

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
October 8, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: October 8, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Office of Dispute Resolution,
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). In her Due Process Complaint, Petitioner alleges that Student has been denied a free appropriate public education (FAPE) by the failure of Respondent District of Columbia Public Schools to fully implement Student’s Individualized Education Plans (IEPs) and by DCPS’ curtailment of Student’s school transportation services.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on July 29, 2014, named DCPS as Respondent. The parties met for a resolution session on August 28, 2014 and did not reach an agreement. On August 26, 2014, I convened a telephone prehearing conferences with counsel to discuss the hearing date, issues to be determined and other matters. The 45-day period for issuance of this decision began on August 29, 2014.

The due process hearing was held before this Impartial Hearing Officer on September 19, 2014 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for Petitioner made an opening statement. Petitioner testified and called EDUCATIONAL ADVOCATE as witness. DCPS called no witnesses. Petitioner's Exhibits P-1 through P-36 were admitted into evidence without objection, with the exceptions of Exhibit P-20, which was admitted over DCPS' objection, and of pages 1 and 2 of Exhibit P-1, to which DCPS' objection was sustained. Respondent's Exhibits R-1 through R-8 were admitted into evidence without objection. Counsel for both parties made closing arguments. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The following issues for determination were certified in the August 26, 2014

Prehearing Order:

- Whether DCPS denied the student a FAPE by failing to implement his IEP provisions for related behavioral support and/or counseling services during the 2012-2013 and 2013-2014 school years;
- Whether DCPS denied the student a FAPE by failing to provide transportation services in his February 25, 2014 IEP.

For relief, Petitioner seeks an order requiring DCPS to revise Student's IEP to provide transportation services and reimbursement from DCPS for her transportation expenses for Student after February 25, 2014. Petitioner also seeks an award of compensatory education for alleged denials of FAPE resulting from DCPS' failure to implement behavioral support services required by Student's IEPs.

FINDINGS OF FACT

After considering all of the evidence, as well as the argument of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student, an AGE youth, resides with Mother in the District of Columbia. Testimony of Mother. Student is a "child with a disability" as defined by the IDEA and is eligible for special education and related services under the primary disability classification Multiple Disabilities (MD), based upon concomitant disorders Learning Disability (LD) and Other Health Impairment - Attention Deficit Hyperactivity Disorder (OHI-ADHD). Testimony of Mother, Exhibit R-3.
2. Student is currently enrolled in CITY SCHOOL 2. For the 2013-2014 school year, Student was enrolled in GRADE at City School 2. For the 2012-2013 School Year, Student was enrolled in CITY SCHOOL 1. Testimony of Mother.
3. Student has had an IEP since he was in elementary school. Testimony of

Mother. His March 6, 2012 City School 1 IEP included annual goals for Mathematics, Reading, Written Expression, and Emotional, Social and Behavioral Development. The IEP provided Student 120 minutes per day of Special Education Services, including 60 minutes per day outside general education and 60 minutes per day in general education, and 120 minutes per month of Behavioral Support Services. The IEP stated that Student required transportation services by bus. Exhibit P-6.

4. Student's January 29, 2013 IEP at City School 1 reduced his Special Education Services to 7.5 hours per week, including 2.5 hours per week outside general education. His Behavioral Support Services were continued at 120 minutes per month. This IEP also stated that Student required transportation services by bus. Exhibit P-5.

5. Student's IEP was revised at City School 2 on January 8, 2014. The City School 2 IEP team reduced Student's Special Education Services to 6 hours per week, including 3.5 hours outside general education and continued his Behavioral Support Services at 120 minutes per month. The January 8, 2014 IEP also stated that Student required transportation services by bus. Exhibit P-4. The IEP team's justification for special education transportation services was that Student was accessing FAPE outside of neighborhood school. Exhibit P-3.

6. Student's IEP team met again at City School 2 on February 25, 2014 to consider amendments to his IEP. Mother did not attend this meeting. The IEP team increased Student's Special Education Services to 8 hours per week, including 5.5 hours per week outside general education, and doubled his Behavioral Support Services to 240 minutes per month. DCPS proposed to increase Student's Behavioral Support Services because, based upon a Functional Behavioral Assessment, classroom observations and discipline referrals, Student's behavior had not improved under his prior IEP. Exhibit

P-2.

7. Student's neighborhood school is CITY SCHOOL 3, which is less than one mile from his home. Hearing Officer Notice. Student is enrolled in City School 2, where his IEP is implemented. City School 2 is approximately 5 miles from his home.

Testimony of Mother, Exhibit P-30.

