at Nonpublic School; DCPS did not respond to the email, but DCPS Placement Specialist called Parent about transportation on 8/18/19.¹⁴

5. DCPS submitted a transportation request form to OSSE for Student on 8/20/19 setting up transportation from Parent's address to Nonpublic School.¹⁵ The 8/20/19 request form indicated that Student did not live at the address; OSSE Associate Director persuasively testified that not living at the address listed on the form would not trigger a review by OSSE, for students are often picked up from addresses at which they do not live due to custody and child care arrangements, and the like.¹⁶

6. OSSE sent a bus to Parent's address on 9/6/19 and 9/9/19 but Student was not there and did not ride the bus.¹⁷ On 9/6/19, after the bus did not go to Student's Address, Parent contacted DCPS personnel repeatedly in an effort to work out alternatives to get Student promptly transported to school, which were unsuccessful.¹⁸

7. DCPS submitted another transportation request form to OSSE on 9/6/19 changing transportation for Student to depart from Student's Address, rather than Parent's address.¹⁹ OSSE's policy is that address changes for students are implemented within 10 business days.²⁰ In the meantime, DCPS unsuccessfully tried to use private transportation or Uber to take Student and an aide to school.²¹ Student's first day at Nonpublic School was 9/19/19.²² On 9/20/19, 9/23/19 and thereafter, OSSE sent a bus to Student's Address and Student rode the bus to Nonpublic School.²³

8. OSSE Associate Director clearly testified about the complexity of arranging efficient bus service to transport 3,400 students over the school year to 200 schools using more than 500 bus routes, and how a change of one student's address can cause cascading effects on many other students on multiple routes; changing an address requires up to 10 business days to determine routing and convey changes to the parents and guardians of all students impacted.²⁴

9. Due to beginning late at Nonpublic School, Student did not have significant time to make progress on goals in reporting period 1 in 2019/20.²⁵ Based on conversations with

¹⁴ P13-1; Parent; DCPS Placement Specialist.

¹⁵ O2-2,4; OSSE Associate Director.

¹⁶ OSSE Associate Director; O2-4.

¹⁷ O5-3,5.

¹⁸ P14-1; Parent; DCPS Placement Specialist.

¹⁹ O3-2,4,5; DCPS Placement Specialist.

²⁰ O1-11; OSSE Associate Director.

²¹ DCPS Placement Specialist.

²² P17-1; Parent.

²³ O5-7,9,11,13,14,17.

²⁴ OSSE Associate Director; O4-1.

²⁵ R20.

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Nonpublic School, the program where Student lives, and Parent, Special Education Advocate recommended that to make up for the missed days of school and put Student in the position Student would have been in, Student should receive 100 hours of Applied Behavior Analysis (“ABA”) therapy and 30 hours of OT, along with a rocking chair, yoga ball and small trampoline.²⁶ Special Education Advocate credibly testified that the OT Student receives is very beneficial for sensory and other needs and that ABA is helpfully provided throughout the entire program at Nonpublic School.²⁷ The recommended hours were to make up for all that ST missed in the first weeks at school, beyond the ABA and limited OT.²⁸

10. On cross-examination, Special Education Advocate acknowledged that the proposed rocking chair, yoga ball and trampoline were “not related” to Student accessing the curriculum at Nonpublic School.²⁹ DCPS Placement Specialist testified that there was no need for the rocker, yoga ball and trampoline for Student to progress at school.³⁰ Special Education Advocate also testified that Student’s IEP provides for 5 hours/week of OT, so that Student missed 10 hours due to lack of transportation for the first 2 weeks of school; Student’s IEP provides for 0.5 hours/week.³¹

Conclusions of Law

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

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5E D.C.M.R. § 3030.3.

Issue: *Whether Respondents denied Student a FAPE by failing to provide transportation to and from school since 9/4/19, the beginning of the 2019/20 school year, through 9/18/19, and as a result Student was not able to attend school at Student’s nonpublic placement. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden on the central issue of whether Respondent(s) failed to implement Student’s IEP by providing transportation to school for the first 2 weeks of the

²⁶ Special Education Advocate.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ DCPS Placement Specialist.

³¹ Special Education Advocate; P4-13.

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school year, which is a related service to which Student was entitled in the IEP. *See* 34 C.F.R. 300.34(a),(c)(16), 300.323(c)(2). As between the Respondents, OSSE did make transportation available at the addresses submitted by DCPS, but DCPS erred in providing the wrong address initially, causing the delay in transportation for Student, as discussed below.

For a failure to implement claim, the IDEA is violated only when a school district deviates materially from a student's IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student's] IEP.” *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), *quoting Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is “the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement.” *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), *citing Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011).

Here, there was no dispute that Student needed and was entitled to transportation to get to Nonpublic School in suburban Maryland, but due to DCPS's error Student missed the first weeks of the school year at a new school. The period of violation alleged is the first 11 days of school, and the transportation issue quite clearly caused Student to miss 100% of schooling during that time, which the undersigned determines is a denial of FAPE. *See Schiff v. Dist. of Columbia*, 18-CV-1382 (KBJ), 2019 WL 5683903, at *6 (D.D.C. 11/1/19), where the Court adopted the Report and Recommendation in which U.S. Magistrate Judge Deborah A. Robinson emphasized that a “total lack of any education is far ‘more than a minor discrepancy between the services a school provides to a disabled child and the services required by that child's IEP’ in violation of the IDEA,” *quoting Johnson*, 962 F. Supp. 2d at 268.

