The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 12-082

Application of the BOARD OF EDUCATION OF THE VALLEY STREAM UNION FREE SCHOOL DISTRICT NO. 30 for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Keane & Beane, PC, attorneys for petitioner, Suzanne E. Volpe, Esq., of counsel

Carrieri & Carrieri, attorneys for respondents, Ralph R. Carrieri, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the services recommended by its Committee on Special Education (CSE) for the student for the 2011-12 school year were not appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings conclusions and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has received diagnoses including an autistic disorder, an attention deficit hyperactivity disorder, combined type (ADHD), and a receptive-expressive language disorder, and has a history of asthma (Parent Ex. A at p. 3). The student has been in the physical custody of a foster parent (the parent) since November 2008, at which time he enrolled in one of the district's elementary schools (Tr. pp. 361-63, 399). A private foster care agency (the agency) is the student's legal custodian and placed the student with the parent (Tr. pp. 361, 398-99).[1]

[1] The agency asserts that it shares legal custody of the student with a public child welfare agency that is not involved in this dispute (Dec. 8, 2011 Tr. pp. 35-36; IHO Ex. 4 at p. 1).

On May 31, 2011, the CSE convened to develop the student's IEP for the 2011-12 school year (Dist. Ex. 2).[2] The CSE recommended that the student attend a 12:1+2 classroom at his neighborhood school and receive related services including occupational therapy (OT) and speech-language therapy (id. at pp. 1, 9). With respect to extended school year (ESY) services, the CSE recommended that the student attend a 12:1+4 program at a private school in another district and receive OT and speech-language therapy services (id. at pp. 9-10). For the student's ESY program, the CSE specified that the student required door-to-door special transportation to meet needs related to his disability (id. at p. 11).

The agency subsequently requested that the CSE review the student's program to consider adding door-to-door transportation to his May 2011 IEP for the 10-month school year as well as for his ESY program, in response to which the CSE reconvened on October 27, 2011 (Tr. pp. 313-15, 400; Dist. Ex. 1 at p. 1). In addition to the materials reviewed at the May 2011 CSE meeting, the CSE considered an October 24, 2011 progress report from the student's special education teacher at the district (Dist. Exs. 1 at p. 2; 5). The October 2011 IEP was substantially similar to the May 2011 IEP, with the addition of a behavioral intervention consultant on an as needed basis as a support to the student's teacher (Dist. Ex. 1 at p. 9). The October 2011 IEP also indicated that the student would "tantrum" in the afternoons if he did not get his way and that the district was in the process of conducting a functional behavioral assessment (id. at pp. 1, 5). By written notice dated the day of the CSE meeting, the district informed the parent that it did not recommend that the student receive door-to-door transportation for the 10-month school year "since an alternate placement was not appropriate" (Dist. Ex. 20 at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated November 3, 2011, the agency requested an impartial hearing on behalf of the parent (IHO Ex. 4 at pp. 1-2).[3] The agency and parent asserted that the district had failed to offer the student a free appropriate public education (FAPE) because of its failure to provide the student with door-to-door transportation from his home to his neighborhood school during the 10-month school year (id. at pp. 2-3).

B. Impartial Hearing Officer Decision

A prehearing conference was held December 8, 2011, at which time the district objected to the agency's and the parent's standing to bring a due process complaint notice on behalf of the student (Dec. 8, 2011 Tr. pp. 16-17).[4] At the first hearing date, the IHO held that although there

[2] The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (Dist. Exs. 1-2; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]). He was previously determined to be eligible as a student with mental retardation, a term no longer used as of an October 2011 change to the State regulations (8 NYCRR 200.1[zz][7]; Dist. Exs. 14-15).

[3] The due process complaint notice requested an impartial hearing on behalf of the student and his younger brother, also in the parent's foster care and in the agency's legal custody (IHO Ex. 4). The cases were later severed, and the district's appeal from the decision of an IHO regarding the younger brother is currently before me in another proceeding.

[4] Because the prehearing conference transcript is not consecutively paginated with the transcript for the impartial hearing, references to it are prefaced by the date of the conference.

was no then-current designation of person in parental relation from the student's biological father at the time the due process complaint notice was filed, the parent and the agency nevertheless had standing to bring the complaint (Tr. pp. 32-33). After receiving written briefs on the issue (IHO Exs. 1; 3),[5] the IHO reaffirmed her initial holding that the parent and the agency each had standing on the basis of State regulations (Tr. pp. 283-86).[6]

The impartial hearing was convened on December 21, 2011 and concluded on January 12, 2012, after three hearing dates (Tr. pp. 1-512).[7] In a decision dated March 8, 2012, the IHO again reaffirmed her holding that the parent and agency had standing to request an impartial hearing on the student's behalf and went on to find that the district had denied the student a FAPE by not providing him with door-to-door transportation (IHO Decision at pp. 17-18, 27). The IHO found that the student's disabilities were such that he required special transportation to address his behavioral, communication, and health needs (id. at pp. 21-26). Accordingly, the IHO directed the district to reconvene the CSE to determine the type of transportation that would be provided to the student and to amend his IEP to reflect this determination within 30 days from the date of her decision (id. at p. 27; IHO Decision Attachment B). Finally, the IHO denied the parent's request for reimbursement for having provided the student with transportation in the past, as this request was not raised in the due process complaint notice (id. at pp. 26-27).

