

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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OSSE  
Office of Dispute Resolution  
November 23, 2022

<b>Parent, on behalf of Student,<sup>1</sup></b>	)	
	)	
<b>Petitioner,</b>	)	
	)	<b>Hearing Date: 11/9/22</b>
<b>v.</b>	)	
	)	<b>Hearing Officer: Michael Lazan</b>
<b>District of Columbia Public Schools and</b>	)	
<b>Office of the State Superintendent of</b>	)	<b>Case No. 2022-0168</b>
<b>Education,</b>	)	
	)	
<b>Respondents.</b>	)	

## **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 (Autism Spectrum Disorder, Other Health Impairment). A due process complaint (“Complaint”) was received by District of Columbia Public Schools (“DCPS”) and Office of the State Superintendent of Education (“OSSE”) pursuant to the Individuals with Disabilities Education Act (“IDEA”) on September 9, 2022. The Complaint was filed by the Student’s parent (“Petitioner”). DCPS filed a response on September 19, 2022. OSSE filed a response on September 20, 2022. A resolution meeting was held on October 13, 2022. The matter was not settled. The resolution period expired on October 19, 2022. The Hearing Officer Determination (“HOD”) is due on November 23, 2022.

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<sup>1</sup> Personally 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 motion to expedite the HOD timelines was filed by Petitioner on September 9, 2022. DCPS opposed the motion on September 15, 2022. OSSE opposed the motion on September 19, 2022. An interim order was issued on September 20, 2022, denying the motion. A prehearing conference was held on October 5, 2022. Attorney A, Esq., counsel for Petitioner, appeared. Attorney B, Esq., counsel for DCPS, appeared. Attorney C, 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 October 12, 2022. DCPS filed a motion to dismiss on September 20, 2022. OSSE opposed the motion on September 23, 2022. The motion was denied through an interim order dated October 7, 2022.

On October 17, 2022, OSSE moved for an extension of the original timelines for the HOD, with respect to claims against OSSE only. An order granting the motion was issued on October 20, 2022, extending the HOD due date with respect to OSSE to November 23, 2022, which is the same as the HOD due date with respect to DCPS.

The hearing was conducted on November 9, 2022, through the Microsoft Teams videoconferencing platform, without objection. Petitioner was again represented by Attorney A, Esq. DCPS was again represented by Attorney B, Esq. OSSE was again

represented by Attorney C, Esq. This was a closed proceeding. During the proceeding, Petitioner moved into evidence exhibits P-1 through P-9 without objection. DCPS did not move any exhibits into evidence. OSSE moved into evidence Exhibits R-1 through R-5 without objection. Petitioner presented herself as a witness. DCPS did not present any witnesses. OSSE presented Witness A, an associate director for audit and compliance from OSSE. The parties presented oral closing statements at the end of testimony on November 9, 2022. DCPS submitted an email with supporting legal authority on November 14, 2022.

#### **IV. Issues**

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

**1. Did DCPS 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 from school to home? If so, did DCPS and OSSE deny the Student a Free Appropriate Public Education ("FAPE")?**

**2. Did DCPS and OSSE fail to follow OSSE's guidelines when it transported the Student from school to home for the 2022-2023 school year? If so, did DCPS and OSSE deny the Student a FAPE?**

As relief, Petitioner is seeking private transportation from school to home for the Student for the 2022-2023 school year.

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

1. The Student is an X-year-old who resides in the upper part of the Northwest Quadrant in Washington, D.C. The Student attends School A, which is located in the Southeast Quadrant of Washington, D.C., in the opposite end of the city.

The drive from School A to the Student's home takes about forty minutes. Testimony of Petitioner.

2. The Student has been diagnosed with autism, epilepsy, asthma, and a rare genetic disorder. The Student functions at the level of a very young toddler. The Student is non-verbal and communicates about his/her basic needs through gestures and sounds, which can be understood by his/her family members. The Student becomes very distressed if events are out of the norm. The Student is confined to a wheelchair and needs assistance to walk. The Student has no concept of danger and needs to be monitored for twenty-four hours a day, seven days a week. Testimony of Petitioner.

3. The Student is considered to be immunocompromised and therefore takes daily medications, including antibiotics. The Student's life can be put at risk because of his/her asthma, which can cause him/her to be out of breath and need an inhaler. The Student has seizures, sometimes more than one a day, which can be anticipated if a person identifies subtle signs such as the Student "being clammy" or dehydrated. The Student also has a medical condition in the genital area, is incontinent, has severe constipation, and wears diapers. If the Student's diaper is not changed in timely fashion, the medical condition can lead to scar tissue and a form of cancer. The Student can also get dehydrated, which can lead to medical complications because s/he cannot ask for water. Testimony of Petitioner.