8. The February 25, 2014 IEP team determined that under new guidelines of the D.C. Office of the State Superintendent of Education (OSSE), Student was no longer eligible for transportation services as an IEP related service. Exhibit P-2. Because Mother did not attend the February 25, 2014 IEP meeting, she only learned that Student would no longer receive transportation services when, subsequent to the IEP meeting, the school bus stopped picking him up at his home. Testimony of Mother.

9. Student is unable to manage public transportation by himself because it is too dangerous for him. Mother attempted having Student use public transportation for school, including bus and metro, but he got lost and got into fights. Since DCPS stopped providing Student school transportation as an IEP related service, Mother has had to drive Student to school. Mother has driven student to and from school every day.

Testimony of Mother.

10. In a Functional Behavioral Assessment (FBA) conducted in spring 2014, a DCPS school social worker reported that Student's "behavior significantly impacts interpersonal relationships, ability to regulate mood, anger, frustration, disrespecting staff and peers, refusing to follow directions, disrupting the class, walking the hallway impedes academic success (*sic*)". The social worker reported that Student requires a small structured, non-stimulating and non-distracting classroom environment with clear behavior expectations using both pro-active and reactive strategies to help

decrease the likelihood of maladaptive behaviors. Exhibit P-26.

11. During the 2012-2013 school year, Student's IEPs provided that he would receive 120 minutes per month of behavioral support counseling services. He never received more than 60 minutes of counseling in any month, and in several months during this period, he received only 30 minutes of counseling. For that school year, he received some 360 minutes of the approximately 1,200 minutes of counseling specified in his IEP. The social worker reported that Student was unavailable for services for approximately half of the sessions, either because he could not be found in the school or because he refused services. Exhibit P-1.

12. During the 2013-2014 school year, Student's IEPs provided that he would receive 120 minutes per month of counseling services, until February 25, 2014 when his Behavioral Support Services were increased to 240 minutes per month. Student received most of these services during the school year. The Service Trackers report that for the 2013-2014 school year, Student received some 1,400 minutes of the approximately 1,680 minutes of counseling services specified in his IEP. He missed some 240 minutes of counseling when he was suspended from school in October 2013 and in January and April 2014. Exhibit P-1.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and the argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

1. Did DCPS deny Student a FAPE by failing to implement his IEP provisions for related behavioral support and/or counseling services during the 2012-2013 and 2013-2014 school years?

Petitioner first alleges that DCPS denied Student a FAPE by failing to implement his IEP requirement for 120 minutes per week of Behavioral Support Services (240 minutes per week after February 25, 2014) required by his DCPS IEPs. DCPS attributes its failure to provide all of the specified services in school year 2012-2013 to Student's unavailability. DCPS maintains that in the 2013-2014 school year, Student was provided his IEP-specified Behavioral Support Services.

The standard for failure-to-implement claims, used by the courts in this jurisdiction, was formulated by the Fifth Circuit Court of Appeals in *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir.2000). This standard requires that a petitioner "must show more than a *de minimis* failure to implement all elements of [the student's] IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP" in order to prevail on a failure-to-implement claim. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268 (Aug. 27, 2013) (quoting *Bobby R.*, 200 F.3d at 349). Courts applying this standard 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. *Id.* (internal quotation and citation omitted.)

During the 2012-2013 school year, Student's IEPs provided that he would receive 120 minutes per month of Behavioral Support counseling services. That year, he never received more than 60 minutes of counseling in any month, and in several months during this period, he received only 30 minutes of counseling. For the school year, he received some 360 minutes of the approximately 1,200 minutes of counseling specified in his IEP. The school social workers reported on Service Tracker forms that Student was unavailable for services for approximately half of the sessions, either because he could not be found in the school or because he refused services. The social workers' reports that Student was unavailable do not excuse the high proportion of counseling sessions that he missed for the school year. Under the IDEA, Local Education Agencies ("LEAs") must demonstrate diligence in addressing a disabled child's failure to attend school or to participate in special education and related services. In *Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F.Supp.2d 18 (D.Me.2005), the court considered a case of a student who had an "extensively documented" array of difficulties, particularly problems with attendance. The court held that the LEA's IEP, which failed to address in some fashion student's persistent absence and tardiness, could not be "adequate and appropriate." *Id.* at 34. *See, also, Lauren P. ex rel. David P. v. Wissahickon School Dist.*, 2007 WL 1810671, 7 (E.D.Pa.2007), *rev'd in part on other grounds*, 310 Fed.Appx. 552, 2009 WL 382529 (3rd Cir. 2009) (LEA's inconsistency of approach to Student's behavioral problems, including lateness, absences, and failure to complete assignments, resulted in denial of FAPE.) Neither the social workers nor any other DCPS witness testified at the due process hearing and there was no evidence that during the 2012-2013 school year, City School 1 endeavored to address Student's abysmal

attendance at the counseling sessions. I conclude that by providing less than a third of the Behavioral Support Services specified in Student's IEPs during the 2012-2013 school year, DCPS failed to implement substantial provisions of the IEPs and that, as a result, Student was denied a FAPE.