IV. Appeal for State-Level Review

The district appeals, arguing that neither the agency nor the parent had standing to request an impartial hearing on the student's behalf and, in any event, the IHO erred in finding that the student required door-to-door transportation in order to receive educational benefits from the program recommended in the October 2011 IEP. The district asserts that because the student did not have any mobility impairments or physical disabilities, he was not entitled to special transportation for the 10-month school year. The district further contends that because the vast majority of students in the district either walk to school or are driven by their parents, the student should be held to the same standard. Respondents answer, reassert the agency's standing to request the impartial hearing, and assert that the student's disabilities are such that he requires door-to-door special transportation.

V. Applicable Standards

Two purposes of the 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

[5] The parties also briefed the issue of whether the student was entitled to receive door-to-door transportation during the pendency of the proceeding (IHO Exs. 1 at pp. 3-9; 2). Neither party appeals from the IHO's determination that the student's pendency (stay put) placement did not include door-to-door transportation (Tr. pp. 272-74).

[6] I remind the IHO that, despite her representations to the contrary, the parties had no right to an interlocutory appeal from her interim determination on the issue of standing (8 NYCRR 279.10[d]; see Tr. p. 286).

[7] I remind the IHO to document each extension she grants in writing and include the documentation in the hearing record (8 NYCRR 200.5[j][5]).

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 Forest Grove v. T.A., 557 U.S. 230, __, 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 Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 889 [1984]; 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 CFR 300.320[a][4]). "Special education" means specially designed instruction, provided at no cost to parents, to meet the unique needs of the student (20 U.S.C. § 1401[29]; see 34 CFR 300.39[a][1]). 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 CFR 300.34[a]).

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, New York State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 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 CFR 300.34[c][16]). Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education (Application of a Child with a Disability, Appeal No. 03-053). The nature of the specialized transportation required for a particular student depends upon the student's unique needs, and it must be provided in the least restrictive environment (34 CFR 300.107; 300.305). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, the 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]). Safety procedures for transporting students are primarily determined by state law and local policy (see Letter to McKaig, 211 IDELR 161 [OSEP 1980]).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Standing—Foster Parent and Foster Agency

The district concedes that the parent is the student's foster parent, but asserts—without further elaboration—that neither she nor the agency is a "parent" pursuant to the definition contained in State regulation.[8] I find that the district's assertion is incorrect under the plain language of both State and federal regulations.

The IDEA defines parent to include "a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent)" (20 U.S.C. § 1401[23][A]). Federal and State regulations similarly provide that "parent" includes "[a] foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent" (34 CFR 300.30[a][2]; see 8 NYCRR 200.1[ii][2]). The district focuses on the fact that the student's biological father's parental rights have not been terminated pursuant to Family Court Act article 6 and, while the agency procured several designations of person in parental relationship pursuant to General Obligations Law § 5-1551 naming the parent as the person with the authority to make educational decisions on behalf of the student, none were in effect at the time the due process complaint notice was filed.

State regulation provides that, unless a judicial decree or order provides otherwise, "when one or more than one party is qualified under paragraph (1) of this subdivision to act as a parent, the birth or adoptive parent must be presumed to be the parent unless the birth or adoptive parent does not have legal authority to make educational decisions for the student" (8 NYCRR 200.1[ii][3]). However, foster parents are qualified to act as parents not under 8 NYCRR 200.1(ii)(1) but under 8 NYCRR 200.1(ii)(2); therefore, to the extent that State regulation would otherwise require a presumption in favor of the student's biological father, it does not in this instance. Federal regulation, in similar language, provides that "the biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child" (34 CFR 300.30[b][1]). Analysis from the United States Department of Education regarding this provision clarifies that it applies "in cases where a foster parent and a biological or adoptive parent attempt to act as the parent" concurrently (Parent, 71 Fed. Reg. 46566-67 [Aug. 14, 2006]). There is no indication in the hearing record that the student's biological father has "attempt[ed]" to act as a parent to the student under the IDEA to any extent, and I find that this presumption also does not apply (see, e.g., Appeal of Rivers, 42 Ed. Dep't Rep. 86, Decision No. 14,784 [2002] [holding that despite a lack of clarity in the hearing record regarding educational decision making capacity, a father would be considered his children's

