

VIRGINIA DEPARTMENT OF EDUCATION DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

CASE CLOSURE SUMMARY REPORT

Public Schools

School Division Name of Parent

November 10, 2009

Date of Decision Name of Child

Carol W. McCoskrie N/A

Counsel Representing LEA Counsel Representing Parents

Alan Dockterman parent

Hearing Officer Party Initiating Hearing

Hearing Officer's Determination of Issues: The parent was afforded all procedural and notice protections required by IDEA; PS offered a FAPE to for the 2008-2009 school year in that the transportation services were reasonably calculated to enable him to progress and receive the level of educational benefits required by IDEA PS offered a FAPE to for the 2008-2009 school year in that the school district fully and adequately implemented the transportation services requirement of the IEP.

(See also written decision of 11/10/09 and prior rulings).

Hearing Officer's Order and Outcome of Hearing: Decision for PS.

This certifies that I have completed this hearing in accordance with regulations and have advised the parties of their appeal rights in writing.

11/10/09 Date

Alan Dockterman

Received

NOV 16 2009

Dispute Resolution & Administrative Services

DUE PROCESS EDUCATIONAL APPEAL

)
)
 Appellant)
)
) In re:
)
 PUBLIC SCHOOLS)
 Respondent)

DECISION

I. INTRODUCTION AND PROCEDURAL HISTORY

Public Schools (PS) received a request for a due process hearing from , the father of , on August 12, 2009. I was appointed as the hearing officer from a list supplied by the Supreme Court of the Commonwealth of Virginia and certified by the Virginia Department of Education. Carol W. McCoskrie, Esq. represented PS.

Ms. McCoskrie submitted a motion to dismiss based on insufficiency in the request for a due process hearing. She argued, *inter alia*, that it failed to identify the school attended, to include a specific or coherent description of the nature of the problem, or to set forth a proposed resolution. She also maintained that the request should be dismissed as moot since the student had moved to County. (See letter of August 24, 2009). She noted that the parent had already filed three other

requests before two other hearing officers, all of which had been dismissed for insufficiency in July of 2009.

On August 26, 2009, a pre-hearing teleconference was conducted. I informed the parties that the request for a due process hearing was clearly deficient because the statutory requirement which required identification of the school the student attended was missing from the request. I also found that the allegations in the request that PS had not provided transportation services, that it had rejected the parents' input in the development of the individualized education plans (IEPs), and that the IEPs had been developed in a biased, improper and incomplete fashion put PS on sufficient notice of the problem to satisfy the statutory requirements. I further determined that the proposed resolution of therapy, re-evaluation, and placement sufficed to fulfill the mandate that a resolution be proposed. (See letter of August 31, 2009).

Mr. [redacted] filed an amended request (Request) on September 2, 2009. Ms. McCoskrie filed another motion to dismiss based on insufficiency or, in the alternative, for entry of an order narrowing the issues. She maintained that the Request was so lacking in coherence and clarity that the school district could not prepare for a hearing. (See letter of September 9, 2009). On September 9, 2009, a second prehearing teleconference took place. The order of witnesses, issues in the appeal, exploration of settlement, and procedures for conduct of the hearing were among the matters discussed. The commencement date of the hearing was changed from October 5, 2009 to October 21, 2009 with two consecutive days scheduled for the hearing.

Mr. [redacted] filed a response to the motion of PS. He contended that his Request should not be narrowed because

he needed a wide range of testimony to support his case and expose wrongdoing. He further contended that limiting the issues would interfere with his efforts to assist his son academically. (See letter of September 10, 2009).

A third prehearing teleconference was conducted on September 16, 2009. During the conference, I denied the motion to dismiss because the school had been properly named. As for the motion to narrow the issues, I discussed with the parties the first three attachments to the Request. Those documents consisted of fourteen unnumbered pages attached to the district's preprinted form which provided for description of the nature of the problem and facts relating thereto. (See Request, ¶7 and ¶8).

Mr. [redacted] interspersed case law, regulations, statutory language, quotations without attribution, allegations of official wrongdoing and incompetence, and descriptions of events over a five year period often unrelated to the authority cited. I had difficulty ascertaining the substance of the claims in light of the regulatory and statutory requirements for the provision of special education services. I therefore granted PS' motion to narrow the issues.

Mr. [redacted] thereafter argued that the issues for consideration should be integrity of the IEPs, transportation and related services, psychological services, qualification of instructors, compensatory education, and parental rights. (See September 29, 2009 e-mail and attachment to the e-mail).