4. An IEP was written for the Student on April 27, 2022. The IEP recommended that the Student be placed in a program with 26.5 hours of specialized instruction, with related services consisting of speech and language pathology 1.5 times per week, occupational therapy 1.5 times per week, and physical therapy for thirty

minutes per week. Consultation services in audiology and physical therapy were also recommended, with a dedicated aide, along with a variety of accommodations, including a wheelchair. P-1. The IEP provided that the Student “must be home within one hour of end of school day.” P-1-19. The same language had been on the Student’s earlier IEPs. Testimony of Petitioner.

5. The Student attends School A for the 2022-2023 school year. Classes end at about 2:30 p.m. to 2:40 p.m. School staff get the students ready to depart at that time. The “school day” ends at 3:00 p.m. at School A. The Student boards his/her bus, which has no access to water, no one-to-one aide, and no one to change the Student’s diaper after s/he boards the bus. Testimony of Petitioner.

6. From August 29, 2022, to September 12, 2022, the Student’s bus arrived at his/her home after 5:00 p.m. on six out of nine days. The bus left School A at 3:30 p.m. or later on seven of the nine days. R-4-1. The Student has come home late more than half of the time during the 2022-2023 school year. Approximately once a week, the Student arrives home about ninety minutes after school ends, and sometimes the delays are longer than that. Bus drivers have told Petitioner that they do not leave school until 4:30 p.m. on some days. The Student has arrived home with a wet diaper, which results in bruising in his/her genital area. As a result of the Student’s unpredictable lateness during the 2022-2023 school year, Petitioner has been unable to schedule the Student’s in-home Applied Behavioral Analysis and physical therapy sessions, which ordinarily occur just after school ends. Testimony of Petitioner.

7. On September 23, 2022, Physician A wrote a letter explaining the need for the Student’s special transportation arrangement for the current school year. The doctor

explained that, in addition to the genetic disorder, the Student carries the diagnoses of Developmental Non-Verbal Disorder, Seizure Disorder, Mental Retardation, Urinary Incontinence, and Hypotonia. The doctor explained further that the Student “has multiple and severe disabilities [that are] medically complex.” The Student is non-verbal, relies on a wheelchair, is incontinent, and has epilepsy, asthma, autism, thermodyregulation, and lichen sclerosus, among “many other” health disorders. The doctor pointed out that, due to the Student’s medical and developmental issues, s/he must arrive home within one hour of school ending, and that s/he should not spend more than one hour on the bus. Physician A stated that several of the Student’s conditions can be exacerbated by bus rides that last over an hour. P-2-1.

8. OSSE provides transportation services for students in the District of Columbia. OSSE receives transportation request forms from the Local Education Agency (“LEA”). The forms provide the address of the pickup and the start and end times at the attending school. OSSE tries to match students with the most efficient route. The rules for this process are set forth in OSSE’s policies and parent handbook. A bus is sent to the location at the designated time. Each bus includes an operator and an attendant. The buses and other vehicles, such as private transportation vehicles, line up in a queue. Once the bus reaches a point in the line where someone from the school can identify the bus, the bus driver and attendant work with the school official to board the students. It is the responsibility of the school to make sure that students board properly. If there is a problem with boarding or loading, the school is supposed to let OSSE know. Testimony of Witness A.

9. OSSE has been working with School A regarding the Student's transportation issues, specifically on arranging for the bus to be boarded sooner to fulfill the Student's IEP requirement. OSSE does arrange private transportation for some students, including when students have triggering behaviors, or audio or visual sensory issues. Testimony of Witness A.

10. According to the Transportation Handbook for Parents and Guardians of Special Education Students ("Transportation Handbook"), the "District" regained control of special education transportation services in December, 2012, after seventeen years of federal court oversight. The Transportation Handbook says that this means the "District" is now accountable for day-to-day student transportation operations. P-3-2. The Transportation Handbook also says that, "as a regional transportation provider for District of Columbia Public Schools, public charter schools and non-public schools, we look forward to providing safe, on-time and efficient transportation services every school year." P-3-4. The Transportation Handbook provides that the "planned ride time" for students within the District of Columbia is seventy-five minutes, based on program location. P-3-6.

## **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 issues in this case, which do not relate to the appropriateness of the Student’s IEP and placement, the burden of persuasion is on Petitioner.