[8] I note that in the appeal involving the student's brother discussed above, the district does not argue that the parent or the agency lacks standing to bring the complaint.

custodian for residency purposes when there was "absolutely no evidence in the record that the children have any other responsible adult claiming to be their parent or guardian"]).[9]

I further note that, although State regulation does not specify that the presumption in favor of biological or adoptive parents only applies when more than one party is attempting to act as the student's parent, the State Education Department (SED) interpreted the definition of parent in State regulation as "consistent with State and Federal law" (N.Y. Reg., July 3, 2007, at p. 17). For the foregoing reasons, I agree with the IHO that the parent had standing to request the impartial hearing on the student's behalf.[10]

B. Related Service—Transportation

As noted above, transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Tatro, 468 U.S. at 891, 894; District of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The requested transportation must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

In a guidance document, SED indicated that the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and that the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate" ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist.,

[9] I note that it would have been helpful for purposes of review for the parties to include in the hearing record more documentation establishing the student's legal custody at the time the impartial hearing was commenced. Specifically, as there is apparently a termination of parental rights proceeding pending in Family Court (Tr. pp. 9, 18, 278), it would have been helpful for the parties to establish whether or not anyone had requested or Family Court on its own initiative had appointed a person to act as the student's parent for purposes of educational decision making (see 34 CFR 300.30[b][2]; 8 NYCRR 200.1[ii][4]). Notwithstanding this point, the hearing record is sufficient in this particular instance to render a determination of the issue.

[10] Having found that the parent has standing to initiate this proceeding on behalf of the student, I need not address whether the agency has standing to initiate the proceeding on behalf of the student, and express no opinion thereon. However, I note that the due process complaint notice stated that the agency was requesting an impartial hearing "[o]n behalf of" the parent (IHO Ex. 1 at p. 2), and provided no indication that the agency intended to act as the student's parent in this proceeding.

987 F. Supp. 772, 775 [D.S.D. 1997]). When reviewing the transportation provisions made for a student by a district, the relevant question "is whether the transportation arrangements [the district] made for [the student] were appropriate to his needs" (Application of a Child with a Disability, Appeal No. 03-054).

In making its recommendations, the October 2011 CSE considered, among other things, March 2009 speech-language, psychological, and education evaluation reports, and an October 24, 2011 progress report prepared by the student's classroom teacher (Dist. Exs. 1 at p. 2; 5; 10-12). The psychological evaluation report indicated that the student's teacher completed an Adaptive Behavior Assessment System-Second Edition (ABAS II), Teacher Form with respect to the student, and that the student received scaled scores of 1 in the areas of communication, community use, health and safety, and self-direction (Dist. Ex. 11 at pp. 2-3). In addition, the student received a general adaptive composite score of 42, placing him in the 0.1 percentile for adaptive functioning and indicating that his overall adaptive behavior was in the extremely low range (id. at p. 3). The speech-language and educational evaluation reports indicated that the student had difficulty remaining focused and following directions (Dist. Exs. 10 at pp. 1, 3; 12 at p. 1). The October 2011 progress report indicated that the student required constant reinforcement to follow rules, was highly distractible and had difficulty focusing, and had difficulty with self-control, including noncompliant and impulsive behaviors (Dist. Ex. 5 at pp. 2-3). After determining that the student did not require door-to-door transportation, the district informed the parent by written notice that "[d]oor to door transportation was not approved, since an alternate placement was not appropriate," and further noted that "[t]here were no other factors relevant at this time" (Dist. Ex. 20 at p. 1).

The principal of the student's neighborhood school testified that the district provides transportation only to "special education students who are coming to a program that is not housed in their home school;" accordingly, if the student had been assigned to attend a program in one of the district's other schools, he would have received transportation (Tr. pp. 100, 102). The district's interim director of special education (the interim director) testified that the student was not recommended to receive door-to-door transportation because "he did not fit the policy requirements for eligibility transportation [and] his handicap and condition did not present any needs for transportation" (Tr. p. 312). Specifically, the interim director testified that the student had no physical disabilities or mobility issues and the CSE had "no evaluation and no observational reports that would indicate that his disability had an impact in him ambulating to and from school" (Tr. p. 318). The principal also noted that while most students the same age as the student who walked to school were accompanied by an older sibling or their parents, there were three children in the student's grade who walked to school unattended (Tr. pp. 101-02, 105).

