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 Office of the State Superintendent of Education
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OSSE
 Office of Dispute Resolution
 September 29, 2014

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS” and/or “LEA”)</p> <p>&</p> <p>Office of the State Superintendent of Education</p> <p>(“OSSE” and/or “SEA”)</p> <p>Respondents.</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p>Hearing Date: September 15, 2014</p> <p style="text-align: right;">E:</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on September 15, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student is a _____ child with an intellectual disability (“ID”) who receives special education and related services pursuant to IDEA. In April 2014 the student began attending a full time special education day school (“School A”) with District of Columbia Public Schools (“DCPS”) funding. DCPS is the local education agency (“LEA”) for the student.

From the time she began attending School A the student received transportation from her home to school in the morning and from school to an afterschool program in the afternoon. Transportation services are operated by OSSE, the State Education Agency or (“SEA”).

The student was deemed eligible to receive extended school year (“ESY”) services and was to begin attending ESY at School A on July 1, 2014. Petitioner asserted that on July 1, 2014, she was notified by OSSE that a new policy required the student be picked up and returned to the same address and as a result she would not be dropped off at her afterschool program. Consequently, the parent kept the student home until the issue was resolved and the student began being dropped off from ESY at her afterschool program.

Petitioner filed this due process complaint on July 16, 2014, asserting the student had been denied a free appropriate public education (“FAPE”) as a result of missing four days of school due to DCPS and/or OSSE failing to provide the student transportation services. Petitioner seeks compensatory education for the student in the form of tutoring.

DCPS filed a timely response to the complaint on July 24, 2014. DCPS denied any alleged violation(s) or denial of a FAPE. DCPS asserted that OSSE manages bus operations and provides transportation and because the complaint solely concerns allegations regarding the provision of transportation rather than any proposed or refused action by the LEA thus the Hearing Officer should dismiss Petitioner’s claim against DCPS. In the alternative, DCPS asserted that any alleged failure to implement the student’s services is *de minimis* and fails to rise to the level of FAPE deprivation. DCPS asserted that transportation services were available to the student from the outset of ESY, which began for the student on July 1, 2014. DCPS acted expeditiously by submitting a transportation request to OSSE to change the student’s route as the parent requested and the change in was in place by Monday, July 7, 2014.

OSSE filed a timely response to the complaint on July 24, 2014. OSSE denied any alleged violation(s) or denial of a FAPE. OSSE further stated in its response that as the

SEA, OSSE operates student transportation services but the LEA is responsible for ensuring the provision of services. OSSE asserted that its division of specialized education sent notifications to parents about the new transportation policy that would take effect at the start of SY 2014-2015, *not* during the ESY/summer school term. When Petitioner contacted OSSE about the policy provisions concerning different morning and afternoon addresses OSSE staff told her to contact the LEA so that an updated transportation request form could be submitted. OSSE asserts that it has never refused to provide transportation to the student for ESY and that OSSE arrived to the student's home to provide transportation for ESY on July 1, 2014.

A resolution meeting was held on July 24, 2014. The case was not resolved. The parties did not mutually agree to proceed to hearing. The 45-day period began on August 15, 2014, and ends (and the Hearing Officer's Determination ("HOD") is due) on September 27, 2014.

The Hearing Officer convened a pre-hearing conference on August 4, 2014, and issued a pre-conference order outlining, *inter alia*, the issues to be adjudicated. OSSE submitted a motion for the decision as to the SEA to be issued within the timeframe as the LEA. Neither of the other parties objected and the Chief Hearing Officer granted the motion. The HOD as to all parties is due on September 27, 2014.

ISSUES:²

1. Whether the LEA has denied the student a FAPE by failing to provide the student with appropriate transportation to attend ESY 2014 from July 1, 2014, through July 7, 2014.
2. Whether the SEA has denied the student a FAPE by failing to provide the student with appropriate transportation to attend ESY 2014 from July 1, 2014, through July 7, 2014.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 8, DCPS Exhibits 1 through 7 and OSSE Exhibits 1 through 8) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

FINDINGS OF FACT:³

1. The student is a child with a disability pursuant to IDEA with an ID classification. The student currently attends School A, a full time special education day school, with DCPS funding. DCPS is the student's LEA. (Parent's testimony, Petitioner's Exhibit 2-1)
2. The student began attending School A in April 2014. Prior to attending School A the student attended another full time special education school ("School B"). While the student was attending School B she was provided transportation pursuant to her IEP from her home to school in the morning and from school to an afterschool program in the afternoon. (Mother's testimony, Petitioner's Exhibit 2-18)
3. The student was deemed eligible to receive ESY services and was to begin attend ESY at School A on July 1, 2014. (Mother's testimony, Petitioner's Exhibit 2-18, 2-20)
4. The bus showed up at the student's home to transport the student to ESY on the July 1, 2014. (Stipulation)
5. On July 1, 2014, the school bus came to the student's home to pick her up. It was a different bus driver than had previously been transporting the student. The bus driver told the parent there was new policy that required the student be picked up from and dropped off to the same address and the student would not be dropped off at her afterschool program. As result the parent kept the student at home because no one would be at the student's home in the afternoon to receive her because both of the student's parents would be working during that time. (Mother's testimony)
6. The parent then called OSSE transportation parent call center and reported what she had been told by the bus driver and then reported the incident to her attorney. The DCPS liaison for School A spoke with the parent and indicated the problem would be resolved so the student could be provided transportation to her afterschool program. By Monday, July 7, 2014, the problem was resolved by DCPS and OSSE and transportation was available for the student from home in the morning and to her afterschool program in the afternoon. However, the student missed four days of school during which the student's mother kept the student at her home with her father. The student's father took off work to stay at home with the student during the four days. One of the four days the student was kept home (Monday, July 7, 2014) the transportation was available to the student from home in the morning and to her afterschool program in the afternoon. (Mother's testimony, DCPS Exhibit 6, OSSE Exhibits 2, 6, 7)
7. During the days the student stayed with her father he occasionally took the student with him on errands that he had to accomplish during the day. The father could not take off