**1. Did DCPS and OSSE fail to implement the Student’s IEP for the 2022-2023 school year with respect to the Student’s transportation from school to home? If so, did DCPS and OSSE deny the Student a FAPE?**

Once 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. § 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). In deciding if the failure was material, courts 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.” Wilson v. District of Columbia, 770 F. Supp. 2d 270, 275 (D.D.C. 2011); compare Catalan v. District of Columbia, 478 F. Supp. 2d 73 (D.D.C.2007) (since the student received consistent speech therapy, the failure to provide all of the required sessions was not a material deviation from the student’s IEP).

There is no dispute that the Student’s IEP requires that the Student arrive home from school within an hour of the end of the school day. Petitioner testified that the Student’s school day ends at 3:00 p.m. and that the Student has arrived home after 4:00 p.m. on more than half of the school days during the 2022-2023 school year. Petitioner



testified that the Student has arrived home more than ninety minutes after the end of school at least once a week, and that bus drivers have told Petitioner that the bus does not even leave school until 4:30 p.m. on some days. Petitioner also testified that she set up a camera in her home to determine the exact time that the Student arrives from school every day.

Neither DCPS nor OSSE presented any testimony or evidence to clearly dispute any of these claims. Indeed, OSSE's Exhibit 4 corroborated these claims, indicating that from August 29, 2022, to September 12, 2022, the Student's bus arrived at his/her home after 5:00 p.m. on six out of nine days. OSSE nevertheless argued that it acted responsibly with respect to the Student's transportation services during the 2022-2023 school year, pointing out that it cannot act alone, and that the transportation failures were at least partly a function of issues relating to DCPS and School A. OSSE argued that its buses cannot act unilaterally to jump the transportation queue of vehicles at the school at the end of the school day. OSSE also suggested that delays may be occasioned by the severity of the Student's disabilities, which, among other things, require School A staff to change the Student's diaper before s/he boards the bus. OSSE also pointed out that there are a number of factors that affect whether a student gets home in time, including the need to drop off other children, traffic patterns, and weather.

Similarly, DCPS suggested that the Student's transportation services were reasonably provided, noting that there are a multitude of factors outside of DCPS's or OSSE's control that impact transportation services, including the number of children on the bus. DCPS contended that no manner of transportation could possibly guarantee that

the Student could get home in an hour given the difficulties in getting across Washington, D.C., after school ends.

Reasonable though these explanations may be, they do not constitute a defense to “failure to implement” claims in this jurisdiction. Neither OSSE nor DCPS provided any support for the argument that a failure to implement claim can be dismissed because of “impossibility.” A similar issue came up in White v. District of Columbia, No. 20-CV-3821 (APM), 2022 WL 971330, at \*5 (D.D.C. Mar. 31, 2022), where an IEP called for a student to receive one hour of occupational therapy per month. This Hearing Officer ruled for DCPS in that case, since the student was *offered* the mandated occupational therapy services (but was not available for the services). A federal court reversed, citing to Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017), and underscoring the importance of complying with the IEP. The court found that “(a)n IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” The court concluded that “it is not enough merely to ‘offer’ the services provided by an IEP; the school district must ‘ensure’ the child actually receives them.” White, 2022 WL 971330, at \*5.

DCPS also argued that there was no evidence in the record of any specific harm to the Student. DCPS pointed out that there was no testimony about the Student failing to receive special education services, no testimony about the Student regressing in skills, and no evidence that the failure to implement the transportation requirement impeded the Student’s progress. However, the materiality standard does not require that a child suffer demonstrable educational harm in order to prevail on a failure-to-implement claim.

Van Duyn, 502 F.3d at 822; cf. MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 537 n. 17 (4th Cir. 2002) (rejecting the argument that parents must show actual developmental regression to prove a failure-to-implement claim). Moreover, Petitioner did present evidence that the Student has arrived home with a wet diaper, which results in bruising that can potentially lead to cancer. Petitioner also testified that, as a result of the Student's unpredictable lateness during the 2022-2023 school year, Petitioner has been unable to schedule the Student's in-home Applied Behavioral Analysis and physical therapy sessions, which ordinarily occur just after school ends. Petitioner also stated that the Student's life can be put at risk because of his/her asthma, which can cause him/her to be out of breath and need an inhaler. Petitioner also said that the Student has seizures, sometimes more than one a day, which can be anticipated if a person is able to identify subtle signs such as the Student "being clammy" or dehydrated. Neither DCPS nor OSSE presented any testimony or evidence to clearly dispute any of these claims.

DCPS also contended that Petitioner did not say exactly how many days the Student was late, that Petitioner did not testify about a single incident, and that Petitioner was generally not credible. However, there is nothing in the record to rebut this portion of Petitioner's testimony, and DCPS does not point to any inconsistent statements by Petitioner. Given the Student's severe disabilities, this Hearing Officer agrees with Petitioner that the failure to timely transport this Student from school to home was a material violation of the Student's IEP.

