

FEB 04 2010

Dispute Resolution & Administrative Services

CASE CLOSURE SUMMARY REPORT

(This summary sheet must be used as a cover sheet for the hearing officer's decision at the end of the special education hearing and submitted to the Department of Education before billing.)

<u>County Public Schools</u> School Division	<u>N/A</u> Name of Parent(s)
<u>(Adult Student)</u> Name of Child	<u>January 29, 2010</u> Date of Decision or Dismissal
<u>Kathleen S. Mehfoud, Esq./Patrick T. Andriano, Esq.</u> Counsel Representing LEA	<u>Pro se (Assisted by _____, Parent)</u> Counsel Representing Parent/Child
<u>Student by Parent</u> Party Initiating Hearing	<u>Split</u> Prevailing Party

Hearing Officer's Determination of Issues(s):

- Whether LEA denied a FAPE to the Student by failing to provide punctual school transportation to him during a period of homelessness in November/December 2009;
- Whether compensatory relief for denial of FAPE is appropriate in the circumstances of this case.

Hearing Officer's Orders and Outcome of Hearing:

LEA's failure to provide punctual transportation was denial of FAPE. Compensatory relief not appropriate under facts of case..

Peter B. Vaden
Printed Name of Hearing Officer

P.B. Vaden 1/29/10
Signature

cc: Virginia Department of Education

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

In Re: STUDENT } Findings of Fact
Due Process Hearing } and
} Decision

Counsel for Student:

Pro se

Counsel for COUNTY
Public Schools:

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This matter came to be heard upon the Request for a Due Process Hearing filed by PARENT (“the Parent”), under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. §1400 et seq., and the Regulations Governing Special Education Programs for Children with Disabilities in Virginia, 8 VAC 20-81 (“Virginia Regulations”). STUDENT, who is an adult, executed a writing appointing the Parent to act as his agent for this due process proceeding. This due process complaint arises out of the Parent’s and Student’s allegation that Student was denied a Free Appropriate Public Education (“FAPE”) as a result of County Public Schools’ (“CPS”) alleged failure to provide transportation during a period in late 2009 when

Student was homeless.¹ The Student and the Parent request an order requiring CPS to provide the Student one-on-one sessions with his teachers and time extensions to complete schoolwork as compensation for the alleged loss of educational opportunity. The requirements of notice to the Student have been satisfied.

The due process hearing was held before the undersigned hearing officer on January 12, 2010 at CPS's Administration Building near CITY, Virginia. The hearing, which was opened to the public, was recorded by a court reporter. The Parent and Student appeared at the hearing, *pro se*. CPS was represented by DIRECTOR OF SPECIAL EDUCATION and by counsel. The Parent and CPS counsel made opening and closing statements.

ISSUES FOR DECISION

- Whether CPS denied a FAPE to the Student by failing to provide school transportation to him during a period of homelessness in November/December 2009;
- Whether compensatory relief for denial of FAPE is appropriate in the circumstances of this case.

BURDEN OF PROOF

In *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Id.*, 546 U.S. at 62, 126 S.Ct. at 537. Here the Student is not challenging an IEP, but seeks relief for CPS's alleged failure to provide

¹ In the complaint for due process, the Parent also alleged violations of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431, *et seq.*, and sought enforcement of orders allegedly entered by a state court. By a decision/order entered January 5, 2010, I held that the hearing officer lacked jurisdiction over these claims and I granted CPS's Motion to Dismiss with respect to the claims.

transportation to the Student. In the Fourth Circuit Court of Appeals' decision affirmed by the U.S. Supreme Court in *Schaffer*, the Fourth Circuit endorsed "the normal rule of allocating the burden to the party seeking relief" in IDEA due process hearings. See *Weast v. Schaffer ex rel. Schaffer*, 377 F.3d 449, 453-456 (4th Cir. 2004), *aff'd*, 546 U.S. 49, 126 S.Ct. 528 (2005). Here the Student is the party seeking relief. Accordingly, I find that in this case, the burden of proof is upon the Student.