On October 5, 2009, I sent the parties a letter which set forth the parameters of the hearing. I accepted the charge that PS had failed to provide transportation services in 2009. I rejected allegations regarding

psychological and related services and qualifications of staff as separate categories unrelated to the IEP process. I also concluded that I lacked jurisdiction over the groupings of parental rights and integrity of the IEPs. (See letter of October 5, 2009).

A fourth prehearing teleconference was held on October 7, 2009. At the request of the parent, I ordered PS to ensure the availability of eight of their officials to testify on his behalf. (See letter of October 9, 2009). A final prehearing teleconference was scheduled for and occurred on October 19, 2009 for the purposes of discussing the issuance of subpoenas and the continuance request that the parent indicated would be made at the hearing on October 21, 2009. Prior to the teleconference, the parent sent an e-mail stating he would not participate in the hearing because the process was biased and unconstitutional, PS and the superintendent had acted discriminatorily, and the "outcome" was "terminated". He also referred to his intention to file a lawsuit in federal court. (See e-mail of October 17, 2009).

On October 19, 2009, the parent was not at home when called to participate in the teleconference. According to his wife, he was in the hospital for back problems. She reported that she had no authority to provide any additional information (See e-mails of October 15, 2009 and October 19, 2009). The following day the parent sent an attachment to an e-mail stating he would not participate in the hearing as he did not recognize the qualifications of the hearing officer or the proceedings. He further objected to the hearing because he was denied a continuance and could not physically participate due to his disability. (See e-mail of October 20, 2009).

The hearing was held on October 21, 2009 in room / of the located at ., VA, . Three witnesses testified. The parent did not attend the hearing. Nor did he submit a list of witnesses or exhibits in accordance with the prehearing order.

References in this Decision refer to the transcript for the proceedings. The district filed six exhibits on October 14, 2009 and three exhibits at the hearing.

II. FINDINGS OF FACT

The following represents findings of fact based upon a preponderance of evidence derived from the testimony of the witnesses and the documents admitted into evidence. Additional findings will be found in other portions of this decision.

The student was born on , . He attended fourth grade at School in for the 2008-2009 school year. He was diagnosed as having the disability of Autism Spectrum Disorder. (Exh. 1, p.1). In July of 2009, he left PS and moved with his family to Dumfries, located in County. Dr. , the coordinator of autism services for the past twelve years at PS, testified regarding the student's history at PS. (TR-69).

The student's public school education began at School in either kindergarten or pre-kindergarten, and he remained continuously at the school through fourth grade, except for a short period in 2008, when he attended a program known as multi-intervention programming for autism at School in

. Once the mother determined that the program was not working out, she successfully obtained his return to in October of 2008. (Tr-83-86).

The coordinator testified that she had known the student since he was four years old and had participated in a number of his assessments and IEPs. She recounted that during the November 25, 2008 IEP meeting, the IEP team discussed his transportation needs. The members concluded that because he became over-stimulated during periods of considerable movement and noise, he should not ride the regular bus to school. Rather, he should take a special bus where there would be an attendant, fewer students, and less noise. She explained that the IEP reflected that decision, which noted under "Team Considerations" that the student required special transportation. (Exh.1, p. 29). Special transportation was also identified as a service in the Least Restrictive Environment section of the IEP as well. (Exh 1, p. 31); (TR.75-78).

The coordinator testified that students who receive special transportation typically travel in a smaller bus with a driver familiar with their special needs and are met at the school by special education staff. According to the coordinator, the mother did not request any specific transportation language to be included in the IEP or object to any of its provisions. The father was not present at the IEP meeting of November 25, 2008. (Tr-77-78, 82, 86, 89).

The student continued to receive special transportation throughout the 2008-2009 school year until the spring of 2009, when the parents decided to take their son out of school. The coordinator noted that PS had been willing and able to provide transportation services for the student

in the spring of 2009 if the parents had wanted to take advantage of such services. (TR-80-81).

PS introduced the testimony of _____, who was employed as the bus driver on-the-job specialist. During the first six months of 2009, she was also the acting on-the-job training specialist. Her duties included supervising the special need drivers and their attendants. She was also involved in development of bus routes, use of proper equipment, and staff training. She testified that in addition to the training received by all drivers, the special education drivers receive supplementary training on the specialized equipment on their buses and the disabilities that the children have, including autism. She further testified that the special education buses are smaller, have more specialized equipment, and tend to pick the children up at or close to their homes rather than in the general area of their residences. (TR-95-98).

