

District of Columbia
Office of the State Superintendent of Education

Office of Dispute Resolution
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OSSE
Office of Dispute Resolution
October 30, 2023

Parents, on behalf of Student,¹)	
Petitioners,)	
)	Hearing Date: 10/13/23
v.)	Hearing Officer: Michael Lazan
)	Case No. 2023-0165
Office of the State Superintendent of)	
Education,)	
Respondent.)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case involving an X-year-old student (the “Student”) who is currently eligible for services. A due process complaint (“Complaint”) was received on August 28, 2023, by District of Columbia Public Schools (“DCPS”) and the Office of the State Superintendent of Education (“OSSE” or “Respondent”), pursuant to the Individuals with Disabilities Education Act (“IDEA”). The Complaint was filed by the Student’s parents (“Petitioners”). On June 6, 2023, Respondent filed a response.

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 (“DCMR”), Title 5-A, Chapter 30.

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

III. Procedural History

On March 22, 2023, Hearing Officer Keith Seat found that OSSE denied the Student a Free Appropriate Public Education (“FAPE”) by failing to provide the Student with transportation services during the first five or so months of the 2022-2023 school year. Though Petitioners sought compensatory education, Hearing Officer Seat did not craft a compensatory education plan for the Student in his decision. Instead, Hearing Officer Seat ordered that the Student be evaluated, and that the parties should then try to agree on an appropriate compensatory education plan themselves. Hearing Officer Seat ruled that, if the parties came to an impasse on the details of the compensatory education plan, Petitioners could file a due process complaint so that another hearing officer could decide on the appropriate compensatory education plan for the Student.

Witness A evaluated the Student in or about July-August 2023 and submitted the evaluation to OSSE, but OSSE and Petitioners could not agree on a compensatory education plan for the Student. As a result, Petitioners brought this Complaint against DCPS and OSSE on August 28, 2023. The crux of the Complaint is the contention that this Hearing Officer should decide on an appropriate compensatory education plan for the Student, pursuant to Hearing Officer Seat’s summary judgment order of March 22, 2023.

DCPS moved to dismiss on September 11, 2023. Petitioners opposed this motion on September 18, 2023. However, DCPS did not have any duties with respect to the compensatory education plan referenced in Hearing Officer Seat’s decision. As a result, DCPS’s motion to dismiss was granted by a written order issued on October 6, 2023.

A prehearing conference took place by telephone on October 3, 2023. Participating in the prehearing conference were Attorney A, Esq., attorney for Petitioners,

Attorney B, Esq., attorney for DCPS, and Attorney C, Esq., attorney for OSSE. On October 6, 2023, a prehearing order was issued, summarizing the rules to be applied in the hearing and identifying the issue in the case.

On October 6, 2023, OSSE moved to dismiss, contending, among other things, that it has no power to force School A, a DCPS school, to implement Petitioners' proposed compensatory education plan; that compensatory education is not equivalent to the provision of a FAPE to a student; and that, therefore, Petitioners failed to state a claim. On October 6, 2023, Petitioners opposed the motion, contending that hearing officers routinely order equitable remedies, and that Hearing Officer Seat's order was appropriate and consistent with law. On October 13, 2023, this Hearing Officer issued an order denying OSSE's motion to dismiss.

On October 10, 2023, OSSE moved to extend the timelines for filing this Hearing Officer Determination ("HOD"). The motion was granted by order dated October 12, 2023. The HOD is currently due on October 30, 2023.

The matter proceeded to trial on October 13, 2023. The hearing was conducted through the Microsoft Teams videoconferencing platform, without objection. After testimony and evidence, the parties presented oral closing statements on October 13, 2023. During the proceeding, Petitioners moved into evidence exhibits P-1 through P-17 without objection. OSSE moved into evidence exhibits R-1 through R-3 without objection. Petitioners presented as witnesses, in the following order: Witness A, an educational advocate (expert in special education); and the Student's mother ("Mother"). OSSE presented as a witness: Witness, B, OSSE Director of Special Education.

IV. Issues

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

After the issuance of Hearing Officer Keith Seat's order on March 22, 2023, did Petitioners develop a more appropriate compensatory education plan for the Student than the plan developed by OSSE? If so, should this Hearing Officer order OSSE to implement Petitioners' compensatory education plan?

At the hearing, this Hearing Officer clarified the issue by explaining that there is no FAPE issue to decide in this case, nor is this litigation focused on a "duty" for either party to create a plan. Rather, as authorized by District of Columbia Circuit precedent, the "issue" here is that this Hearing Officer is bound to decide on an appropriate compensatory education plan for the Student, since the parties were unable to agree on a plan on their own, per the final (and unappealed) order of Hearing Officer Seat.

