DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE

STUDENT, **By and through PARENT,**[1] ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	)))))))))))	**Case No.** **Bruce Ryan, Hearing Officer** **Issued: May 31, 2011**

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HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The Complaint was filed March 17, 2011, on behalf of a ·year old student (the "Student") who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. The Student currently attends a DCPS elementary school (the "School") located outside of his home neighborhood pursuant to a DCPS placement. Petitioner is the Student's mother.

Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") by failing to provide bus transportation services in conformity with his individualized education program ("IEP") between March 9 and 17, 2011. As a result, Petitioner alleges that the Student had missed six full days of specialized instruction and behavior support services as of the date of the Complaint. *See P-1.*

DCPS filed its Response on March 28, 2011, which responded that DCPS has not denied the Student a FAPE. DCPS also asserted (*inter alia*) that it is not the party responsible for

[1] Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

providing transportation services to the Student pursuant to his IEP for the 2010-11 school year. DCPS asserted that the Office of the State Superintendent of Education ("OSSE") is responsible for ensuring that transportation is provided to the Student, because OSSE allegedly assumed responsibility for the operation of the former DCPS Division of Transportation Services at the start of the 2009-10 school year. *See R-1.*

A resolution session was held on March 30, 2011, which did not resolve the Complaint, and the statutory 30-day resolution period ended as of April 16, 2011. A Prehearing Conference ("PHC") was then held on April 22, 2011.

On May 3, 2011, as discussed and directed at the PHC, DCPS filed a motion to dismiss the Complaint based on the argument that "DCPS is not the party responsible for providing transportation services to the Student for the 2010/2011 school year." Petitioner filed an opposition to the motion to dismiss on May 9.

In an Order issued May 16, 2011, the Hearing Officer ruled that DCPS had not shown that the Complaint failed to state any claim upon which relief could be granted as a matter of law. The Hearing Officer concluded that IDEA and applicable D.C. law impose on the LEA the obligation to ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP; and that DCPS' motion failed to establish that DCPS has been relieved of such obligation by virtue of any rulings in the *Petties* case,[2] the OSSE's assumption of direct service responsibilities, or otherwise. The Hearing Officer stated that his ruling was without prejudice to any determination on the merits of this issue based on the complete record developed at the hearing.[3] The parties filed five-day disclosures on or about May 11, 2011; and the Due Process Hearing was held on May 18, 2011. Petitioner elected for the hearing to be closed.

At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-6.

Respondent's Exhibits: R-1 through R-7.

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[2] *Petties v. District of Columbia,* Civ. Action No. 95-0148 (PLF) (D.D.C.).

[3] *See Prehearing Order,* issued May 16, 2011, at 2.

In addition, the following Witnesses testified on behalf of each party:

Petitioner's Witnesses: (1) Parent-Petitioner; and (2) Educational Advocate.

Respondent's Witness: DCPS presented no witnesses and chose to rest on the written record.

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *SOP*. The statutory HOD deadline is May 31, 2011.

III. ISSUE AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioner resulted in the following single issue being presented for determination at hearing:

> **Failure to Implement IEP** — Did DCPS deny the Student a FAPE by failing to provide the related service of bus transportation, in conformity with his IEP, during March 2011?

Petitioner requests that DCPS be (a) found to have denied a FAPE in the respect alleged, and (b) ordered to provide appropriate compensatory education services as relief.

IV. FINDINGS OF FACT

1. The Student is a -year old student who has been determined to be eligible for special education and related services under the IDEA as a child with a disability. His primary disability is Emotional Disturbance ("ED"). *R-3.*
2. The Student currently attends a DCPS elementary school (the "School") located outside of his home neighborhood, pursuant to a DCPS placement made on or about October 26, 2010. *See P-1; P-3; R-1; Parent Testimony.*