Here, there was no allegation that there has been any problem with transportation for Student since DCPS corrected the address for Student and the bus began picking Student up at the correct address. Thus, the undersigned finds it unnecessary to order OSSE or DCPS to provide transportation to Student in the future, as there is no doubt that they intended to provide what was needed from the start.

As for the secondary issue of whether only one or both Respondents bear responsibility for the denial of FAPE, the undersigned is persuaded that the transportation problem was simply due to DCPS's error in submitting to OSSE the wrong address for Student. It is well established that a State Educational Agency (“SEA”) may be responsible for violations of the IDEA when the SEA in some way “fail[s] ‘to comply with its duty to assure that the IDEA's substantive requirements are implemented.’” *John T. v. Iowa Dep't of Educ.*, 258 F.3d 860, 864-65 (8th Cir. 2001) (*quoting Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 952 (4th Cir. 1997)); *Pachl v. Seagren*, 453 F.3d 1064, 1070 (8th Cir.2006). *See also* 34 C.F.R. §§ 300.146, 300.600.

But here OSSE had no independent duty to verify information provided by DCPS as the LEA. While the form DCPS initially submitted on 8/20/19 did correctly note that

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Student did not live at Parent's address, OSSE Associate Director convincingly explained that there are various circumstances in which students are picked up or dropped off at addresses where they do not live, as the result of custody and other child care arrangements, or other circumstances. Thus, it was reasonable for OSSE to rely on the information provided by DCPS, which had been working closely with Student and Parent and should have provided the correct address. In short, even though OSSE runs the bus system, DCPS has sole responsibility for making a FAPE available to Student. *See* 5E D.C.M.R. § 3002.1; *see also Carnwath v. Grasmick*, 115 F. Supp. 2d 577, 582 (D. Md. 2000) ("IDEA does not create a type of respondeat superior liability, imputing liability to SEAs for every local deviation from the State-created standards"), *citing Gadsby*, 109 F.3d at 955. Thus, DCPS is solely responsible to Petitioner for the denial of FAPE.

Remedy

In determining compensatory education for a denial of FAPE, there is often "difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position," *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. *See Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required "to have a perfect case to be entitled to compensatory education." *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, educational harm did not need to be shown in order to establish an implementation violation, *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016), but the compensatory education remedy that results does depend on the extent of educational harm. While Petitioner's expert has a great deal of experience, Special Education Advocate did not fully persuade the undersigned with her compensatory education proposal of 100 hours of ABA and 30 hours of OT for Student, along with a rocking chair, yoga ball and small trampoline.

As an initial matter, the undersigned was persuaded by Special Education Advocate's testimony that OT is beneficial for Student's sensory and other needs and that ABA is helpfully provided throughout the entire program at Nonpublic School. But the quantity was another matter. Special Education Advocate apparently understood that Student was receiving more OT than is the case by a factor of 10, asserting that Student missed 10 hours of OT due to lack of transportation for the first 2 weeks of school. In fact, Student's IEP only provides for 0.5 hours/week, so Student missed 1 hour over 2 weeks. While compensatory education is certainly not an hour-for-hour remedy, what appears to be a mathematical error by Special Education Advocate results in the undersigned reducing the OT proposal by 2/3 and awarding a total of 10 hours of OT services to Student to make up for missed OT and other aspects of school, as Special Education Advocate urged.

Turning to ABA therapy, Special Education Advocate credibly testified that ABA is a helpful part of all programming at Nonpublic School, but here again the fact that the school week at Nonpublic School consists of 30 hours in total (as indicated by Student's

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IEP) suggests that Special Education Advocate's proposal of 100 hours is too high, particularly since the school week focuses on many things beyond ABA therapy. Consequently, the undersigned in the exercise of discretion awards 50 hours of ABA therapy which – with the OT services – should more than make up for the 11 school days lost due to the transportation problem.

Finally, Special Education Advocate acknowledged on cross-examination that a rocking chair, yoga ball and trampoline were “not related” to Student accessing the curriculum at Nonpublic School. DCPS Placement Specialist shared the view that there was no need for a rocker, yoga ball and trampoline for Student to progress at school. Thus, the undersigned was not persuaded that these items are required in order to restore Student to the position Student would have been in had Student been able to attend the first 11 days of school.

Based on all the evidence and carefully considering the totality of the circumstances, this Hearing Officer has determined that a total of 50 hours of ABA therapy and 10 hours of OT services would be an appropriate remedy to restore Student to the place Student would have been but for the denial of FAPE. These determinations by the undersigned are specifically tailored to address Student's unique needs as a matter of equity, as “hearing officers are reminded that ‘[t]he essence of equity jurisdiction’ is ‘to do equity and to mould each decree to the necessities of the particular case.’” *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). All compensatory education hours are to be used within 12 months in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on Respondent DCPS which may result from compensatory education awards stretching over excessively long timeframes.

ORDER

Petitioner has prevailed on the single claim in this case against Respondent DCPS but not Respondent OSSE, as set forth above. Accordingly, **it is hereby ordered that:**

As compensatory education for the denial of FAPE found herein, DCPS shall provide letter(s) of authorization within 10 business days after Petitioner's request(s) for a total of (a) 50 hours of Applied Behavior Analysis (“ABA”) therapy, and (b) 10 hours of Occupational Therapy (“OT”), from independent providers chosen by Petitioner. All hours are to be provided and used within 12 months; any unused hours shall be forfeited.

Any and all other claims and requests for relief are **dismissed with prejudice.**

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.

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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).

Copies to:

Counsel of Record (Appendix A, by email)

OSSE-SPED (due.process@dc.gov)

ODR (hearing.office@dc.gov)

██████████@k12.dc.gov

██████████@k12.dc.gov