

DC Office of the State Superintendent of Education

Office of Compliance & Review

State Enforcement & Investigation Division

STUDENT HEARING OFFICE

Van Ness Elementary School

1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003

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Impartial Due Process Hearing Officer

CONFIDENTIAL

OSSE
STUDENT HEARINGS OFFICE
2009 SEP 23 AM 9:25

<u>In Re the Matter of:</u>)	
)	CASE NO.
Parent on behalf of Student *)	
)	
Petitioner,)	Complaint Date: 07/27/09
)	Hearing Date: 08/24/09
vs.)	
)	Hearing Site:
The District of Columbia Public Schools)	Van Ness Elementary School
)	1150 5th Street, S.E., 1st Floor
Respondent.)	Washington, D.C. 20003

HEARING OFFICER DETERMINATION

Petitioner's Attorney: Domiento Hill, Esq.
James E. Brown & Associates, PLLC
1220 L Street, N.W., Suite 700
Washington, D.C. 20005

Respondent's Attorney: Daniel Kim, Esq.
Assistant Attorney General
Office of the Attorney General as Counsel
for D.C. Public Schools
825 North Capitol Street, N.E., 9th Floor
Washington, D.C. 20002

*Personally identifiable information is attached as an Index to this decision and must be removed prior to public distribution.

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JURISDICTION

The due process hearing was convened and this Hearing Officer Determination ("HOD") and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA; 34 Code of Federal Regulation ("C.F.R.") Part 300; Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and DC Code Title 38, Subtitle VII.

INTRODUCTION

On 07/27/09, an Administrative Due Process Complaint Notice ("Complaint") was filed by the parent ("Parent" or "Petitioner") on behalf of the year old student ("Student"), alleging that District of Columbia Public Schools ("DCPS") denied Student a free appropriate public education ("FAPE") in violation of IDEIA when DCPS failed to provide transportation services prescribed by Student's Individualized Education Program ("IEP") and when DCPS failed to provide Extended School Year ("ESY") services. Petitioner asserts that Student is entitled to compensatory education due to the denials of a FAPE.

THE DUE PROCESS HEARING

The due process hearing convened and concluded on 09/16/09 at the Van Ness Elementary School located at 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003.

Petitioner was represented by Domiento Hill, Esq. ("Petitioner's Attorney") and DCPS was represented by Daniel Kim, Esq. ("DCPS' Attorney"). Petitioner participated in the due process hearing in person.

Both parties declined to discuss settlement prior to the commencement of the due process hearing.

Disclosures:

Petitioner's Five-Day Disclosure letter dated 09/09/09 contained Petitioner's Exhibits #1-49. Petitioner's Exhibits #1-15 and #39-49 were admitted into evidence without objection. Petitioner withdrew Petitioner's Exhibits #16-38.

DCPS' Disclosure Statement dated 08/25/09 contained DCPS' Exhibits #1-4. DCPS' Exhibits #1-4 were admitted into evidence without objection.

Witnesses:

Petitioner testified as the sole witness for Petitioner.

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DCPS presented no witnesses.

Issues For Litigation:

- (1) Whether DCPS denied Student a FAPE by failing to provide transportation services for ESY services from 07/01/09-07/24/09?
- (2) Whether DCPS denied Student a FAPE by failing to provide Extended School Year ("ESY") services from 07/01/09-07/24/09?
- (3) Whether Student is entitled to compensatory education for DCPS' failure to provide Student with transportation services and ESY services from 07/01/09-07/24/09?

Relief Requested by Petitioner

- (1) A finding that DCPS failed to provide Student a FAPE by failing to provide Student with transportation services from 07/01/09-07/24/09;
- (2) A finding that DCPS failed to provide Student a FAPE by failing to provide Student's ESY services from 07/01/09-07/24/09;
- (3) DCPS to provide Student with compensatory education services in the amount of 50 hours of tutoring services, 2.5 hours of psychological counseling services, and 2.5 hours of speech and language services; and
- (4) Any other relief deemed just and reasonable.

Stipulations

- (1) At the 05/05/09 Multidisciplinary Team ("MDT") meeting, the MDT determined that Student required a more restrictive environment.
- (2) On 06/30/09, the Principal of _____ provided signature authority for Student to receive Extended School Year ("ESY") services.

FINDINGS OF FACT

#1. On 05/05/09, Student attended _____ a charter school functioning as its own Local Education Agency ("LEA"). (*Petitioner's Exhibit #8, Memorandum from OSSE dated 05/05/09; Public Charter School LEA Status for Special Education (2008-2009), OSSE website*). On 05/05/09, Student was a special education student with a disability classification of Multiple Disabilities ("MD")/Other Health Impairment ("OHI") (ADHD)/Learning Disability ("LD"). (*Petitioner's Exhibit #14, IEP dated 05/05/09*).

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#2. On 05/05/09, the MDT at _____ met and determined that Student required a more restrictive environment (*Stipulation #1; Petitioner's Exhibit #7, MDT Meeting Notes dated 05/05/09*); that the Office of the State Superintendent of Education ("OSSE") would issue a notice of placement within 10 business days; that transportation services for the new placement was OSSE's responsibility; and that the transportation data form would be completed by the Special Education Coordinator ("SEC") at _____ and forwarded to the OSSE Department of Special Education Change in Placement Coordinator who would complete the bottom of the transportation form and make sure that DCPS transportation was arranged. (*Petitioner's Exhibit #7, MDT Meeting Notes dated 05/05/09; Petitioner's Exhibit #8, OSSE Memorandum dated 05/05/09*). An OSSE representative participated in the 05/05/09 MDT meeting, but a DCPS representative did not. (*Testimony of Petitioner; Petitioner's Exhibit #7, MDT Meeting Notes dated 05/05/09*).

#3. OSSE-Department of Special Education's Memorandum dated 05/05/09 specifically stated that it was the responsibility of _____ as the LEA, to submit to the Transportation Department within DCPS (attention: Maureen Anderson) a transportation data form that included the name of the new school and pickup locations. (*Petitioner's Exhibit #8, OSSE Memorandum dated 05/05/09*).

#4. On 06/17/09, the OSSE Change in Placement Coordinator issued a memo indicating that the attached Notice of Location Assignment for Student replaces the DCPS Prior to Action Notice form; however, the memo indicated that the DCPS Prior to Action Form would also be issued. (*Petitioner's Exhibit #9, Memo from Avni Patel dated 06/17/09*).

#5. On 06/17/09, a Prior Notice was issued on a DCPS standard form indicating that Student's placement was changed from _____ to _____, Montgomery County, MD; however, the form noted that a request for further information should be addressed to the OSSE Change in Placement Coordinator, Avni Patel. (*Petitioner's Exhibit #9, MDT Prior Notice dated 06/17/09*).

#6. On 06/24/09, Petitioner consented to an IEP Addendum for ESY Services consisting of 90 minutes/day in Reading, 90 minutes/day in Mathematics, and 90 minutes/day in Written Expression, for 5 weeks beginning on or about 07/03/09, with ESY services to be provided in a placement different from the regular school year. (*Petitioner's Exhibit #10, IEP Addendum dated 06/24/09*).

#7. On 06/29/09, the SEC at _____ provided a Student Transportation Data Form to _____ via facsimile at (202) 654-6065, requesting transportation services for Student to attend _____, Montgomery County, MD from 07/01/09 through 07/24/09, and the form contained Student's home address as well as Petitioner's name and telephone number. (*Petitioner's Exhibit #48, PCS Student Transportation Data Form dated 06/29/09 with facsimile confirmation dated 06/29/09*).

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#8. On 06/30/09, the Principal of _____ provided signature authority for Student to receive 2009 ESY services at _____, Montgomery County, MD, with bus transportation. (*Stipulation #2; Petitioner's Exhibit #10, ESY Service Form dated 06/30/09*).

#9. Student did not participate in ESY services at Montgomery County, MD from 07/01/09 through 07/24/09 because bus transportation never came to Student's home to take Student to and from school. (*Testimony of Petitioner*).

DISCUSSION AND CONCLUSIONS OF LAW

"The burden of proof in an administrative hearing...is properly placed upon the party seeking relief." *Schaffer v. Weast, 44 IDELR 150 (2005)*. "Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. 3030.3.

The purpose of IDEIA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1. Furthermore, public agencies are tasked with this responsibility, and public agencies are defined as the State educational agency ("SEA"), the Local educational agency ("LEA"), educational service agencies, and public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA. 34 C.F.R. 300.2(a), 300.2(b).

Issue #1 – Whether DCPS failed to provide Student with transportation services, thereby denying Student a FAPE? Petitioner alleges that on 05/05/09, the MDT determined that _____ was no longer an appropriate placement for Student, and that Student would need transportation services to a new school. Petitioner also alleges that the MDT determined that Student would be provided with 2009 ESY services, and subsequent to the 05/05/09 MDT meeting, DCPS issued a Prior Notice of Placement to _____, Montgomery County, MD along with a transportation data form. Petitioner further alleges that DCPS failed to provide Student with transportation services to and from the _____ for ESY services from 07/01/09 – 07/24/09.

