

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
November 09, 2022

PARENTS,
on behalf of STUDENT,¹

Date Issued: November 9, 2022

Petitioners,

Hearing Officer: Peter B. Vaden

v.

Case No: 2022-0174

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Online Videoconference Hearing

Hearing Date: November 3, 2022

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioners (Petitioners or PARENTS) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-A, Chapter 5-A30 of the District of Columbia Municipal Regulations (“D.C. Regs.”).² In their due process complaint, the Parents allege that Student has been denied a free appropriate public education (FAPE) by Respondents D.C. Office of the State Superintendent of Education’s (OSSE) and District of Columbia Public Schools’ (DCPS) failure to implement the special education transportation services required by Student’s Individualized Education Program (IEP) in the 2022-2023 school year.

¹ Personal identification information is provided in Appendix A.

² Effective July 1, 2022, DCMR Chapter 5E-30 was repealed and replaced by the new Chapter 5A-30.

Petitioners' Due Process Complaint, filed on September 23, 2022, named OSSE and DCPS as Respondents. The undersigned hearing officer was appointed on September 26, 2022. Concurrent with the filing of their due process complaint, the Parents filed a motion for an expedited hearing. By order of October 5, 2022, I denied this motion, which was opposed by DCPS and OSSE. On October 14, 2022, the Parents and DCPS met for a resolution session and were unable to resolve the issues in dispute. On October 18, 2022, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters.

With the Parents' consent, the due process hearing was held online and recorded by the hearing officer, using the Microsoft Teams videoconference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on November 3, 2022. Both parents appeared online for the hearing and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL. Respondent OSSE was represented by OSSE's COUNSEL.

Counsel for the respective parties made opening statements. MOTHER testified as the only witness for the Parents. DCPS called ADMISSIONS DIRECTOR as its only witness. OSSE called no witnesses.

Petitioners' Exhibits P-1 through P-20 were all admitted into evidence, with the exception of Exhibit P-19. DCPS' objections to Exhibits P-3 through P-12 were overruled. I sustained DCPS' objection to Exhibit P-19. DCPS' Exhibits R-1 through R-7 were admitted into evidence without objection. OSSE did not offer any exhibits.

After the taking of the evidence, DCPS' Counsel made an oral motion for DCPS to be dismissed as a respondent on the grounds that a case had not been made that DCPS was responsible for implementing Student's IEP special education transportation services. I took the motion under advisement. Counsel for the respective parties then made oral closing arguments.

In lieu of receiving written closings, I allowed the parties to submit citations to relevant authorities, by email, by November 7, 2022. Only OSSE filed a post-hearing submission.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-A, § 3049.1.

ISSUES AND RELIEF SOUGHT

The issue for determination in this case, as certified in the October 18, 2022 Prehearing Order, is:

Whether DCPS and/or OSSE have denied the child a free appropriate public education in the 2022-2023 school year by not implementing the school transportation provision in Student's November 18, 2021 IEP.

For relief, the Parents request that DCPS be ordered to immediately comply with the transportation section of Student's IEP within three days of the final decision. The Parents will also seek an award of compensatory education to compensate Student for the educational harm resulting from DCPS' and/or OSSE's alleged failure to provide Student school transportation.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia with his/her Parents. Testimony of Mother. Student is eligible for special education under the disability classification Multiple Disabilities (MD), based on Specific Learning Disability (SLD) and Other Health Impairment (OHI) impairments. Student is a highly complex child with medical fragility. Student is performing below grade level expectation. Student's OHI affect's the child's access to the general education curriculum because he/she has extensive medical, cognitive and adaptive needs. These needs require Student to have specialized instruction outside the general education setting, constant medical supervision, Occupational Therapy (OT), Physical Therapy (PT) and classroom modification. Exhibit P-1.

2. Student has a chronic lung disease and breaths through a tracheostomy tube. At times, Student needs supplemental oxygen. Student must be accompanied by a nurse when transported to and from school. Testimony of Mother.

3. For the 2020-2021 and 2021-2022 school years, Student was enrolled at CITY SCHOOL 1. Student received virtual instruction at home in the 2020-2021 school year due to the COVID-19 pandemic. In the 2021-2022 school year, Student was also instructed, virtually, at home for most of the school year following Student's hospitalization in the fall for a respiratory track infection. In the summer of 2022,

Student attended extended school year (ESY) classes at CITY SCHOOL 2, where he/she received IEP related services. Testimony of Mother.

4. Student's most recent DCPS IEP was developed by the City School 1 IEP team on November 18, 2021. For special education and related services, the November 18, 2021 IEP provides for:

24.75 hours per week of Specialized Instruction outside General Education
120 minutes per month of Adapted Physical Education
180 minutes per month of Speech-Language Pathology (SLP)
240 minutes per month of Occupational Therapy (OT)
240 minutes per month of Physical Therapy (PT)
15 minutes per month of SLP Consultation

Exhibit P-1.