Student matriculated to City School 2 for the 2013-2014 school year. During that year, City School 2 provided some 1,400 minutes of the approximately 1,680 minutes of Behavioral Support Services specified by Student's IEPs. Student missed over 200 minutes of services when he was suspended from school. I find that for the 2013-2014 school year, Petitioner has not demonstrated that DCPS failed to implement substantial or significant provisions of his IEPs.

2. Did DCPS deny student a FAPE by failing to provide transportation services in his February 25, 2014 IEP?

Petitioner next contends that DCPS has denied Student a FAPE by amending his IEP on February 25, 2014 to curtail school transportation services. DCPS responds that under a new OSSE policy, Student was no longer eligible for special education transportation services. The IDEA requires an LEA to transport students with disabilities to and from school if determined, through the IEP process, to be reasonably calculated to enable the student to receive education benefits. *See District of Columbia v. Ramirez*, 377 F.Supp.2d 63, 69 (D.D.C.2005). A student's IEP team is responsible for determining whether transportation between school and home is necessary for the student to receive FAPE, and, if so, the student must receive the necessary transportation and supports at no cost to the parents. *See Department of Education, Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46576 (August 14, 2006).

City School 2 is located some five miles from Student's home. Prior to the February 25, 2014 IEP amendment, Student's IEP team had determined that school transportation was necessary because Student was accessing FAPE outside of his neighborhood school. According to the testimony of the parent, Student is unable to use public transportation to travel to and from City School 2 because it is too dangerous. Mother testified that she tried to teach Student to use public transportation but was not successful. On one occasion, when Student tried to use public transportation to return from school, he said he got lost and did not make it home until 10:00 p.m. Mother testified that she always makes sure that someone is with Student when he is out in public. Based upon Mother's testimony which was not rebutted by DCPS, I find that Student is unable to safely travel to and from school without supervised transportation. Without transportation services, there can be no reasonable expectation that Student "will reap any benefit from the services prescribed in his IEP, since he cannot be in school to receive them." *See Ramirez, supra*. I find, therefore, that the removal of transportation services from Student's IEP resulted in a denial of FAPE.²

Remedy

In this decision, I have found that DCPS denied Student a FAPE by failing to implement a substantial part of his IEP Behavioral Support Services during the 2012-2013 school year and by removing school transportation services in a February 25, 2014

² This finding is fully consistent with the OSSE Special Education Transportation Policy which states that, "[t]he intent behind special education transportation services is to ensure that children with disabilities receive transportation when it is necessary to enable the child to receive FAPE." *See OSSE, Special Education Transportation Policy*, updated Nov. 6, 2013 (Exhibit R-8-7). *See, also, District of Columbia v. Ramirez*, 377 F.Supp.2d 63, 68 (D.D.C.2005) (While DCPS is free to fulfill its [transportation] responsibilities under the IDEA in a manner of its own choosing, it cannot choose a manner that fails to satisfy the various requirements of the IDEA and regulations issued pursuant thereto.)

amendment to Student's IEP. For relief, Petitioner seeks compensatory education and reimbursement of her expenses for driving Student to and from school.

i. Compensatory Education

The IDEA gives Hearing Officers "broad discretion" to award compensatory education as an "equitable remedy" for students who have been denied a FAPE. *See Reid v. District of Columbia*, 401 F.3d 516, 522-23 (D.C.Cir. 2005). A compensatory education award must "rely on individualized assessments" after a "fact specific" inquiry. *Id.* "In formulating a new compensatory education award, the hearing officer must determine 'what services [the student] needs to elevate him to the position he would have occupied absent the school district's failures.'" *Stanton v. Dist. of D.C.*, 680 F.Supp.2d 201, 206 (D.D.C. 2010) (quoting *Anthony v. District of Columbia*, 463 F.Supp.2d 37, 44 (D.D.C. 2006); *Reid*, 401 F.3d at 527.) *See, also, e.g., Turner v. District of Columbia*, 952 F.Supp.2d 31 (D.D.C.2013).