³ The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

work early in order to be at home when the student returned from school if the parent had chosen to send the student to ESY for the four days rather than keep her at home.
(Father's testimony)

8. The student's mother believes the student missing four days of ESY was significant because of the severity of her developmental delay. The student's parents wants the four days she missed to be made up with 25 hours of tutoring in reading, writing and math.
(Mother's testimony)
9. The student's IEP has ESY goals and prescribes that ESY services were to be provided from July 1, 2014, through on July 30, 2014. The student was be provided 18.5 hours of specialized instruction per week and 30 minutes each of related services per week: occupational therapy, speech language pathology, and behavioral support. (Petitioner's Exhibit 2-20)
10. The student attended ESY at School A from July 8, 2014, through August 4, 2014. (Stipulation)
11. The student was provided two additional days of ESY than the student's IEP prescribes: on August 1, 2014, and August 4, 2014. (Petitioner's Exhibit 2-20, DCPS Exhibit 1)
12. During ESY the student was provided ESY services and made progress toward her ESY IEP goals. (DCPS Exhibits 2, 3, 5)
13. Petitioner's educational advocate requested academic tutoring (25 hours) as compensatory education for the student missing four days of ESY. (Witness 1's testimony, Petitioner's Exhibit 7)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.⁴ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Whether the LEA has denied the student a FAPE by failing to provide the student with appropriate transportation to attend ESY 2014 from July 1, 2014, through July 7, 2014.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student's was denied a FAPE, by either respondent, DCPS or OSSE, by her not being provided transportation services to ESY from July 1, 2014, through July 7, 2014.

Although the respondents as part of their defenses asserted that the other respondent was responsible for the transportation not being provided as the parent the parent expected at the start of ESY on July 1, 2014, the Hearing Officer did not conclude that either respondent's actions or inactions in this regard resulted in a denial of a FAPE to the student. The Hearing Officer concludes that there was insufficient harm to the student demonstrated to sustain Petitioner's burden of demonstrating a denial of a FAPE to the student.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (*quoting Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch .Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

Petitioner asserts that the student missed IEP services that should have been provided the student for the four days the parent kept the student home from ESY because the transportation to the student's afterschool program was not being provided.

The evidence demonstrates that the school bus came to the student's home on July 1, 2014, and as result of the parent being informed by the bus diver that the student would not be dropped off

⁴ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

at her afterschool program the parent kept the student home and sought to resolve the issue through DCPS and OSSE. The evidence demonstrates that the problem was resolved by Monday, July 7, 2014, and that on that day the transportation was available just as the parent sought. However, there was no explanation offered by Petitioner as to why the student was kept home on July 7, 2014. As result the Hearing Officer concludes that the student missed three days of school (July 1, 2014, July, 2, 2014, and July 3, 2014) rather than four days because transportation was not yet available to the student's afterschool program.

The student's IEP prescribes that the student's ESY services are to be provided from July 1, 2014, through July 30, 2014. However, the evidence also demonstrates the student was provided two additional days of ESY services beyond what her IEP prescribes.⁵ Consequently, the Hearing Officer concludes based upon the evidence that the student missed a single day of ESY services as result of the parent keeping the student home because the transportation services to her afterschool program had not been provided.

The evidence demonstrates that on the days the student attended ESY she was consistently provided services and made progress toward her ESY goals. There was no specific credible evidence provided from which the Hearing Officer could conclude that the student was harmed by missing a single day of ESY. There was no evidence the student missed any related services or that any instruction she missed caused her any specific detriment.

Although the student's parent and educational advocate testified that the student's deficits are severe and that 25 hours of tutoring is desired to compensate the student, the Hearing Officer was not convinced by this testimony. First, because there testimony was based on their presumption the student had actually missed four of days of services, and second, there was no documented harm to the student in contrast to the progress notes and services logs that demonstrated the student made progress during ESY. Absent the lack more specific evidence of harm the Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence of a denial of a FAPE to the student. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006), *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007).

ISSUE 2: Whether the SEA has denied the student a FAPE by failing to provide the student with appropriate transportation to attend ESY 2014 from July 1, 2014, through July 7, 2014.

Conclusion: As stated above, Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student's was denied a FAPE, by either respondent, DCPS or OSSE, by her not being provided transportation services to ESY from July 1, 2014, through July 7, 2014. For the forgoing reasons as articulated under issue #1 regarding the LEA, the Hearing Officer also concludes that Petitioner did not sustain the burden of proof as to OSSE.

⁵ Although Petitioner asserted that School A's ESY program included these days, there was no evidence that this was the case or as to whether School A's program was same or different that that of DCPS. Consequently, the Hearing Officer concluded that the student's IEP was the determining factor in whether and how many days the student missed.

ORDER:⁶

The due process complaint in this matter is hereby dismissed with prejudice and all other requested relief is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/s/ Coles B. Ruff

Coles B. Ruff, Esq.

Hearing Officer

Date: September 27, 2014

⁶ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.