The specialist became familiar with the parents and their son during the 2008-2009 school year due to a number of minor issues that arose. She discussed these issues with the driver and attendant and found them blameless. The driver and attendant for the student's bus had attended training on autism in August of 2008 and in May of 2009. (TR-98-101). PS introduced training materials into the record. (Exh. 10).

The specialist recounted that on May 13, 2009, she was called by the dispatcher and informed of a dispute involving the mother. The specialist contacted the driver and attendant to determine what occurred. Both the driver and the attendant informed the specialist that the student's bus waited at a stop until two general education buses unloaded and that the mother and student had become

angry and had screamed at the driver and attendant. The parent accused them of hating her child and complained that the attendant had not helped the student get off the bus. The specialist testified that it would have violated PS' procedures for the attendant to have done so where extra assistance was unnecessary. (TR-102-105).

The specialist testified that she reviewed the incident with the staff and determined that the bus driver and attendant acted properly. When she went to the stop the next day to discuss the matter with the parents, neither they nor their son appeared. The student never rode the bus again. (TR-107-108).

The Director of Special Education, Dr. , was also called as a witness by PS. She oversees the special education programs for PS, working with various school officials to provide support for students with disabilities in the school system. With regard to the related service of transportation, she coordinates with the Department of Transportation to ensure that disabled students' needs are met on the general education and special education buses and that staff are properly trained. Joint meetings are held monthly. (TR-48-50).

The father initiated contact with the director to discuss general transportation issues. After a meeting had been scheduled, the purpose shifted to discussion of the incident on May 13, 2009. The meeting was held on May 26, 2009 in which the father, the director and the specialist participated. The director testified that she had learned that the driver had felt threatened by the mother who sought to board the bus. She supported the testimony of the specialist that an investigation had been conducted and

that staff had been found to have acted properly. (TR-52-56).

The director recalled that the father had raised concerns about the training of bus drivers and threatened legal action. He said that the particular bus driver for his son was insensitive to the special characteristics of his son's disabilities. The director and the specialist responded to the father's concerns by explaining the training program to him. They also offered to provide a behavioral specialist to ride with the student on the bus and provide recommendations. In addition to ensuring that the bus the student had been taking remained available during his absence, the school officials suggested that the student could take a pre-kindergarten special bus that ran the same route, return by a different bus, or ride the regular bus. The father rejected all these options. (TR-56-61, 108-117; Exhs. 3,4,6).

The school system continued its efforts to convince the parents to allow their son to return to school by offering alternative transportation arrangements, effective June 2, 2009. (TR-110-111; Exh. 6). Nevertheless, the assistant principal at _____ notified the school officials that the father rejected those proposals for a variety of reasons, arguing that the school rather than the student would be accommodated, too much disruption and inconsistency would be created, and different drivers and assistants for the morning and for the afternoon would be assigned. He further complained to the assistant principal that PS would not deal directly with the parents and informed him that his son would not play musical chairs with transportation. (Exh. 6).

On June 1, 2009, the father notified the principal of that his son would be withdrawing from the school system and, in fact, he has not returned to PS. (TR-62). On June 3, 2009, The director sent the parents a letter which outlined the various options PS had already offered. The letter also referred to Virginia compulsory school attendance policies. (Exh.7).

III. GENERAL LEGAL FRAMEWORK

The Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.* (2005) amended the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (1997) (IDEA). IDEA requires states, as a condition of acceptance of federal financial assistance, ensure a "free appropriate public education" (FAPE) to all children with disabilities. 20 U.S.C. §1400(d), §1412(a)(1). Virginia has elected to participate in the program and has required its public schools, which include ACPS, to provide FAPE to all children with disabilities residing within its jurisdiction. Va. Code Ann., §22.1-214-215.

The Act imposes extensive substantive and procedural requirements on states to ensure that children receive a FAPE. 20 U.S.C. §1415. See also *Board of Education v. Rowley*, 458 U.S. 176 (1982). The safeguards guarantee "... both parents an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decision they think inappropriate." *Honig v. Doe*, 484 U.S. 305, 311-312 (1987).

The primary safeguard protecting the child's rights is the IEP. The educational program offered by the state must be tailored to the unique needs of the handicapped child by means of the IEP. 20 U.S.C. §1414. IDEA directs that local school districts, in consultation with parents, the child, and teachers, develop an IEP for each handicapped child. 20 U.S.C. §1414(d)(1)(B). Should there be any complaints regarding the content of a child's IEP, the parents have the right to an "impartial due process hearing" 20 U.S.C. §1415(f); See also *Barnett v. Fairfax County School Board*, 927 F.2d 146, 150 (4th Cir. 1991).