DCPS argues that DCPS was not responsible for providing bus transportation services to Student because at the time that ESY services were authorized and a transportation data form was submitted to the DCPS transportation department, Student was not attending a public school under the authority and control of DCPS. DCPS further argues that OSSE, as the public agency participating in the 05/05/09 MDT meeting, was responsible for Student's transfer from a charter school that was its own

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LEA, i.e., _____ to a school outside of the District of Columbia, i.e., _____ School, and that at no time was DCPS as a LEA, involved in the authorization of ESY services or the request for transportation for ESY services.

The LEA shall ensure that extended school year services are available as necessary to provide FAPE to a child with a disability. 5 D.C.M.R. 3017.1. On 05/05/09, OSSE, as part of the MDT, determined that Student needed a more restrictive environment than _____ that OSSE would issue a Notice of Placement; that _____ would submit to OSSE a transportation services data form as soon as a new placement was determined by OSSE; and that OSSE would be responsible for arranging transportation services for Student to attend a new placement. (*Finding of Fact #2*).

However, subsequent to the 05/05/09 MDT meeting, and after OSSE issued a Notice of Placement to _____ Montgomery County, MD (*Findings of Fact #4, #5*), 2009 ESY services were added to Student's IEP to begin on or about 07/03/09. On 06/24/09, Petitioner consented to Student receiving ESY services (*Finding of Fact #6*); on 06/29/09, the SEC at _____ submitted a Student Transportation Form to DCPS requesting transportation services for Student to attend _____, Montgomery County, MD from 07/01/09-07/24/09 with the form containing all pertinent data (*Finding of Fact #7*); and on 06/30/09, the Principal of _____ provided signature authority for Student to receive 2009 ESY services at the _____, Montgomery County, MD, with transportation services. (*Finding of Fact #8*). Transportation services include travel to and from school and between schools. 5 D.C.M.R. 3001.1.

The question to be answered is who was responsible for providing Student with transportation services for 2009 ESY services, i.e., DCPS, OSSE, or both? Pursuant to a memorandum issued by OSSE dated 05/05/09, transportation to Student's new placement was clearly the responsibility of OSSE; however, _____ was tasked by OSSE to submit the transportation data form to the transportation department within DCPS. (*Finding of Fact #3*).

34 C.F.R. 300.2(b) defines a public agency as a State educational agency (SEA), a local educational agency (LEA), educational service agency (ESA) and public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA. 5 D.C.M.R. 3001.1 defines the Local Education Agency ("LEA") in the District of Columbia as "any public agency having administrative control and direction of a public elementary or secondary school in the District of Columbia."

In the District of Columbia, "DCPS" is defined as the public local education system under the control of the Board of Education, and does not include public charter schools. 38 D.C. Code 2561.01(2). In the District of Columbia, "State education agency" or "SEA" means the Office of the State Superintendent of Education, or any successor agency that has primary responsibility for the state-level supervisory functions for special education that are typically handled by a state department of education or

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public instruction, a state board of education, a state education commission, or a state education authority.” 38 D.C. Code 2561.01(13).

In this case, there were generic forms in the record completed by either OSSE or that suggested that DCPS had the responsibility of providing transportation services for Student. The District of Columbia OSSE of Education Policy and Procedure for Placement Review, effective 10/01/08, states that:

- “When a DCPS or District Charter School (DCPS-LEA) IEP team is considering placement into a less integrated environment, that IEP team must notify the DCPS Office of Special Education (DCPS OSE).
- When an Independent Charter School IEP team is considering placement into a less integrated environment, that IEP team must notify the Office of the State Superintendent of Education (OSSE).

In these situations, it is the role of DCPS/OSSE (as applicable) to:

- Provide input and technical assistance to the school/LEA to support placement in the Least Restrictive Environment;
- Document the barriers to services at the LEA level; and
- When necessary, place the student into the alternative location.”

In this case, OSSE, as the public agency, gave Student the alternate placement that the 05/05/09 MDT agreed was necessary. (*Finding of Fact #2, #4, #5*). OSSE stated in its own Memorandum dated 05/05/09 that _____ was responsible for submitting the data transportation form to the Transportation Department within DCPS (*Finding of Fact #3*), and that OSSE was responsible for making sure that transportation was arranged. (*Finding of Fact #2*). DCPS in its role as the LEA for public schools in the District of Columbia was not a participant or party to the responsibilities for placement and transportation for Student because Student did not attend any DCPS public school over which DCPS exercised control and responsibility. The evidence in the record clearly indicated that during the relevant time period, Student transferred from a public charter school acting as its own LEA to a nonpublic school located outside of the District of Columbia, and that OSSE was the transfer authority. (*Finding of Fact #1, #5*).