5. The November 18, 2021 IEP provides, regarding special education transportation, that Student requires special education transportation services as a medically fragile student and identifies "DOT Vehicle" as the mode of transportation. The IEP elaborates that Student "requires a nurse to be with [him/her] on the bus. [Student] requires private air conditioned transportation that takes no longer than and a maximum of 60 minutes from home to school due to the need for oxygen and the length of the tank expiration. This is necessary to ensure safety of the student at all times as lack of oxygen can result in permanent harm or death. Without constant supervision of a nurse, [Student] can remove [REDACTED] tracheotomy which can be life threatening." Exhibit P-1.

6. In spring 2022, Student was offered admission to Public Charter School

(PCS). PCS is located in the District of Columbia. PCS is a dependent charter school with DCPS, which means that DCPS is the local education agency (LEA) for PCS.

Testimony of Admissions Director.

7. PCS is open to all District Students, with special education enrollment a priority. PCS admits its students essentially on a lottery wait-list. The school is ungraded and serves approximately 250 students, aged 3 through 22. The school focuses on functional life skills and functional academics. DCPS has no ability to place a student at PCS. The Parents applied for Student's admission at PCS. Testimony of Admissions Director.

8. OSSE is the state education agency (SEA) for the District of Columbia. Hearing Officer Notice. Pursuant to OSSE's November 6, 2013 Special Education Transportation Services Policy, effective January 6, 2013, OSSE's Department of Transportation (OSSE-DOT) shall provide special education transportation services to students with disabilities when transportation is appropriately identified on an IEP as a related service under the IDEA. Exhibit R-7.

9. At PCS, OSSE-DOT provides transport for students with disabilities. DCPS does not provide transportation to any students at PCS. Testimony of Admissions Director.

10. Over the summer of 2022, the Parents communicated regularly with PCS staff regarding completing Student's enrollment paperwork, including health orders. To arrange special education transportation for Student, PCS was required to submit an

online request through EASY IEP, OSSE's online special education data program. PCS was unable to access EASY IEP, to submit Student's transportation request until Student had been disenrolled from City School 1. Student was not released from the enrollment rolls at City School 1 until September 16, 2022. Because Student had not been released from the City School 1 enrollment rolls until September 16, 2022, PCS did not submit a transportation request to OSSE for Student until September 19, 2023. Testimony of Admissions Director.

11. It is undisputed that OSSE has not provided school transportation for Student since the start of the 2022-2023 school year through the date of the due process hearing. OSSE's Counsel represents that due to a shortage of nurses, OSSE has been unable to provide a nurse to accompany Student on the school transport vehicle as required by Student's IEP. Representation of OSSE's Counsel.

12. Because special education transportation has not been provided in the 2022-2023 school year, Student has not been able to attend school this school year and Student has missed IEP special education and related services through the date of the due process hearing. Testimony of Mother.

CONCLUSIONS OF LAW

Based upon the above findings of fact and argument of counsel, as well as this hearing officer's own legal research, my conclusions of law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Parents in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the parent shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. For the issue in this case, Petitioners hold the burden of persuasion. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

Has DCPS and/or OSSE denied Student a free appropriate public education (FAPE) in the 2022-2023 school year by not implementing the school transportation provision in Student's November 18, 2021 IEP.

DCPS' November 18, 2021 IEP for Student provides that Student requires special education transportation services as a medically fragile student and that Student requires a nurse to be with him/her on the bus. The IEP identifies "DOT Vehicle" as the mode of transportation. Since the beginning of the 2022-2023 school year, neither OSSE nor DCPS has provided school transportation for Student. According to OSSE's Counsel's representation, this is due to the unavailability of a nurse to accompany Student on the DOT vehicle. Petitioners maintain the District's failure to implement the

IEP transportation provision has resulted in a denial of FAPE. I agree.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), that a material failure to implement substantial or significant provisions of a child's IEP may constitute a denial of FAPE.

A 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). A material failure to implement a student's IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268–69 (D.D.C. 2013). To meet its burden, the moving party "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, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)).

Middleton at 144.

Under the IDEA, school transportation is a "Related service" as required to assist a child with a disability to benefit from special education. *See* 34 C.F.R. § 300.34(a). School transportation is a substantial and significant provision of Student's IEP, because as a result of the respondents' not providing school transportation, with a nurse, Student has been unable to attend school for the current school year, a period of over two months. *Cf. Dist. of Columbia v. Ramirez*, 377 F. Supp. 2d 63, 68 (D.D.C. 2005) ("It is clear that without an aide to assist him onto the school bus, there can be no reasonable expectation that C.G–R. will reap any benefit from the services prescribed in his IEP, since he cannot be in school to receive them." *Id.*) I find that the Parents have met their burden of persuasion that the failure to provide special education

transportation services for Student, with a nurse to be with him/her, was a material failure to implement Student's IEP and has resulted in a denial of FAPE.