A school district fulfills its obligation to provide FAPE as long as the IEP "consists of education instruction specially designed to meet the unique needs of the handicapped child...supported by such services as are necessary to permit the child to 'benefit' from the instruction." *Rowley, supra*, at 188-189. Each year the IEP sets out a curriculum to address the child's disabilities, with appropriate objective criteria, evaluating procedures and schedules for determining whether the instructional objectives are being achieved. 20 U.S.C. §1414(d).

"Congress did not intend that a school system could discharge its duty under the [ACT] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Board of Education*, 774 F.2d 629, 636 (4th Cir. 1985). The Supreme Court has held that an IEP meets the requirements of IDEA if it is "reasonably calculated to enable the child to receive educational benefits." *Rowley, supra*, at 207.

The IEP shall also include "a statement of the special education and related services and supplementary aids and services...to be provided to the child, or on behalf

of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child" to advance toward his goals and progress in the curriculum. 34 C.F.R. §300.320(a)(4). In accordance with IDEA's objectives, related services must be provided when necessary to provide a disabled child FAPE as described in his IEP.

The term "related services" encompasses transportation. Transportation includes travel to and from school as well as specialized equipment, such as special or adapted buses as required to provide transportation for a disabled child. 20 U.S.C. §1401(22); 34 C.F.R. 300.34(c)(16). The appropriate transportation services will depend on the student's unique needs as determined by a IEP team. See 34 C.F.R. Pt. 300, §300.24.

Hearing officers ordinarily engage in a two step inquiry to decide whether FAPE has been provided under IDEA. First, they determine whether school officials have complied with the procedures contained in the Act and, secondly, whether the IEP is reasonably calculated to enable the child to receive educational benefits. *Rowley, supra*, at 181.

Turning first to the question of procedure, there does not appear to be any dispute as to whether the school district followed the procedures set forth in IDEA. The parent did not raise any violations. In any event, technical violations that do not obstruct the student's participation in the process do not make a proposed program inadequate. *Burke County Board of Education v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990).

Moreover, in this case, the record demonstrates that the parents had a full opportunity to participate in a

meaningful way in the decision making process that resulted in the development of the IEPs and the proposed placement for the 2009-2010 school year. The district introduced uncontroverted testimony that the parents did not object to any aspect of special transportation services at the IEPs and signed off on each IEP. See *Rowley, supra*, at 205-206.

The burden of proof on the issues of whether ACPS failed to provide special transportation services and whether any procedural violations deprived the student of a FAPE rests upon the party challenging the IEP. *Schaffer v. Weast*, 546 U.S. 49 (2005). For this hearing, that is the parent.

Hearing officers are to give appropriate deference to local educators. *Hartmann v. Loudoun County School Board*, 118 F.3d 996, 1000-1001 (4th Cir. 1997, cert. denied, 522 U.S. 1046 (1998)). They are entitled to latitude in the development of an IEP appropriate for the student. *A.B. v. Lawson*, 354 F.3d 315, 328 (4th Cir. 2004). However, that does not relieve the hearing officer of the responsibility to determine as a factual matter whether the IEP is appropriate. *County School Board of Henrico v. Z.P. ex rel. R.P.*, 399 F.3d 298, 307 (4th Cir. 2005).

If an IEP is reasonably calculated to enable the child to receive benefits, the hearing officer cannot reject it based on a belief that a different methodology is better for the child. *County School Board of Henrico, supra* at 308. The school district is not required to provide services preferred by the parents even if greater educational benefits would ensue. See *Gregory K. v. Longview School District*, 811 F.2d 1307, 1314 (9th Cir. 1987).

In order to prevail in his claim under IDEA, the father must show that the district failed to provide special transportation services and that such failure was material. Such an approach enables school systems to exercise flexibility in implementing IEPs but holds them accountable for material failures and for providing the child a meaningful educational benefit. *Houston School District v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000), cert. denied 531 U.S. 817 (2000). This reasoning has been accepted by other circuit courts. See *Fisher ex rel. T.C v. Stafford Township Board of Education*, 2008 WL 3523992 n.3 (3d. Cir. 2008); *Van Duyn v. Baker School District 5j*, 502 F.3d 811, 821-822 (9th Cir. 2007); and *Neosho R-V School District v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003).