The explanation for why a Prior to Notice Action was issued on a DCPS form is explained by Step 5.4 of the OSSE Policy and Procedure for Placement Review which states that “The Notice of Location Assignment (generated by SEDS) will be issued by DCPS OSE/the OSSE within SEDS/Easy IEP and mailed in paper copy to the parent, parent’s representative, receiving school and nonpublic billing unit (if the student is entering a nonpublic school). This document replaces the DCPS Prior to Action Notice Form, which in the past documented this step. During the first year of the present procedure, the OSSE will include copy of the paper DCPS Prior to Action Notice form and a note of explanation that the Notice of Location Assignment replaces it.” DC OSSE Policy and Procedure for Placement Review, Policy Version 1.0, effective date 10/1/08.

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In this case, the Notice of Location Assignment was issued by OSSE, and not by DCPS (*Finding of Fact #4, #5*), even though the form said "OSSE/DCPS OSE." In this case, OSSE was the applicable party to the issuance of the notice. And, since is an Independent Charter School and its own LEA, (*Finding of Fact #1*), it was required to notify OSSE of its request for a change of placement for Student, and it did so with a MDT meeting resulting on 05/05/09 that was attended by OSSE and not by DCPS. (*Finding of Fact #2*). Subsequent to the 05/05/09 meeting, followed through with its responsibility to submit a transportation services data form and also duly authorized ESY services, with transportation services. (*Findings of Fact #7, #8*).

The Hearing Officer concludes that DCPS was at no time the LEA for Student from 05/05/09 through the terminal date of ESY services on 07/24/09, and DCPS cannot be held responsible for Student not receiving transportation services from 07/01/09 - 07/24/09. (*Finding of Fact #9*).

5 D.C.M.R. 3002.1(a) states that the LEA shall make a free appropriate public education (FAPE) available to each child with a disability, ages three to twenty-two, who resides in, or is a ward of the, the District. Moreover, the services provided to the child must address all of the child's identified special education and related services needs and must be based on the child's unique needs and not on the child's disability. 5 D.C.M.R. 3002.1(f). And, "related services" include transportation. 5 D.C.M.R. 3001.1. DCPS was not the LEA for this Student; therefore, the Hearing Officer concludes that DCPS as an LEA did not fail to provide Student with a FAPE. The Hearing Officer also concludes that OSSE, as a public agency, was responsible for Student's failure to receive transportation services and ESY services from 07/01/09-07/24/09.

Petitioner failed to meet its burden of proof on Issue #1.

Issue #2 – Whether DCPS failed to provide ESY services, thereby denying Student a FAPE? Petitioner alleges that due to DCPS' failure to provide transportation services, DCPS failed to provide ESY services to Student.

As discussed under Issue #1, DCPS was not responsible for providing 2009 ESY transportation services for Student. As such, DCPS was not responsible for providing the 2009 ESY services for Student.

Petitioner failed to meet its burden of proof on Issue #2.

Issue #3 – Whether Student is entitled to compensatory education services? Petitioner alleges that Student's 05/05/09 IEP prescribed 25 hours/week of specialized instruction, 1 hour/week of speech and language services, and 1.5 hours/week of psychological counseling. Petitioner further alleges that Student is entitled to compensatory education for missing all special education services from 07/01/09 through 07/24/09.

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“When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning “appropriate” relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.” *Reid v. District of Columbia*, 43 IDELR 32 (2005).

Petitioner failed to meet its burden of proof on Issues #1 and #2, i.e., that DCPS failed to provide Student with transportation services and 2009 ESY services. Therefore, Petitioner failed to meet its burden of proof that Student is entitled to compensatory education for missed services due to the fault of DCPS.

ORDER

WHEREFORE, this Complaint having been fully litigated and there being no basis in fact and law to support Petitioner’s allegations that DCPS denied Student a FAPE, it is

ORDERED that this Complaint be and hereby is **DISMISSED** with prejudice.

IT IS SO ORDERED.

This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).

Virginia A. Dietrich /s/

Virginia A. Dietrich, Esq.
Impartial Due Process Hearing Officer

09/22/09

Date

Issued: September 22, 2009