That leaves the question as to which respondent, OSSE or DCPS, is responsible for the denial of FAPE. OSSE is the state education agency (SEA) for the District of Columbia. There is nothing in the IDEA that prevents an SEA from assuming responsibility for the direct provision of FAPE to children in the state. Specifically, if an SEA, such as OSSE, determines that the local education agency (LEA) "[h]as 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 these children," the SEA may use IDEA funding, that would otherwise have been available to a local education agency, to provide special education and related services directly to children with disabilities residing in the area served by that LEA, or for whom that State agency is responsible. *See* 34 C.F.R. § 300.227(a)(1).

With regard to school transportation related services, OSSE has determined that children with disabilities in the District of Columbia can best be served by special education transportation services provided by OSSE-DOT. *See Exhibit R-7*. OSSE has assumed responsibility for providing school transportation for children with disabilities in the District of Columbia. In accordance with OSSE's policy, DCPS does not provide special education transportation. I conclude that OSSE has denied Student a FAPE by not providing direct transportation services to Student as required by the November 18, 2021 IEP. *Compare Chavez ex rel. M.C. v. New Mexico Pub. Educ. Dep't.*, 621 F.3d

1275, 1283 (10th Cir. 2010). (Absent a determination that it was providing direct services to M.C., state education agency was not responsible for the matters covered by due process hearings.)

The Parents and OSSE contend that DCPS has at least joint responsibility because of its overarching duty to ensure that Student's IEP is implemented. In order to secure OSSE transportation services, PCS was obliged to notify OSSE of Student's transportation requirement for the 2022-2023 school year. DCPS is the LEA for PCS. Therefore, I deny DCPS' oral motion made at the due process hearing for its dismissal from the case. Because Student had not been released from the City School 1 enrollment rolls until September 16, 2022, PCS was unable to submit a transportation request to OSSE for Student until September 19, 2023. There was no evidence offered at the hearing that OSSE would have had a nurse available to accompany Student even if PCS had notified OSSE earlier of Student's transportation requirement. I conclude, therefore, that DCPS' failure to ensure that OSSE was notified of Student's transportation requirement before September 19, 2022 did not rise to a material failure to implement Student's IEP.

Remedy

The IDEA, 20 U.S.C. § 1415(i)(2)(C), provides courts and hearing officers with discretion to grant such relief as the hearing officer determines is appropriate. In this case, the Parents request that the respondents be ordered to immediately comply with the transportation section of Student's IEP within three days of this decision. The IDEA

requires that as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. *See* 34 C.F.R. § 300.323(c)(2). "As soon as possible" is, by design, a flexible requirement. It permits some delay between when the IEP is developed and when the IEP is implemented. . . . Nonetheless, just because the as-soon-as-possible requirement is flexible does not mean it lacks a breaking point. 'It is no doubt true that administrative delays, in certain circumstances, can violate the IDEA by depriving a student of his right to a 'free appropriate public education.'" *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503, 514 (2d Cir. 2006), *opinion amended on denial of reh'g*, 480 F.3d 138 (2d Cir. 2007), *quoting Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 (2d Cir.2003).

In the present case, Student has been without school transportation for over two months. Each additional day without transportation means another missed day of school for the child. Recognizing the upcoming school closings for the November holidays, I will order OSSE to implement school transportation for Student, pursuant to the November 18, 2021 IEP, as soon as possible and no later than Monday, November 28, 2022.

Compensatory Education Relief

The Parents also seek an appropriate compensatory education award to compensate Student for schooling missed due to OSSE's failure to provide special education transportation. The compensatory education inquiry requires "figuring out

both [(1)] what position a student would be in absent a FAPE denial and [(2)] how to get the student to that position.” *Butler v. District of Columbia, supra*, at 6. Designing a compensatory education remedy requires a fact-specific exercise of discretion by the district court or a hearing officer. *See Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005). At the due process hearing, Petitioners did not offer a formal compensatory education proposal. Mother requested that Student be provided make-up hours of IEP related services (Adapted Physical Education, SLP, OT and PT), which Student missed because he/she could not attend school. However, this request was not supported by evidence that such an award would be “appropriately tailored to the child’s individual needs.” *See Herrion v. Dist. of Columbia*, No. 20-CV-3470- RDM-RMM, 2022 WL 2753461, at *11 (D.D.C. Feb. 15, 2022). Moreover, at least until OSSE complies with this hearing officer’s order to implement Student’s IEP transportation requirement, the denial of FAPE remains ongoing and it cannot yet be determined what position Student would be in absent the FAPE denial. Therefore, I will not award compensatory education in this decision, but will encourage Student’s new IEP team at PCS to work with the Parents and OSSE to craft an appropriate compensatory education award for Student. If those efforts are unavailing, the Parents may request a new due process hearing to seek compensatory education relief from OSSE after Student’s IEP transportation is implemented and Student is able to attend school again.

ORDER

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

ORDERED:

1. OSSE is ordered to provide school transportation for Student, with a nurse, as soon as possible, and starting no later than November 28, 2022, in accordance with the November 18, 2021 IEP, as may be revised from time to time;
2. Petitioners' request for compensatory education for Student is denied without prejudice and
3. All other relief requested by the Petitioners herein is denied.

Date: November 9, 2022

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

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).

cc: Counsel of Record
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