IV. LEGAL ANALYSIS

The IEPs required that PS furnish special transportation services to the student. As best as I can ascertain from the vague language in the attachments to the Request, the father appears to challenge the transportation arrangements for his son during recent years and the nature of the training provided to the bus drivers and attendants. He also apparently alleges that the May 7, 2009 incident caused him to remove his student from school. Since that incident arose in the context of the provision of special transportation services, he presumably maintains that the PS failed to properly implement the transportation services mandated by the 2008-2009 IEP.

With regard to the frequency, duration, and setting for the special transportation services, there is no

evidence that the student had not been receiving such services in accordance with the IEP. The testimony of the coordinator was clear that the student had always received transportation services and that the services would have been available to him if he had returned to school in May of 2009. There is also no evidence that the parents ever sought language in any of the IEPs to modify any of the applicable transportation provisions.

PS is not required to provide the exact special transportation services the father demands. As the Supreme Court noted, the appropriate methods of instruction and methodologies of providing special education and related services were best left to the discretion of the school staff. *Rowley, supra*, at 206.

The district is required to offer special transportation services that are appropriate for the child. The record is clear that it had done so during the 2008-2009 school year. Nevertheless, when the arrangements became unacceptable to the father, the district then offered a number of reasonable options to address his concerns. I conclude that PS has conscientiously and competently offered a range of special transportation services which fully satisfied its obligations under IDEA and under the language of the student's IEP.

The father did not identify deficiencies in the training provided to the bus drivers and attendants other than to argue they were insensitive to his son and his disabilities. The evidence showed that PS developed a training program designed to train drivers and attendants on autism and its relationship to their role in providing special transportation. I also find from the documentary evidence and testimony that staff did not act improperly

during the May 7, 2009 incident. The decision of the parents to remove their son from school because of the confrontation and to decline reasonable proposals for alternative special transportation services was arbitrary and unjustified.

The parent has failed to meet his burden of showing that the offer of bus transportation denied FAPE to his son. The evidence overwhelmingly establishes that the transportation services provided by the district were designed to meet the student's unique needs and assist him to benefit from special education.

The dismissal and grounds therefore of a variety of claims made by the father have been set forth in my letter of October 5, 2009. Those determinations and the reasoning contained therein are incorporated into this Decision. Having found in this Decision that PS provided adequate special transportation services in accordance with the IEP, I have now resolved all issues in favor of PS.

Accordingly, I conclude that the father has failed to meet his burden under *Wiest* to prove by a preponderance of evidence that the IEP for the 2008-2009 year was not reasonably calculated to offer his son meaningful educational benefits and that FAPE had not been provided to his son.

V. ISSUES

1. Whether the parent has sustained his burden of proof that the school district denied FAPE to his child because of its alleged failure to provide special transportation services for the 2008-2009 school year as required under the IEP.

2. Whether the parent has sustained his burden of proof that school district failed to provide FAPE to his son for 2008-2009 school year by showing that the transportation services in the IEP were not reasonably calculated to enable him to progress and receive the level of educational benefits required by IDEA.

VI. CONCLUSIONS OF LAW AND FINAL ORDER

1. The student has the disability of autism, and qualifies for services under IDEA.


2. The parent was afforded all procedural and notice protections required by IDEA.

3. The school district offered FAPE to the student for the 2008-2009 school year in that the transportation services offered in the IEP were reasonably calculated to enable him to access the education program as required by IDEA.

4. The school district offered FAPE to the student for the 2008-2009 school years in that the school district fully and adequately implemented the requirement to provide transportation services contained in the IEP.

5. This decision is final and binding unless either party appeals to a federal District Court within ninety calendar days of the date of this decision, or to a state Circuit Court of local jurisdiction within one hundred eighty calendar days of the date of this decision.

Date: 11/10/09


Alan Dockterman
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have, this 10th day of November, 2009, caused this Decision to be sent via first-class mail, postage prepaid, and by e-mail to
Esq. counsel for _____, VA ; to Carol W. McCoskrie,
Public Schools, 2100
_____, Suite _____, VA ; and sent
via first-class mail, postage prepaid, to Dr. _____
_____, Director, Special Education,
Public Schools, _____, VA and
to Dr. Judy Douglas, Director, Dispute
Resolution/Administrative Services Department of Education,
Commonwealth of Virginia, P.O. Box 2120, Richmond, VA
23218-2120.


Alan Dockterman

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