FINDINGS OF FACT

The Parent presented the Student's case. She testified herself and called as witnesses the Student, ASSISTANT PRINCIPAL and ENGLISH TEACHER. CPS called as its only witness Assistant Principal. Each party offered into evidence separate documents prepared by Assistant Principal purportedly tracking the times when Student arrived and left school during the period in questions. I make the following findings of fact based upon the preponderance of the evidence adduced at the hearing:

1. Student was born on BIRTH DATE. He is a GRADE student at COUNTY HIGH SCHOOL.
2. It is not disputed that Student is a child with a disability in need of special education services. In the Student's special education reevaluation in March 2007, he was found eligible for special education services based upon the disability criteria for Emotional Disability ("ED").²
3. After a disturbance at the family home on November 11, 2009, Student was jailed

² The Student's IEP was not offered into evidence. To make this finding, I take judicial notice of a finding made in a 2008 hearing officer decision concerning the Student.

at the County jail until November 16, 2009. For most of the period from November 16 through December 15, Student was homeless. He lived for most of the period in a homeless shelter in SHELTER CITY, Virginia.

4. Student did not report to school when he was released from jail on November 16, 2009. On that day, Parent telephoned Assistant Principal to advise him that Student was homeless.

5. On November 17, 2009, Student reported to school on time. On that date and on November 18, 2009, a teacher at County High School provided lodging to Student to her home.

6. On November 18, 2009, Assistant Principal assisted Student to obtain lodging at HOMELESS SHELTER. On his first night at the Homeless Shelter, Student was required to check in by 5:00 p.m. Assistant Principal drove Student to the Homeless Shelter.

7. The Student was no longer homeless after December 15, 2009.

8. From November 20, 2009 through December 15, 2009, CPS provided transportation for Student to and from school whenever requested. Schools were closed from November 25-29, 2009 for the Thanksgiving Break. On most days, CPS provided car transportation for Student between school and the Homeless Shelter, a 45-50 minute drive.

9. Assistant Principal kept contemporaneous, daily records of Student's school arrival and departure times. According to Assistant Principal's records, Student missed a total of 91 minutes of school between November 17, 2009 and December 1, 2009 due to transportation issues. All of the time was missed from Student's first period English class. Parent's contention that Student missed more than 91 minutes was not established by the evidence.

10. After the Student became homeless, a co-teacher from his first period class would

pull Student out of class as needed and assist him with missed work. Student was able to make up all of the missed work from English class except for one quiz and a worksheet.

11. During the time period at issue, Student was scheduled to receive after school tutoring from 3:30 p.m. to 5:30 p.m., two days per week. Some of the tutoring sessions were cut short at 5:00 p.m. so that Student could catch his afternoon rides back to the homeless shelter. CPS made up all of the Student's missed tutoring time by providing tutoring during the school day.

DECISION

The Student and Parent contend that Student was denied a Free Appropriate Public Education ("FAPE") because CPS failed to assure that its transportation arrangements enabled the Student to arrive at school on time during part of the period when the Student was homeless. The Student and Parent also allege that CPS's shortening of Student's after school tutoring sessions so that he could leave school at 5:00 p.m. was a denial of FAPE. CPS concedes that from November 20, 2009 through December 1, 2009, the Student missed 91 minutes of class time due to CPS's not providing punctual transportation. CPS also acknowledges that some of the Student's afternoon tutoring sessions were shortened because the CPS-provided transportation back to the homeless shelter departed at 5:00 p.m. CPS argues that any loss of educational opportunity was "*de minimis*" and has already been made up by the Student.

The IDEA provides that "[i]t is the purpose of this chapter to assure that all children with disabilities have available to them a free appropriate education that emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. § 1400(d)(1)(A)

(emphasis supplied). The term “related services” means transportation, as well as other specified services “designed to enable a child with a disability to receive a free appropriate public education” 20 U.S.C. §1401(26)(A). The Virginia Regulations require that every child with a disability, placed in an education program by the local school division, “shall be entitled to transportation to and from such program at no cost if such transportation is necessary to enable such child to benefit from educational programs and opportunities.” 8 VAC 20-81-100.G. Student is “a child with a disability.” Under the IDEA therefore, the Student was entitled to transportation, at no cost to him, to enable him to benefit from his Individualized Education Program (“IEP”) placement and other educational programs and opportunities at County High School.