The principal also testified that the student had significant communication difficulties and an intellectually disability (Tr. pp. 92, 141-42). The principal opined that the student was incapable of walking to school unaccompanied, but could do so with supervision (Tr. pp. 102, 114-15). She expressed no opinion whether the student would be capable of walking to and from school if he received training to do so, but opined that in any event he would not be capable of doing so independently (Tr. pp. 135-36, 144). The principal was unaware of the route the student would have to take to walk to school, but knew that he would be required to cross at least one street (Tr. pp. 103-04). The student's teacher testified similarly that the student could not safely walk home from school by himself, but that he could do so if accompanied by an adult or older sibling (Tr. pp. 201, 225). The interim director opined that the student could not walk to school

unaccompanied, but would be able to do so with supervision (Tr. p. 319). The interim director testified that he did not know which or how many streets the student would have to cross to reach his neighborhood school, or whether the student could recognize traffic signs or their significance (Tr. pp. 329, 347).

The parent testified that she lived within a five to ten minute walk from the school, and that the walk involved crossing three streets, none of which had a traffic control device (Tr. p. 369). She further testified that she experienced difficulty when walking the student to school because of his propensity to run off and not listen to instruction (Tr. pp. 370, 388); however, she believed she could safely walk the student to school (Tr. pp. 371, 374). The parent testified that the student could not walk to school by himself, as he could not determine the path on his own and had an underdeveloped sense of danger and boundaries which required constant redirection to maintain his focus (Tr. pp. 371-73, 377-78).

The hearing record establishes that the student has significant needs that relate to transportation, including difficulty communicating and focusing and a lack of appreciation for environmental dangers, such that it would be dangerous for him to walk to school independently. I note that all parties agree that the student is incapable of walking to school on his own, unlike other students his age who did so, and therefore, I find that he is entitled to transportation to and from school on that basis (see Weymouth Pub. Schs., 56 IDELR 117 [SEA MA 2011]; Maple Heights City Sch. Dist., 45 IDELR 201 [SEA OH 2006]; Fort Sage Unified Sch. Dist., 23 IDELR 1078 [SEA CA 1995]; Norton Sch. Dist., 21 IDELR 974 [SEA VT 1994]; Letter to Hamilton, 25 IDELR 520). Furthermore, as noted above, there is no indication that any district member of the October 2011 CSE considered the student's needs relating to transportation other than his ability to ambulate, including the route the student would have to take to school; moreover, none of the district CSE members familiar with the student's functioning outside of a school setting, nor did they seek an evaluation of his need for transportation services (see Malehorn, 987 F. Supp. at 775 [transportation not required to be provided where the CSE thoroughly considered the student's ability to attend school without the provision of special transportation]; Application of a Student with a Disability, Appeal No. 08-078; Application of a Child with a Disability, Appeal No. 03-053; "Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf). Because the evidence does not support the conclusion that the district considered the relevant factors in determining to deny the student transportation as a related service, and the hearing record contains sufficient evidence to support the IHO's determination that the student requires special transportation as a related service, there is no need to disturb her decision granting transportation to the student. I encourage the district to evaluate the student's transportation needs and consider whether travel training would be appropriate if it seems likely to enable the student to make his own way to school going forward (see 34 CFR 300.39[a][2][ii]; [b][4][ii]).

To the extent that the district intimates that the student should continue to be transported to school by the parent, I note that the district "cannot relieve itself of its obligations to provide [a] FAPE by denying services which the [p]arent later provides" (Maple Heights City Sch. Dist., 45 IDELR 201; see Weymouth Pub. Schs., 56 IDELR 117 [finding that parents have no obligation to provide transportation to a student who could not travel independently]; Montgomery County Pub. Schs., 504 IDELR 228 [SEA MD 1982] [the district "may not make the provision of special education services to the child conditional upon the parents' participation in a related service"']).

To the extent the district contends that the October 2011 progress report was prepared at a time when the student was not taking medication for his ADHD and that the student was no longer exhibiting those behaviors at the time of the impartial hearing (Tr. pp. 162-63, 172-73, 194-95, 216-19), I note that the IDEA specifically prohibits conditioning receipt of related services on a student obtaining a prescription for a controlled substance (20 U.S.C. § 1412[a][24]; 34 CFR 300.174; 8 NYCRR 200.4[e][9]).

Based on the evidence above, I find that the student was entitled to transportation for the 2011-12 school year.

VII. Conclusion

Although I find that the student is entitled to transportation as a related service, I express no opinion about the mode of transportation the district must provide to offer the student a FAPE, considering what constitutes suitable transportation for the student a matter best left to the CSE in the first instance (see Educ. Law § 4402[4][a]; see, e.g., Ms. K. v. City of South Portland, 2006 WL 463943, at *6 n.7 [D. Me. Feb. 24, 2006], adopted by 2006 WL 839493 [D. Me. Mar. 30, 2006]; Weymouth Pub. Schs., 56 IDELR 117 [SEA MA 2011]). I note in particular that there is no evidence in the hearing record that the student requires any particular accommodations or modifications for transportation to be suitable.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 6, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER