

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: HS

Date of Birth: xx/xx/xx

Date of Hearing:
July 8, 2008
OPEN HEARING
ODR #8842/07-08 AS

Parties to the Hearing:

Mr. and Ms

School District of Philadelphia
440 North Broad Street, Suite 313
Philadelphia, PA 19130-4015

Representative:

Pro Se

Kimberly A. Caputo, Esquire
Office of General Counsel
440 North Broad Street, Suite 313
Philadelphia, PA 19130-4015

Date Record Closed:

July 14, 2008

Date of Decision:

July 28, 2008

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is a teen aged eligible resident of the School District of Philadelphia (District). (NT 55-58; HO-1 p. 13-14¹, P-1, P-2.) The Student is identified with Multiple Disabilities, including mental retardation, autism, and speech and language needs. Student requires related services including physical therapy, occupational therapy and transportation. (NT 56-59.)

Mr. and Ms. (Parents) requested due process on May 5, 2008, alleging, among other things², that the District had failed to provide transportation as required in the IEP. As a result, the Parents alleged that they had lost employment opportunities and had incurred substantial costs for fuel and repairs for their vehicle. They requested reimbursement for lost employment opportunity and for the cost of maintenance of their vehicle.

The District, in its response dated June 23, 2008, and again at the hearing convened on July 8, 2008, (NT 27-32), moved to dismiss the Complaint Notice on grounds that the law does not authorize an administrative hearing officer to grant the requested relief. The District also asserted that the Parents had agreed to transport the Student in return for a mileage reimbursement, and that it had reimbursed the Parents for all miles submitted to the District. Ibid.

The hearing officer reserved on the motion insofar as it challenged the request for relief concerning transportation, but granted it in part by dismissing the allegations of lost employment opportunity. (NT 45-50.) The hearing officer, in response to the District's "five day" objection, agreed to hold the record open for five days after the hearing. (NT 50-51.) The

¹ The Parents in this matter filed their Complaint Notice on an ODR form, with several pages of attachments, including educational records for the Student. These are marked, "HO-1".

² The Parents requested due process regarding an alleged need for a more restrictive placement and ESY services. (HO-1.) These were resolved at the resolution meeting, (NT 28, 128-134); thus, only the transportation-related issues remained for the hearing, and the hearing officer applied normal, not expedited, time lines for the hearing and decision.

District interposed no objections, and the record closed upon receipt of the transcript on July 14, 2008.

ISSUES

1. Did the Parents supply transportation to the Student at any time for which they were not reimbursed?
2. Should the hearing officer award either mileage reimbursement or the costs of maintenance and fuel for the Parents' vehicle for any time during which the Parents were transporting the Student to school in the absence of District supplied transportation?

FINDINGS OF FACT

1. The Student registered in the District in February 2008, when Student's Parents moved from [city redacted]. (NT 55, 56-57.)
2. The Student was identified with an exceptionality in [city redacted], and Student's IEP called for transportation as a related service. (NT 55-56.)
3. The Student's IEP from [city redacted] became pendent pending evaluation by the District and formulation of a new IEP. (NT 55-56.)
4. The District evaluated the Student during the 2007-2008 school year and offered a new IEP that provided for transportation as a related service. (NT 56-59; HO-1 p. 14.)
5. The Student was in eighth grade during the 2007-2008 school year. (HO-1 p. 13.)
6. The Student suffers from multiple physical conditions in addition to the disabilities for which Student is identified. (NT 31-32, 56-57, 140-143; HO-1 p. 6.)

7. The Parents removed the Student from Student's neighborhood high school, [redacted], because they believed that the level of supervision at the school permitted student behavior that would pose a physical danger for the Student due to Student's physical cognitive and social disabilities. (NT 58, 108, 113-115, 123-125; HO-1 p. 6.)
8. The District offered to transport the Student to another school, [redacted], but the Parents declined and asked that the Student be returned to [redacted – hereinafter School]. The Parents believed that the Student would not have been placed in an autistic support class at this school. (NT 93, 113, 116-117, 125-126.)
9. The Parents wanted the Student to attend School, because the teacher to whom Student would be assigned was able to provide better services to the Student. (NT 122-123.)
10. The District permitted a transfer to the School, which was not the Student's neighborhood school, but it was unable to provide transportation on an existing bus route that would take a reasonable amount of time. On March 14, 2008, the Parents agreed in writing to provide transportation. On March 25, 2008, the Student began attending the School. (NT 59-66; P-1, P-3, D-1.)
11. At the meeting on March 14, 2008, in which the Parents agreed to transport the Student, District officials believed that the Parents would transport the Student for the remainder of the school year. (NT 60; P-1.)
12. On April 9, the District offered an IEP which included bus transportation, curb to curb, in an air conditioned lift bus. (NT 21-23, 25; HO-1 p. 14.)
13. At the meeting on April 9, 2008, the District began an inquiry into existing bus routes. (NT 68-69, 71-72.)
14. At the meeting on April 9, the District agreed to reimburse the Parents for the transportation they were providing. (NT 67-68.)

