



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-069

**Application of the BOARD OF EDUCATION OF THE
[REDACTED] SCHOOL DISTRICT for review
of a determination of a hearing officer relating to the provision
of educational services to a student with a disability**

Appearances:

Donoghue, Thomas, Auslander & Drohan, LLP, attorneys for petitioner, Neelanjan Choudhury, Esq., of counsel

Littman Krooks, LLP, attorneys for respondents, Adrienne Arkontaky, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which ordered the district to reimburse respondents (the parents) for the costs of transporting the student¹ to and from his educational placement during the period of September 2010 through February 2011. The appeal must be sustained.

Background and Procedural History

Due to the nature of the issues presented in this appeal, a detailed recitation of the student's educational history is unnecessary. The hearing record indicates that during the student's eighth grade (2009-10) school year, the student received home instruction for part of that school year due to difficulties at school (Tr. p. 10). In March 2010, the student was hospitalized for a brief period, and upon discharge, it was recommended by his providers that he be placed in a therapeutic day program (Tr. pp. 10-11). On June 21, 2010, a Committee on Special Education (CSE) convened for the student's annual review and to develop an individualized education program (IEP) for his ninth grade (2010-11) school year (Joint Ex. 2). In relevant part, the CSE continued the student's eligibility for special education programs and related services as a student with an emotional disturbance and recommended placement in a

¹ The student's eligibility for special education programs and related services as a student with an emotional disturbance is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]; Tr. p. 15).

12:1+1 therapeutic day program at a State-approved nonpublic school (id. at pp. 1, 5-6). Among other things, the CSE also recommended that the student receive extended school year (ESY) services, individual counseling one time per week, and portal to portal special transportation (id. at pp. 1-2).

During summer 2010, the student attended the therapeutic day program identified in his June 2010 IEP and was transported to and from his educational placement by the district together in a vehicle with four other students, the a driver, and a bus monitor (Tr. p. 22; Joint Ex. 4). On July 28, 2010, an incident occurred in the afternoon in which one of the students exited the district's vehicle, threatened to run away, and damaged the vehicle's door (Tr. pp. 26-27; Joint Ex. 12). During this incident, the student remained on the bus along with the driver and was later transported home by his mother (Tr. pp. 29-30).

On October 25, 2010, the CSE reconvened pursuant to the parents' request to discuss the student's transportation to the therapeutic day program (Joint Ex. 5 at pp. 1, 6). As relevant to this appeal, the parents expressed concerns about the length of the student's bus ride as well as the behavior of another student who rode on the bus (id. at p. 6). The October 25, 2010 IEP reflects that the student's bus route would be shortened due to a change in stops and that the "bus situation [was] being resolved" (id.).

Due Process Complaint Notice

In a due process complaint notice dated November 23, 2010, the parents requested an impartial hearing, asserting among other things, that the district failed to provide "appropriate special education transportation services to [the student] that [would] allow him to engage in, and make progress in, his educational program" (Joint Ex. 4 at p. 2). Specifically, the parents alleged that the July 2010 incident on the bus and another student's behavior caused the student to arrive at his educational placement in a state of anxiety that made it difficult for him to engage in his educational program (id.). The parents further asserted that despite the district's assurances that the student's bus ride would be shortened and that the other student would be removed from the bus, the other student remained on the bus, and their son's anxiety escalated further (id.). As relief, the parents requested that the district promptly begin providing transportation to their son without the presence of the other student and that the parents be reimbursed for the costs that they incurred for transporting the student to and from his educational placement (id.).

Impartial Hearing Officer's Decision

An impartial hearing was convened on February 10, 2011 and concluded on March 18, 2011 (Tr. pp. 1, 258). During the course of the proceeding, the parties agreed at the impartial hearing that the only issue to be addressed was the provision of the student's transportation and whether the district should be required to reimburse the parents for their costs for transporting the student to his educational placement during the period of September 2010 to February 1, 2011 (IHO Decision at pp. 4-5; Tr. pp. 97-98; see Pet. ¶ 7; Answer ¶ 7). The parties further agreed that if the issue was decided in favor of the parents, the district shall not have to reimburse the parents more than \$1,000.00 (IHO Decision at pp. 5, 14).

In a decision dated May 9, 2011, the impartial hearing officer summarized the evidence before him and found, among other things, that there was no indication in the hearing record that the student was threatened by another student while riding the district's vehicle to and from his educational placement (IHO Decision at p. 13). He nevertheless ordered the district to reimburse the parents for the costs of transporting their son to his educational placement for those days that the student attended school and did not use district transportation, at a cost not to exceed \$1,000 (id. at p. 14).

Appeal for State Level Review

The district appeals, asserting that the impartial hearing officer erred as a matter of law because his findings of fact were inconsistent with an award of reimbursement for transportation costs. The district cites to the impartial hearing officer's findings that: (1) the district's witnesses credibly testified that at no time did any of the students on the bus threaten the student; (2) none of the parents' witnesses had actual knowledge of what took place on the bus; and (3) the hearing record does not include any "negative interaction either verbal or physical directed at [the student]" by another student on the bus. As relief, the district requests reversal of the impartial hearing officer's award of transportation costs.

In their answer, the parents assert admissions and denials without cross-appealing any part of the impartial hearing officer's decision. According to the parents, the impartial hearing officer's order directing the district to reimburse the parents for their transportation costs does not contradict his findings or the hearing record. The parents contend that the district failed to offer the student a free appropriate public education (FAPE) because another student's behavior on the bus created a hostile environment that caused the student to feel threatened and the parents to transport the student to his educational placement on multiple occasions. The parents also assert that because the district provided inappropriate transportation to the student, the impartial hearing officer appropriately awarded them reimbursement for their transportation costs. The parents request that the impartial hearing officer's decision be upheld.