3. The Student's most recent IEP, dated October 26, 2010, provides for 26.5 hours per week of specialized instruction and 60 minutes per week of behavioral support services in a setting Outside General Education. *R-3,* p. 5. The IEP also provides that the Student requires transportation services, and states that the "Mode of Transportation" shall be by "Bus." *Id.,* p. 7.
4. On or about October 27, 2010, DCPS completed a Student Transportation Data Form to provide the Student with bus transportation, stating that the Student required "special accommodations for bus." *P-4; see also R-4* (Student Transportation Form, specifying beginning date of 11/01/2010). Following submission of this data, Petitioner was notified that the Student would be picked up at his residence address each school day at approximately 7:30 AM. *See P-1; Parent Testimony.*
5. During the 2010-11 School Year, the Student has generally been provided with transportation to and from the School via a DCPS school bus. However, during March 2011, there were several days on which the Student did not successfully access this service.
6. Petitioner testified that on March 9, 10, 11, and 14, the DCPS school bus did not arrive at all; and that on March 15 and 16, the bus arrived late. *Parent Testimony.* Beginning March 17, the date the Complaint was filed, she testified that the bus arrived on time. *Id.; see also P-1,* p. 2. However, there were significant discrepancies between the allegations in the Complaint and Petitioner's testimony at hearing regarding bus transportation service on the specific dates in question, [4] as well as between Petitioner's claims and the official school records. As a result, the Hearing Officer finds that Petitioner's evidence is generally less credible and deserves less weight than DCPS' documentary evidence.
7. DCPS' school bus trip tickets show: (a) that on ***March 9***, 2011, the bus arrived at 7:36 AM and departed at 7:39 AM, with the Student listed as "no show"; (b) that on ***March 10***, 2011, the bus arrived at 8:30 AM and departed at 8:32 AM with the Student on the bus; (c) that on ***March 14,*** 2011, the bus arrived at 7:47 AM and departed at 7:50 AM, with the

[4] For example, the Complaint alleged that the DCPS bus "arrived significantly earlier than 7:30 am" on March 15th, whereas Petitioner testified that the bus arrived late that day. The Complaint also alleged that the bus "did not come at all" on March 17th, whereas Petitioner testified that the bus arrived on time that day. *Compare P-1, at 2 with Parent Test.* The Hearing Officer has generally resolved such internal conflicts in Petitioner's case in favor of her live testimony.

Student listed as "no show"; and (d) that on ***March 17***, 2011, the bus arrived at 7:25 AM and departed at 7:30 AM, with the Student again listed as "no show." *R-6,* pp. 1, 3, 5, 7.

8. DCPS attendance records for the same period show that the Student was absent on March 9, 10, 14 and 17, 2011, with "Excused Absences" on March 9 and 10 and "Unexcused Absences" on March 14 and 17. *R-5* (Attendance Summary 08/16/2010 to 05/10/2011). [5]
9. Petitioner failed to establish a material deviation from the transportation requirements of the Student's IEP during the relevant time period.
10. Petitioner failed to establish that the Student suffered educational harm from any deviation from the transportation requirements of the IEP during the relevant time period.

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Summary

The Hearing Officer concludes that Petitioner did not meet her burden of proving that DCPS denied the Student a FAPE by failing to provide the related service of bus transportation, in conformity with his IEP, during March 2011. DCPS did not deviate materially from the IEP where the evidence shows that the school bus arrived six minutes late on one day and 17 minutes late on another day, with the result that the Student was listed as a "no show" at the bus stop and was marked absent from school on those dates. To the extent DCPS failed to provide timely bus transportation on each and every school day, consistent with the terms of the IEP, such failure has not been shown to have caused educational harm to the Student.

B. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer* v. *Weast,* 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to implement an IEP. 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-E3030.3. The recognized standard is preponderance of the evidence. *See, e.g., N.G.* v. *District of*

[5] While no bus trip tickets were presented by DCPS to substantiate bus services for March 11, 15, and 16, 2011, the attendance records also showed no absences on those dates. *See R-5.*

Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw* v. *District of Columbia,* 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

C. Issue/Alleged Denial of FAPE

Petitioner claims that DCPS denied the Student a FAPE by failing to provide the related service of bus transportation, in conformity with his IEP, during March 2011. For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to present sufficient evidence to prevail on this issue in accordance with applicable legal standards.