15. On May 16, 2008, the Student's Parent provided a written notice to the District that they could no longer provide the Student with transportation to school. (NT 60-61; D-2.)
16. About one week after receiving the note from the Parent, the District provided transportation to the Student. (NT 40-41, 62-66, 86-87.)
17. The District's Special Education Regional Director initiated reimbursement by informing the Parents that it was available. (NT 67-68.)
18. The District's transportation department assisted the Father in determining the number of days for which reimbursement would be available. (NT 40-42.)

REIMBURSEMENT

19. On April 11, 2008, the Parents billed the District for mileage reimbursement of 422.28 miles, representing transportation on nineteen school days. This bill was paid. (NT 94-96; HO-1 p. 2, D-3.)
20. On June 24, 2008, the Parents submitted a second bill for mileage, representing mileage for transporting the Student to school on seven days in May. Payment for this bill is pending. (NT 96-98.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The United States Supreme Court has decided who has the burden of proof in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court decided that the burden of proof is on the party asking a hearing officer to enter an order. In this case, that party is the Parent. However, the Court noted that the burden of persuasion determines

the outcome only where the evidence is closely balanced, which the Court termed “equipose” – that is, where neither party has introduced more evidence than the other party. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is clearly in favor of one party, that party will prevail.

FREE APPROPRIATE PUBLIC EDUCATION

Not every child with a disability is entitled to special education and related services from a school district. The IDEA defines a child with a disability as “a child ... who, by reason [of Student’s or her disability], needs special education and related services.” 20 U.S.C. §1401(3)(A)(emphasis supplied); accord, 34 C.F.R. §300.8(a)(1). Only a child who needs such services is considered eligible for them. 20 U.S.C. §1412(a)(1)(A). Thus, the need for services is the basis for identification of a child as a child with a disability. See generally, Mr. I v. Maine School Administrative District No. 55, 480 F.3d 1 (1st Cir. 2007).

When a child is identified with a disability, the District is obligated to provide a free and appropriate public education (“FAPE”), in accordance with an Individualized Education Plan (IEP) reasonably calculated to enable the child to receive meaningful educational benefit. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982). “The education provided must be sufficient to confer some educational benefit upon the handicapped child.” L. E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006). Under the IDEA, a district must address “each of the child’s ... educational needs that result from the child’s disability” 34 C.F.R. § 200.320(a). See, M.C. v. Central Regional School District, 81 F. 3d 389, 393-394 (3rd Cir. 1996). These needs include behavioral, social and emotional skills. Ibid. Thus, a district’s obligation is to provide those services that address the child’s individual needs. Mr. I, supra.

The District’s obligation to provide FAPE includes transportation services in some cases, but not in all cases. FAPE is defined as “special education and related services” provided according to the IEP. 20 U.S.C. §1401(9); 34 C.F.R. §300.17. The term “related services” is further defined:

Related services means transportation and such developmental, corrective, and other

supportive services as are required to assist a child with a disability to benefit from special education

34 C.F.R. §300.34(a). The Supreme Court has made it clear that districts are required to provide only those services that are necessary to enable the child to benefit from education. In Irving Independent School District v. Tatro, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed. 2d 664 (1984), the Court stated that “only those services necessary to aid a handicapped child to benefit from special education must be provided” Thus, a child with a disability is entitled to transportation only if transportation is required to help that child benefit from Student’s special education as set forth in the IEP.

TRANSPORTATION

The only issue in this due process request is whether or not the District failed to reimburse the Parents properly for their transportation of the Student to school. The District challenged the form of relief requested by the Parents – namely, payment of repair costs – and the hearing officer reserved decision on the appropriateness of that requested relief. However, upon review of the record, it is unnecessary to reach that issue of law and therefore the hearing officer will not decide it. Rather, the matter can be resolved by answering the question, whether there is proof that the District failed or refused to reimburse the Parents on a mileage basis for providing transportation? The Parents failed to provide more evidence in their favor (a “preponderance” of evidence)³ that the District refused or failed to pay. Therefore, the hearing officer will not award further reimbursement.