DCPS also renewed its argument, first made in a motion to dismiss, that it should not be deemed liable on claims relating to the failure to implement transportation services, since those services are controlled by OSSE. DCPS contended that there is

nothing in the IDEA that prevents a State Educational Agency (“SEA”) from assuming responsibility for transportation services, and that all of the hearing officers in this jurisdiction have found that DCPS is not liable on transportation claims because it is not the direct provider of those services. DCPS argued that, under District of Columbia law, the funding for transportation for students with disabilities is allocated to OSSE. D.C. Code Sect. 38-2907(a). In support of its argument, DCPS submitted three decisions from other hearing officers.

However, 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). DCPS did not point to any federal caselaw in support of its argument that it must be dismissed from the case because the related services at issue are being provided by third parties. Moreover, of the three decisions submitted by DCPS, one made it clear that there *are* other hearing officers that rule that DCPS can be liable for transportation claims in the District of Columbia. Order on Motion to Dismiss, Case # 2022-0025 (May 12, 2022) at 6 (quoting Hearing Officer Seat)(“DCPS’ role continued to be critical in ensuring that Student received a FAPE and the undersigned thus concludes that DCPS cannot be dismissed from this case.”).

Finally, there is federal caselaw suggesting that FAPE claims premised on a failure to deliver special education transportation can be brought against DCPS. 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). 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 April 27, 2022, IEP.

**2. Did DCPS and OSSE fail to follow OSSE's guidelines when it transported the Student from school to home for the 2022-2023 school year? If so, did DCPS and OSSE deny the Student a FAPE?**

Petitioner argued that FAPE denial can be premised on violation of an agency's own guidelines. Petitioner pointed out that the Transportation Handbook has a provision that requires trips from school to home in the District of Columbia be no more than seventy-five minutes long.

This Hearing Officer's research indicates that there is some support for Petitioner's position in this jurisdiction. In particular, a decision by Judge Lamberth established that a violation of an educational agency's own guidelines can constitute FAPE denial where the violation of the guidelines leads to a denial of FAPE. Beckwith v. District of Columbia, 208 F. Supp. 3d 34, 43 (D.D.C. 2016) (involving violations of rules relating to physical restraints).

However, Petitioner did not clearly show that the Transportation Handbook establishes a seventy-five minute limit on bus rides from school to home. In a pie chart, the Transportation Handbook does say that the "planned ride time" for students who are traveling within the District of Columbia is seventy-five minutes. But there is nothing in the Transportation Handbook to explain exactly what "planned ride time" means or establish that the reference to "planned ride time" creates a binding rule that all student bus rides within the District of Columbia must be completed within seventy-five minutes. To the contrary, the Transportation Handbook says that "(r)ide times are determined on a

case-by-case basis to take into account the individual dual medical needs of students.” Indeed, before the pie chart appears, the Transportation Handbook states that “(T)raffic and Weather Conditions may affect ride times on given day,” and that “throughout the school year, OSSE DOT monitors ride times and adjusts routes as needed.” Finally, Petitioner did not present evidence that, in practice, this pie chart has been used or interpreted by OSSE to firmly set a seventy-five minute time limit on bus rides from school to a student’s home. This claim must be dismissed.

### **RELIEF**

As relief, Petitioner seeks private transportation from school to home for the remainder of the 2022-2023 school year. 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.”

OSSE argued that the remedy of private transportation will not put the Student in a better position to travel. OSSE argued that the Student will still have to wait on the same queue that the school bus has to wait on. However, according to the undisputed testimony of Petitioner, private transportation significantly shortened the Student’s travel time from school to home in prior years. Additionally, OSSE did not acknowledge that a private vehicle would not have to drop off any children other than the Student, which should shorten the Student’s travel time. While OSSE indicated that it is working on

getting the Student's bus to the transportation queue at School A earlier, OSSE did not argue or suggest that this initiative has solved the problem for the Student. In fact, neither DCPS nor OSSE clearly suggested any clear alternative to the approach suggested by Petitioner. This Hearing Officer will therefore order that the Student receive private transportation from school to home for the remainder of the 2022-2023 school year.

### **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 to pick up the Student for travel from School A to the Student's home at the end of the school day;
2. Such private transportation shall transport the Student from School A to home so that the Student arrives at home within one hour of the end of the school day;
3. All other requests for relief are denied.

Dated: November 23, 2022

Michael Lazan  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Attorney A, Esq.  
Attorney B, Esq.  
Attorney C, Esq.  
OSSE Division of Specialized Education  
[REDACTED]/DCPS  
[REDACTED]/DCPS

### **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: November 23, 2022

Michael Lazan  
Impartial Hearing Officer