Petitioner has proposed a compensatory education plan for Student (Exhibit P-34), devised by Educational Advocate. This plan asserts that progress reports from the 2012-2013 school year indicate no progress on Student's ability to control impulsive behaviors. Educational Advocate recommends that Student receive compensatory education in the form of 50 hours of independent counseling services, 40 hours of independent tutoring in math and 25 hours of independent tutoring in reading and written language.³

A compensatory education award must be reasonably calculated to provide the

³ Educational Advocate also asserts that had Student received his IEP Behavioral Support Services in school years 2012-2013 and 2013-2014, he would have obtained academic grades of C or better. I find this contention to be purely speculative. For the 2013-2014 school year, when Student received most of his Behavioral Support Services, he still earned a D or F in four of eight subjects. *See Exhibit P-35.*

educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *See Gill v. District of Columbia*, 770 F.Supp.2d 112, 116-117 (D.D.C.2011), *aff'd.*, *Gill v. District of Columbia*, 2011 WL 3903367, 1 (D.C.Cir. Aug. 16, 2011). Educational Advocate's recommendation assumes that DCPS failed to implement Student's Behavioral Support Services in both the 2012-2013 and 2013-2014 school years. However, Petitioner has not shown that DCPS failed to implement substantial or significant provisions of Student's IEP in the 2013-2014 school year. Neither has Petitioner shown that independent academic tutoring, as proposed by Educational Advocate, would be reasonably calculated to provide the educational benefits that would have accrued had Student received all of his IEP Behavioral Support Services in school year 2012-2013. Notwithstanding, a student is not required "to have a perfect case to be entitled to compensatory education." *See Cousins v. District of Columbia*, 880 F.Supp.2d 142, 148 (D.D.C.2012) (citations omitted.) Taking into account the testimony of Educational Advocate that Student missed some 14 hours of Behavioral Support Services over the 2012-2013 school year, as well as my finding that Petitioner has not established her failure-to-implement claim for the 2013-2014 school year, I will reduce Educational Advocate's recommendation for compensatory counseling by two-thirds and will order DCPS to provide Student 17 hours of additional individual counseling services as compensatory education. I decline to include academic tutoring in the compensatory education award.

ii. Transportation Reimbursement

Petitioner seeks reimbursement for her mileage expenses incurred driving Student to and from school, following the removal of transportation services from Student's IEP on February 25, 2014. The courts have recognized that reimbursing

parents for transportation expenses for their child, when there has been an IDEA violation, may be appropriate. *See, e.g., Gefre v. Leola School Dist. 44-2*, 2009 WL 3147645, 9 (D.S.D., Sept. 25, 2009) (collecting cases); *Malehorn on Behalf of Malehorn v. Hill City School Dist.*, 987 F.Supp. 772, 780 (D.S.D.1997) (holding that the parents were entitled to reimbursement for the transportation they provided until the new IEP came into effect); *Moubry v. Independent School Dist. 696, Ely, Minn.*, 9 F.Supp.2d 1086, 1107 (D.Minn.1998) (if the parents incurred expenses in transporting the plaintiff to school, when a proper IEP would have provided free transportation directly to and from his home, the IDEA would authorize an award of transportation expenses). Here Mother's testimony was undisputed that she drove Student to and from school on a daily basis after February 25, 2014. I find that she is entitled to DCPS reimbursement of her school transportation expenses for Student at the mileage rate authorized by OSSE for travel in personally owned vehicles.⁴

ORDER

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

ORDERED:

1. Within 10 school days of entry of this order, DCPS shall ensure that Student's IEP is revised to provide that Student requires special education transportation services and shall promptly arrange for Student's transportation to and from school;
2. Upon receipt of an appropriate certification by Petitioner, DCPS shall promptly reimburse Petitioner for her expenses incurred driving Student to and from school after February 25, 2014, based upon OSSE's applicable personally owned vehicle mileage reimbursement rate. DCPS shall reimburse Petitioner for her certified mileage expenses for each school day

⁴ *Cf. Division of Specialized Instruction, Nonpublic Payment Unit Revised Procedures and Guidance, Version 1.3 April, 2013 at 25. (A personally owned vehicle will be reimbursed in accordance with the GSA mileage rates as documented on their website.)*

since February 25, 2014 that Student was present at school.

3. As compensatory education, DCPS shall provide Student 17 hours of individual counseling services by a qualified DCPS counselor or independent provider. These services shall be in addition to Student's current IEP Behavioral Support Services and shall be provided on a schedule as may be reasonably agreed between Petitioner and DCPS. The compensatory counseling services shall be used before the end of the 2014-2015 school year; and
4. All other relief requested by the Petitioner herein is denied.

Date: October 8, 2014

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).