Applicable Standards—Transportation as a Related Service

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A "FAPE" is defined as special education and related services: (1) that meet state standards; (2) include an appropriate preschool, elementary, or secondary school education; and (3) that are provided at public expense and in conformity with an IEP (20 U.S.C. § 1401[9]; see Rowley, 458 U.S. at 203 [explaining that a school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction"]). Pursuant to the IDEA and its implementing regulations, a district is required to develop an IEP with a written statement of the special education and related

services to be provided to a student with a disability (20 U.S.C. § 1414; 34 C.F.R. § 300.320[a][4]). "Special education" means specially designed instruction, at no cost to parents, to meet the unique needs of the student (20 U.S.C. § 1401[29]). The term "related services" includes transportation and other services as may be required to assist a student to benefit from special education (20 U.S.C. § 1401[26], see 34 C.F.R. § 300.34[a]; 8 NYCRR 200.1[ww]). Transportation as a related service can include travel to and from school and between schools; travel in and around school buildings; and specialized equipment such as special or adapted buses, lifts, and ramps (34 C.F.R. § 300.34[c][16]). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, a district must ensure that the student receives the necessary transportation at public expense (Transportation, 71 Fed. Reg. 46,576 [Aug. 14, 2006]; see 8 NYCRR 200.1[ww]).

Discussion

Here, it is undisputed by the parties that the student requires transportation as a related service and that the student's IEP provided for "portal to portal" special transportation (see Joint Exs. 2; 5). The hearing record demonstrates that the district provided special transportation to the student as a related service; however, there were times when the parents opted to transport their son to his educational placement themselves and chose not to use the available special transportation offered by the district. The essence of the parents' claim is that they are entitled to reimbursement for their transportation expenses because the special transportation provided by the district interfered with the student's receipt of educational benefits due to the behavior of another student on the bus who caused their son to arrive at his educational placement in a state of anxiety. However, as explained below, the evidence in the hearing record does not indicate that the district failed to provide the student with special transportation to the therapeutic day school or that the implementation of the transportation service deviated from the student's IEP in a material way. A party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP such that the district precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 (D.D.C. 2007) [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

With regard to evidence weighing in favor of the district, as noted by the impartial hearing officer, the district's bus driver and monitor persuasively testified that the student was not involved in incidents with other students on the bus and that he typically listened to his MP3 player and kept to himself during the bus ride (Tr. pp. 23-24, 38-39, 40-43, 83-84). The bus monitor further testified that another student on the bus would sometimes have verbal outbursts directed toward her or the bus driver, but was never physically or verbally abusive toward the student (Tr. pp. 24, 39). With regard to the July 2010 incident, the bus monitor reported that she believed that the damage to the vehicle's door was an accident and she stated that the student remained on the bus with the driver observing the incident (Tr. pp. 27, 29-30; Joint Ex. 12). The bus monitor did not notice any change in the student's behavior after the July 2010 incident, stating that the student continued to be quiet and keep to himself on the bus (Tr. p. 32).

With regard to evidence favorable to the parent, a social worker from the therapeutic day school testified that after the July 2010 incident, the student sought to avoid riding on the bus with the other student who attended the same educational placement (Tr. pp. 291-93). The social worker also testified that the student became angry and withdrawn after he was promised that the other student would be removed from the bus and was not (Tr. p. 293).² According to the student's father, the student would "sit in transition all day" at his educational placement and not attend any of his classes (Tr. p. 303).

While the parents' concerns about the student's bus ride are understandable in light of his anxiety, the impartial hearing officer had the evidence from both parties before him and the district correctly points out that he did not articulate any of the reasons for awarding reimbursement for transportation to the parent and instead made factual findings that would lead to the conclusion that transportation costs should not be reimbursed in this instance (IHO Decision at pp. 12-14). The impartial hearing officer determined that there was no indirect or direct threat to the student while on the bus; the greatest effect of travel to the therapeutic day school upon the student was noticed at home; the other student with the outbursts did not negatively interact with the student; and that the student was a bystander to the July 2010 incident (*id.* at p. 13). Additionally, the impartial hearing officer noted that the parents did not articulate the amount of transportation they provided for which they sought reimbursement (*id.* at pp. 13-14). Upon an independent review, I find that the evidence in the hearing record is consistent with the factual findings of the impartial hearing officer. Although the parents allege that the impartial hearing officer incorrectly determined that the student was not bullied, they did not assert a cross-appeal to overturn his adverse findings. Under these circumstances, I am constrained to find that their claim for reimbursement must fail. Even if the parent had cross-appealed, the evidence in the hearing record with regard to the effect of the July 2010 incident upon the student does not show that the special transportation provided by the district deviated from the IEP to such a degree that the student was precluded from the opportunity to receive educational benefits at the therapeutic day school.³

² The hearing record does not indicate when the student was "promised" that the other student would be removed from the bus.

³ The evidence alludes to some discussion that the other student would possibly be placed on home instruction and would therefore no longer require transportation thus resulting in the student's preferred outcome, but it appears that this course of events did not ultimately transpire (Tr. p. 293).

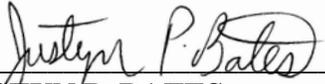
Conclusion

In view of the forgoing evidence, I find that the hearing record does not support the conclusion that the district failed to offer the student special transportation services (see 34 C.F.R. § 300.34[a]; 8 NYCRR 200.1[ww]). Accordingly, I will annul the portion of the impartial hearing officer's decision that directed reimbursement to the parents for their transportation costs.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated May 9, 2011 that ordered the district to reimburse the parents for transportation costs is hereby annulled.

Dated: Albany, New York
July 21, 2011



JUSTYN P. BATES
STATE REVIEW OFFICER