Here, the evidence shows that the Student was entitled to transportation as a related service. (FF 1-4.) This is not in issue. However, the District did not offer to transport the Student by bus to a school over ten miles away from Student’s home, because they claimed that the established school bus routes would have required too long a trip. (FF 5-10.) Instead,

³ A “preponderance” of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810 (please note that the Manual was promulgated before the Supreme Court ruled in Schaffer v. Weast, at a time when the Local Educational Agency had the burden of persuasion in Pennsylvania and elsewhere in the federal Third Judicial Circuit. Thus, the first sentence of section 810, indicating that the LEA has the burden in most cases, is outdated and was effectively overturned by Schaffer).

the District reimbursed the Parents on a mileage basis for the miles they drove in transporting the Student to school. (FF 11-14.) The record makes clear that the District was ready at all times to reimburse the Parents for these miles.

The record provides evidence from which it is possible to piece together the period of time during which the District was not providing bus transportation, and during which the Parents provided it. It is most likely that this period was from March 25 to May 16. The record shows that the Parents agreed to transport the Student on March 14, 2008, and the Student began at School on March 25, 2008. (FF 10.) After the Parent indicated that he could not transport the Student any longer, the District provided bus service, (FF 15-16); it is not clear when the bus service started, but most likely it started on May 26, about ten calendar days and five school days after the Parents indicated in writing that they could not drive the Student to school. (FF 16.) There was evidence that the Student missed about one week of school, after which the bus service commenced, and there was evidence that the District's bus service started about one week after the Parents gave notice that it would be necessary. (FF 16.) The hearing officer concludes that the Parent stopped transporting the Student on May 16 at the latest.

This period constitutes about thirty nine school days on which the Parents may have transported the Student. Of these, the District either paid or approved reimbursement for twenty six school days. (FF 19-20.) This leaves approximately thirteen school days unaccounted for. There are three reasons why this hearing officer will not order reimbursement for these days.

First, the Parents did not specify on which days they actually transported the Student. They generally stated that they were providing transportation during the above period, but the hearing focused upon an issue that does not determine whether reimbursement should be awarded: for how long the Parents had agreed to transport the Student. Even if the Parents only agreed to transport from March 25 to April 9, the date of the IEP meeting, they would still have to prove exactly how many days they transported the Student in order to receive reimbursement of any kind. They did not do so.

Second, the Parents had submitted bills for reimbursement to the District, covering twenty-six days. (FF 19-20.) On or about April 11, they

submitted a bill for nineteen days. (FF 19.) On or about June 24, they submitted a bill for seven days in May. (FF 20.) One would expect that the Parents would have submitted bills for all the days on which they transported the Student, especially where the last bill came in June, well after the District began providing bus service. Thus, by their own actions, the Parents created a reasonable inference that they did not transport the Student on more than the twenty-six days for which they actually billed the District. Thus, the hearing officer cannot find that there were more days for which they should have been reimbursed.

Third, the District has been willing at all times to reimburse the Parents for all days on which they transported the Student to school. The record shows that the District's officials originally informed the Parents that reimbursement was available, (FF 170, and that the District's transportation department sat down with the Father and calculated the number of days for which reimbursement would be available. (FF 18.) The Parent even testified that he decided not to submit a request for reimbursement for an unknown number of days for which the District's employees had expressed a willingness to reimburse him – apparently because they were not sure that they were owed that amount of money. (FF 18.) Because the District was willing to reimburse fully for the days on which the Parents transported the Student, the hearing officer considers an order to be unnecessary. Conversely, the hearing officer trusts that the District would reimburse for any additional days on which the Parents could show to the District's satisfaction that they transported the Student and did not submit a bill for reimbursement.

The Parents argued that they should receive payment for car repair bills because the District should have provided transportation for most of the time during which the Parents provided it. They argued that they had not agreed to transport the Student beyond April 9. Yet, they were reimbursed at a standard mileage rate for many if not all of the days upon which they provided transportation, including many days beyond April 9.⁴ Thus, even if the District failed to provide transportation when they should have done so, the Parents accepted reimbursement for mileage for days on which the

⁴ . It is commonly accepted in business and government that a reimbursement based upon mileage covers both fuel and maintenance costs incurred for the miles reported. Thus, once reimbursed for mileage, the Parents would not be able to receive maintenance costs in addition.

District should have provided the transportation. Thus, the Parents accepted what the District offered to make them whole, and they cannot now undo that decision.

CONCLUSION

In conclusion, the evidence does not support a finding that the District failed to reimburse the Parents for the days upon which they transported the Student. Under these circumstances, the hearing officer will not award any further reimbursement.

ORDER

1. The District reimbursed the Parents for all miles for which they submitted claims, and did not refuse to honor any such claim.
2. The hearing officer will not award either mileage reimbursement or the costs of maintenance and fuel for the Parents' vehicle for any time during which the Parents were transporting the Student to school in the absence of District supplied transportation.

WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

July 28, 2008