The IDEA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

> ***[S]pecial education and related services*** that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are ***provided in conformity with the individualized education program (IEP)***..." 20 U.S.C. § 1401(9); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1 (emphasis added). [6]

"Related services" under the IDEA specifically include transportation services to and from school, as are provided in the Student's IEP. 34 C.F.R. § 300.34 (c) (16).

As the statute indicates, the failure to provide services in conformity with a student's IEP can constitute a denial of FAPE. 34 C.F.R. § 300.17(d). In order to constitute a denial of FAPE, however, courts have held that the aspects of an IEP not followed must be "substantial or significant," and "more than a *de minimus* failure"; in other words, the deviation from the IEP's stated requirements must be "material." *Catalan* v. *District of Columbia,* 478 F. Supp. 2d 73 (D.D.C. 2007), *quoting Houston Indep. Sch. Dist. v. Bobby R.,* 200 F.3d 341,349 (5th Cir. 2000). *See also Wilson v. District of Columbia,* 111 LRP 19583 (D.D.C. March 18, 2011) ("Although the D.C. Circuit has not yet squarely addressed the question of what standard governs failure-to-

[6] The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia,* 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe,* 484 U.S. 305, 311-12 (1988)). To be sufficient to provide FAPE under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children." *Anderson* v. *District of Columbia,* 109 LRP 18615 (D.D.C. 2009), slip op. at 6, *quoting Board of Education* v. *Rowley,* 458 U.S. 176,200,207 (1982). *See also Kerkam v. McKenzie,* 862 F. 2d 884 (D.C. Cir. 1988); *J G. v. Abington School,* 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 ("while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit. ").

implement claims under the IDEA, the consensus approach to this question among the federal courts that have addressed it has been to adopt the standard articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*"); *S.S. ex rel. Shank v. Howard Road Academy,* 585 F. Supp. 2d 56, 68 (D.D.C. 2008).

As was recently confirmed by the District Court in *Wilson,* in the context of transportation services, "a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEPs, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit." 111 LRP 19583, slip op. at 5 (*quoting Bobby R*). A "material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." *Id., quoting Howard Road Academy,* 585 F. Supp. 2d at 68.

In *Wilson*, DCPS failed to transport a student to three of the four weeks of an ESY program, and thus "almost entirely failed to provide a service that [student's] IEP team determined was necessary for his educational development." Hence, the deviation was found to be material, and not a "minor discrepancy." *Id.,* slip op. at 6-7.

That is not the case here. The record evidence shows that, at most, DCPS may have failed to provide bus transportation services in a timely manner on a few school days. On one of the days the bus arrived six minutes late, and on another day it arrived 17 minutes late. On a third day, it was an hour late, but managed to pick up the Student for school. *See R-6. See also Parent Test.* (cross examination) (noting that the Student sometimes waited at the bus stop until only about 7:25 AM, although the scheduled pick-up time was 7:30 AM).

Moreover, there is little evidence to suggest that the Student was harmed educationally by this slight deviation from required bus services. Petitioner did not show that the Student missed significant portions of specialized instruction or related services on these dates; and the IEP progress report covering this time period shows the Student making substantial progress toward his IEP goals. *See R-7.*

Accordingly, Petitioner has failed to meet her burden of proving by a preponderance of the evidence that DCPS denied a FAPE to the Student by materially failing to provide transportation services in conformity with his IEP during March 2011. [7]

VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. Petitioner's requests for relief in her Due Process Complaint are **DENIED;**
2. The Complaint filed March 17, 2011, is **DISMISSED, With Prejudice;** and
3. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.

Dated: May 31, 2011

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).

[7] As a result, there is no occasion to consider Petitioner's claim for compensatory education relief – which, in any event, appears to assume (incorrectly) that the Student missed six full days of school, and was developed by an educational advocate who has not observed the Student in a classroom or spoken with any of the Student's teachers since November 2010. *See Educational Advocate Test* (cross examination).