As relief, Petitioners are seeking: (1) a finding that OSSE denied the Student a FAPE; (2) an order requiring OSSE to explain to Petitioners and counsel why it no longer agrees to implement Petitioners' compensatory education plan; (3) an order directing OSSE to immediately begin to implement the compensatory education plan developed by Petitioners and ordered by a hearing officer; and (4) related relief.

V. Findings of Fact

1. The Student is an X-year-old who is eligible for services. The Student is non-verbal and has severe, life-threatening medical issues. The Student ambulates through a wheelchair, breathes through a tracheostomy tube, and his/her oxygen saturation and pulse must be constantly monitored. Testimony of Witness A; P-7. The Student has daily respiratory treatment early in the morning. The Student communicates

through body language, expressions, and gestures. The Student can discuss his/her needs, including classroom materials. Testimony of Mother.

2. The Student attends School A, which is run by DCPS. P-7; Testimony of Witness B. The Student loves School A, where some staff refer to him/her as the “mayor” and where s/he takes routine seriously. Testimony of Mother. The Student previously attended an independent learning skills program at a different school. R-2-1. School A provides specialized instruction in a therapeutic learning environment to students with often severe disabilities, focusing on a functional life skills curriculum. At School A, the Student receives full-time special education, with specialized instruction throughout the day, and related services including speech-language pathology, physical therapy, and occupational therapy. The Student is also assigned a full-time licensed practical nurse (“LPN”) as a dedicated aide. R-2. School A’s school day ends at 3:00 p.m. No activities take place after that time, though staff are “in and out” of the classroom, taking students to buses. It takes a while for the staff to attend to all the students and load them all into the buses. Testimony of Witness A.

3. After receiving distance learning during the 2021-2022 school year, the Student enrolled at School A for the 2022-2023 school year. Transportation was included in the Student’s Individualized Education Program (“IEP”), including an LPN bus aide, a climate-controlled bus, and a ride time of no longer than sixty minutes due to the limits on the Student’s use of oxygen tanks. R-2.

4. Bus transportation was not provided for the Student from the beginning of the 2022-2023 school year until February 2023. As a result, the Student missed

specialized instruction, physical therapy, occupational therapy, speech therapy, and 1:1 direct support that his/her IEP required. R-2.

5. Petitioners filed a due process complaint on January 9, 2023, alleging that the Student was denied a FAPE because s/he did not receive transportation services during the 2022-2023 school year. On March 22, 2023, Hearing Officer Seat issued a final decision on Petitioner's summary judgment motion, granting relief to Petitioners on behalf of the Student. Hearing Officer Seat ordered "a compensatory education evaluation conducted by an evaluator who is expert in Student's profile...to determine what services may be necessary to put Student in the position [s/he] would have been, but for the denial of FAPE." Hearing Officer Seat cited to B.D. v. Dist. of Columbia, 817 F.3d 792, 800 (D.C. Cir. 2016), "in which the Circuit Court emphasized that a hearing officer 'should not hesitate' to order further assessments if needed to discern students' needs and fashion an appropriate compensatory education program." Hearing Officer Seat accordingly ordered the following: (1) OSSE shall provide school transportation for Student, with a nurse, as required by Student's IEP; (2) within 10 business days after Petitioners' request, OSSE shall provide a letter of authorization for up to \$1,000 for an independent evaluator, chosen by Petitioners with input from OSSE, to conduct a compensatory education evaluation of Student after s/he has been back in school for at least 30 days; (3) upon completion of the compensatory education evaluation, Petitioners and OSSE shall meet in good faith in an attempt to determine what compensatory education services should be provided for Student; and (4) if Petitioners and OSSE are unable to agree informally on appropriate compensatory education, any claim for compensatory education based on the lack of school transportation is expressly reserved

for formal resolution through a new case. Hearing Officer Seat also ruled that “Petitioners’ remaining claims of lack of specialized instruction (Issue 3) and failure to comply with the 11/9/22 HOD (Issue 2) are hereby dismissed **without prejudice** in accordance with Petitioners’ representations” (emphasis in original). Hearing Officer Seat also ruled that, “Any and all other claims and requests for relief are **dismissed with prejudice**” (emphasis in original). R-3.