The violation of a substantive requirement of the IDEA results, of necessity, in the denial of a FAPE. *See, e.g., A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 684 (4th Cir. 2007). In this case, CPS provided school transportation to the Student while he was staying at the Homeless Shelter outside of the County, but CPS did not always wholly accommodate the Student’s class and tutoring schedule. As a result, the Student missed over 90 minutes of first period class time and experienced some curtailment of his scheduled afternoon tutoring sessions. I find that CPS’s failure to provide transportation to enable Student to attend all of his first period class time and his after school tutoring sessions was a substantive violation of the IDEA. CPS’s argument that the violation was *de minimis* is unavailing. Unlike a procedural violation of the IDEA, a substantive violation is not subject to a harmlessness analysis. *See Id.*, 484 F.3d at 679 n. 7 (Procedural violations are subject to “harmlessness analysis,” while substantive violations of the IDEA are not.)

Although the “harmlessness” of a substantive violation is not considered in determining whether or not a denial of FAPE has occurred, the degree of harm is an important factor to be considered in the remedy analysis. A hearing officer may only grant a remedy that is appropriate based upon the evidence at the hearing. *Cf.* 20 U.S.C. § 1415(i)(2)(C)(iii) (Court to grant such relief as it determines is appropriate); *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002 (1985) (IDEA does not specify the type of relief, except that it must be “appropriate.”). In this case, Student’s homelessness ended after December 15, 2009. The provision of transportation is no longer an issue. The relief sought for the Student, one-on-one sessions with his teachers and additional time to complete assignments, would be a compensatory remedy for past violations of the IDEA. The hearing officer’s authority to grant such relief is contingent upon a finding that the past violations of the IDEA resulted in the denial of some educational benefit to the Student. *Cf. M.S. ex rel. Simchick v. Fairfax County School Bd.*, 553 F.3d 315, 325 (4th Cir. 2009) (Court’s power to grant compensatory relief in light of a school system's failure to provide educational benefit to a disabled student); *G ex rel. RG v. Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003) (Compensatory education to remedy educational deficit created by an educational agency's failure over period of time to provide a FAPE); *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) (Award to be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied.)

I find that the evidence in this case does not establish that the Student lost educational benefit as a result of CPS’s failure to provide punctual transportation. CPS concedes that the

Student missed 91 minutes of class time. However, according to the Student's English Teacher, she and her co-teacher worked with the Student to catch him up. The co-teacher would work directly with Student, either one-on-one or in small groups, to make up his class assignments. As of the hearing date, Student was current in his classwork, but for one quiz and a worksheet, and it was not established whether the Student's failure to complete these assignments was attributable to CPS's late transportation. The evidence also did not establish how much tutoring time the Student actually missed in the afternoons when he left early to return to the Homeless Shelter. However, if tutoring was curtailed by 30 minutes on some days between November 20th and December 2nd, 2009, the Student could not have missed more than several hours of after school tutoring time.³ According to the Assistant Principal's undisputed testimony CPS made up all of the Student's missed tutoring time.

I find therefore that even though CPS's failure to provide punctual transportation when the Student was homeless was a substantive violation of the IDEA, the Student did not establish that this violation resulted in an educational deficit or the loss of educational benefit to him. Accordingly, I determine that compensatory relief for the Student is not appropriate in this case.

ORDER

For the reasons set forth above, it is hereby ordered as follows:

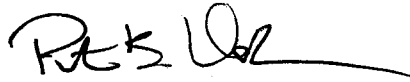
1. The relief requested by the Student and the Parent, herein is denied in its entirety;
2. The Student prevailed on the issue of whether there was a substantive violation of the IDEA;

³ The Parent concedes that CPS corrected the transportation issues after she filed the due process complaint on December 2, 2009.

3. CPS prevailed on the issue of whether an award of compensatory relief is appropriate in this case.

Right of Appeal Notice

This decision is final and binding unless either party appeals in a federal district court within 90 calendar days of the date of this decision, or in a state circuit court within 180 calendar days of the date of this decision.



Peter B. Vaden, Hearing Officer
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Date of Decision: January 29th, 2010.