6. The Student would have a difficult time making good progress through outside tutoring, given the Student’s needs. An outside tutor or related service provider would not have knowledge of, or access to, the visuals, modified materials, supports, and accommodations that the Student requires for instruction. The additional transportation arrangements that would be necessary for the Student to travel to outside tutoring would also be difficult because someone must help the Student with his/her wheelchair and respiratory issues. After arriving home from school, the Student would have a difficult time with home-based tutoring, because the Student is tired after school, needs to take medication, and is not inclined to do school work at that time. Testimony of Mother; Testimony of Witness A.

7. On June 20, 2023, OSSE offered a plan to address the Student’s compensatory education in this case. The plan proposed an authorization-of-services letter for 228 hours of independent tutoring at a rate not to exceed the greater of \$75.15 per hour or the maximum related rate established by 5-A DCMR Sect. 2845; fifteen hours of speech/language services at a rate not to exceed the greater of \$115.28 per hour or the maximum related rate established by 5-A DCMR Sect. 2845; ten hours of occupational therapy at a rate not to exceed the greater of \$130.38 per hour or the maximum related

rate established by 5-A DCMR Sect. 2845; and ten hours of physical therapy at a rate not to exceed the greater of \$117.53 per hour or the maximum related rate established by 5-A DCMR Sect. A-2845. The plan also stipulated that Petitioners would have ten years from the date of the authorization-of-services letter to use the authorized services. R-1.

8. On July 13, 2023, Witness A observed the Student in a classroom with an aide. Despite the aide's presence, the Student exhibited off-task behaviors, including wanting to engage in a preferred activity other than the group instructional activity. Witness A observed that the Student needed many supports to participate in and navigate the environment, including a wide variety of visual supports, devices, and assistive technology. Witness A characterized the Student as a "high needs" student. Testimony of Witness A.

9. Witness A, who was formerly the principal at School A, developed a compensatory education plan for the Student. Witness A spoke to School A staff who were "very positive" and said that the plan could be implemented, though Witness A did not specifically ask School A's staff or administration if they were willing to implement the plan. Witness A referenced an earlier case where a student received compensatory education services during the school day, though in that case, the compensatory education was included in the Student's IEP. Testimony of Witness A.

10. Witness A's compensatory education plan, dated and sent to OSSE on August 3, 2023, contended that the Student has many medical complexities and needs constant supervision in all settings. Witness A concluded that if the Student had transportation to school during the 2022-2023 school year, s/he would have been able to participate in specialized instruction, make gains in functional academic and daily living

skills, and make gains in mobility, fine motor skills, and communication skills. In addition, Witness A believed that the Student would have been included in social opportunities with peers and provided supports to improve his//her behavior. Witness A also pointed out that the lack of transportation for the Student delayed the process of collecting instructional data to inform academic present levels. R-2.

11. Witness A's compensatory education proposal contended that the Student is at a critical developmental stage, where s/he is available for learning. Witness A recommended that the compensatory education plan be condensed as much as possible to capitalize on the Student's enthusiasm for school, physical health, and stamina. Witness A indicated that increasing the Student's mobility should be a priority, to enable him/her to access the learning environment more independently, because the Student's mobility could become compromised as s/he gets older. Witness A said that, according to the Student's school team, therapists had stated that an additional thirty minutes per week of therapy services for the Student would not result in substantial fatigue and would increase his/her progress. Witness A wrote that, "given the therapeutic environment at [School A], and the structure of related services being provided during classroom instructional time, it is my professional opinion that the school setting would be the most beneficial setting to implement [the Student's] compensatory education plan. It would not result in [his/her] missing instructional class time, and would not result in fatigue from additional time spent in therapy outside of school." Witness A accordingly recommended that the Student receive, in the school setting: ten hours of compensatory physical therapy, not to exceed one 30-minute session per week; ten hours of compensatory occupational therapy,

not to exceed one 30-minute session per week; and fifteen hours of compensatory speech therapy, not to exceed one 30-minute session per week. R-2.

12. Witness A's compensatory education plan also noted that the Student would benefit from direct, 1:1 instructional support from a behavior specialist. The behavior specialist would work on the functional academic skills identified in the Student's IEP in a more systematic manner, such as through discrete trials, errorless teaching, and task analysis. Witness A said that these services should be provided by a qualified/certified behavior therapist experienced in conducting evidenced-based teaching methodologies in a safe and therapeutic setting, that the Student's current school setting meets these needs, and that school staff agree that the required services could be provided within the classroom setting. As compensatory services, the plan also recommended that the Student receive 228 hours of direct instruction from a certified/qualified behavior specialist, not to exceed one hour per week in two 30-minute sessions. R-2.

13. OSSE is concerned that delivering the Student's compensatory education services during the school day could potentially impinge on School A's ability to deliver routine IEP services to the Student, who has a limited capacity for learning during the school day. Testimony of Witness B.

14. An extended school day could enable the same School A staff in the same setting to provide the Student with both education during the school day and compensatory education services immediately after the end of the school day. Otherwise, those staff might not be available to work with the Student on his/her compensatory education. Testimony of Witness B.

15. OSSE discussed alternate compensatory education programs for the Student, including summer programming, school break programming, and overnight programs and experiences. Testimony of Witness B.

16. The Student's current school day includes thirty minutes of waiting for the bus at the end of the day. If thirty minutes of instruction were added to the Student's school day, buses would still be available to take him/her home, and there would be no disruption to the Student's transportation. Testimony of Witness B; R-1-20.

17. Petitioners will not allow the Student to receive services during weekends because they feel that, on weekends, the Student needs a break from school and is entitled to participate in family activities. Testimony of Mother.

18. School A has made changes since Witness A left the school, though the school maintains the same foundational approach to education. Nothing has been drastically restructured except perhaps curriculum materials. Testimony of Witness A.

VI. Conclusions of Law

OSSE contended that Hearing Officer Seat's order was in error and that this Hearing Officer does not have jurisdiction to hear this case because the case does not involve FAPE denial. However, not every IDEA case involves FAPE denial. This case fits squarely within the requirements of 34 C.F.R. Sect. 300.507(a)(1), which sets forth the rules for filing a due process complaint. This section specifically says that a parent may file a due process complaint relating to the evaluation of a child, which is effectively the issue here, since the parties, after Witness A's evaluation, could not agree on the appropriate compensatory education plan for the Student.

Hearing Officer Seat specifically explained that his approach was based on a District of Columbia Circuit case. In B.D. v. District of Columbia, 817 F.3d 792, 800 (D.C. Cir. 2016), a case originally decided by this Hearing Officer, the court stated “In carrying out the complicated work of fashioning such a remedy, the district court or Hearing Officer should pay close attention to the question of assessment.” The court added that “it may also well be that further assessments are needed. If so, the district court or Hearing Officer should not hesitate to order them....”

Notably, the decision in B.D. was written by Judge David S. Tatel, the judge who wrote the decision in Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 523-24 (D.C. Cir. 2005), where the circuit court declared that a “flexible approach” to the compensatory education remedy is appropriate. In Reid, the court described compensatory education as “[t]he essence of equity jurisdiction” where the goal is “to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.” Id. (citing to Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944)).

Like Hearing Officer Seat, this Hearing Officer reads B.D. to authorize hearing officers to order an evaluation, if needed, to determine an appropriate compensatory education award for a student. Also like Hearing Officer Seat, this Hearing Officer reads B.D. to stand for a parent’s right to request a second hearing on the nature of a compensatory education award if the parties cannot agree on a compensatory education award after an evaluation of a student.

Indeed, this scenario occurred in Phillips ex rel. T.P. v. District of Columbia, 736 F. Supp. 2d 240, 250 (D.D.C. 2010), where Hearing Officer Terry Banks originally

decided not to award compensatory education because there was no evidence in the record to support such an award. The parents then filed a second due process complaint seeking compensatory education, even though Hearing Officer Banks had flatly denied their request for compensatory education after an evidentiary hearing. The district court allowed the parents to file a second due process complaint and reversed Hearing Officer Banks, concluding that he should give the parents a second opportunity to supplement the record with evidence to support a compensatory education award. Id. at 249.

Then (as discussed in Lopez-Young v. District of Columbia, 211 F. Supp. 3d 42, 55–56 (D.D.C. 2016)), on remand, Hearing Officer Banks ordered an evaluation of the student by specialists “who possess knowledge and expertise in childhood development and would be able to ascertain how the lack of early intervention impacted the student.” On appeal, DCPS argued that the hearing officer’s order on remand overstepped his authority, but the district court determined that Hearing Officer Banks’s order for an evaluation was appropriate, explaining that “the Hearing Officer must be free to order any relief that he believes would assist the plaintiff in developing her case for an award of compensatory education....” 211 F. Supp. 3d 42, 55–56; see also Gill ex rel. W.G. v. District of Columbia, 751 F. Supp. 2d 104, 114 (D.D.C.2010) (“inviting” parents to request an evidentiary hearing concerning the appropriate compensatory education due to the student).

The evaluation of the Student in this case was written by Witness A, a former principal at School A, who came across as well-intentioned and credible during testimony. Witness A recommended 228 hours of compensatory tutoring, fifteen hours of compensatory speech-language pathology, ten hours of compensatory occupational

therapy, and ten hours of compensatory physical therapy. OSSE, which originally came up with these amounts, did not contest these numbers at the hearing.

The issue here is that Witness A's approach to providing compensatory education to the Student appears to be novel. Instead of proposing services after school, or during the weekend, or during the summer, Witness A proposes a plan to provide compensatory education to the Student within the school day, effectively arguing for a supplement to the Student's existing program. Witness A believes that this approach would enable the Student to make more progress than s/he would under his/her current IEP. While the approach makes sense at some level for this Student with high needs, compensatory education plans are generally supposed to focus on goals from prior IEPs, not current IEPs. Petitioners did not present this Hearing Officer with any authority authorizing this form of compensatory education for the Student, which can be read to be in conflict with the intentions of the Student's current IEP team, as Witness B suggested.

Moreover, as Witness A herself said during testimony, a collaborative compensatory education program like the one proposed would require the full and complete cooperation of the Student's school. Even if, under the flexible Reid and B.D. approaches, this Hearing Officer has the authority to force School A to unilaterally change the Student's existing IEP so that the Student receives 2.5 more hours of services per week, School A is not willing to provide these services to the Student during the school day, even though the Student and the school apparently have an excellent relationship, to the point where the Student has been called the "mayor" of the school.

Given this resistance from School A, the preferable option is the plan suggested by Witness B of OSSE. One of Witness A's main concerns was that the Student should

not receive compensatory education services in a setting that s/he does not know. The plan discussed by Witness B at the hearing would provide the Student with thirty minutes of additional services per day, after the end of the school day, inside the classroom, with all the Student's current visuals, accommodations, and assistive technology. This plan conforms with many of the requirements in Witness A's compensatory education plan. Moreover, there are strong suggestions in the record that the plan proposed by Witness B could be implemented by the same teachers and service providers from School A that the Student works with during the school day.

Petitioners raised concerns about Witness B's plan, noting that the Student would not be in the classroom with other students, for modeling purposes, during the additional thirty minutes of services each day. But least restrictive environment considerations are not ordinarily a main concern in HODs that assess the adequacy of compensatory education awards. In fact, there is no clear evidence in the record that the Student greatly benefits from group activity. To the contrary, during Witness A's one observation of the Student, s/he was not willing to participate in group activity. Nor is there any convincing evidence or testimony in the record to establish that the delivery of compensatory education services to the Student in his/her classroom, just after the end of the school day, would be practically difficult to manage at School A. Witness B guaranteed that the Student would be picked up from the school by OSSE after the Student's compensatory education work was over. Petitioners did not dispute this contention. Finally, Petitioners raised concerns about the Student being tired late in the day. However, a close review of the Mother's testimony revealed that these concerns related mainly to the Student's

inability to function academically after s/he arrived at home after school, not when s/he was still in school.

In retrospect, Hearing Officer Seat's choice to order an evaluation of the Student before ordering compensatory education seems wise. Without such an order, the Student might have received a package of authorizations for outside tutoring and related services that might have been difficult for the Student to access. Instead, under Witness B's plan, the Student will receive an individualized compensatory education program that is delivered at the school where s/he is comfortable, with the accommodations that s/he needs, and very possibly by the teachers and service providers who already service the Student during the school day.

VII. Order

As a result of the foregoing:

1. The Student is awarded 228 hours of compensatory tutoring, fifteen hours of compensatory speech-language pathology, ten hours of compensatory occupational therapy, and ten hours of compensatory physical therapy;
2. In furtherance of this compensatory education award, OSSE shall deliver these services to the Student as follows: 1:1 tutoring/behavioral support services in two sessions per week for thirty minutes per session; 1:1 speech-language pathology for thirty minutes per week; 1:1 occupational therapy for thirty minutes per week; and 1:1 physical therapy for thirty minutes per week;
3. The Student's right to services shall continue until all the services referenced in Order #1 are used;

4. Services shall be delivered to the Student in the Student's classroom at School A at/after the end of the school day;
5. OSSE shall make every effort to staff the additional 2.5 hours per week of services with the same providers who regularly service the Student during the school day. If such providers are unavailable after the school day, OSSE shall provide the Student with qualified, licensed providers in their stead;
6. All other requests for relief are denied.

Dated: October 30, 2023

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney C, Esq.

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 USC Sect. 1415(i).

Dated: October 30, 2023

Michael Lazan
Impartial Hearing Officer