

Due Process No. 06-07

IMPARTIAL HEARING OFFICER: Anne Werum Lambright

Initiator

STUDENT:

PARENT:

COUNSEL: none

Second Party

AGENCY:

COUNSEL:

DUE PROCESS HEARING: January 23 and 24, 2006

Closed hearing

Student attended briefly

Taken and transcribed by Certified Court Reporters

EXHIBITS and WITNESSES: as noted in hearing transcripts

POST-HEARING SUBMISSIONS:

Parent did not submit; County school system submitted February 16, 2006

WRITTEN DECISION ISSUED: February 28, 2006.

Due Process No. 06-07

I. Issues

1. Whether the county school system must provide door-to-door transportation for the student¹ or, in the alternative, move the bus stop closer to his home?
2. Whether the county school system's provision of a regular education bus for student in the afternoon violates the IEP's transportation notation of a special education bus AM and PM?
3. Whether the county school system must continue reimbursement for student's mother's mileage?
4. Whether the student's school day meets his IEP requirements and state law, in particular Policy 2510?

II. Procedural History

This matter came on for hearing upon the student/parent's request for a due process hearing received by the State Department of Education on December 16, 2005; the assignment of the impartial hearing officer; a telephone status conference on December 20, 2005; a scheduling letter dated December 21, 2005; the resolution session waiver; the student's mother issues/ resolution form dated December 22, 2005; the January 6, 2006, letter from the hearing officer requesting the guardian appointment papers; the guardian appointment papers and the witness/document exchange on

¹All personally identifiable information, including the name of the county school system, the name of the student and parents and the names of the witnesses are omitted from this decision to ensure confidentiality for the student.

January 13, 2006. The noticed hearing was convened on January 23, 2006, and continued through January 24, 2006. The student/parents elected a closed hearing without the student present, although the student attended after school. The student's mother, stepfather and friend attended the hearing. The county school system was present by its Director of Special Education and by its attorneys. The student/parents introduced two exhibits and called eight (8) witnesses. The county school system introduced one exhibit and one witness in addition to those called by the student/parents. A stenographic record of the hearings was prepared. The post-hearing submission was received on February 16, 2006, and the written decision was issued February 28, 2006.

III. Stipulations

At the hearing, the student/parents stipulated to all the exhibits offered into evidence by the county school system with any exceptions noted in the hearing transcripts and the county school system stipulated to the exhibits offered into evidence by the student/parent with any exceptions noted in the hearing transcripts.

IV. Motions

All decisions on motions filed in this action and rendered at the aforesaid hearings are hereby affirmed. All other motions filed in this action by either of the parties which were not previously ruled upon by the impartial hearing officer are hereby denied and rejected.

V. Findings of Fact and Conclusions of Law

After a review of the record and the exhibits admitted into evidence, stipulations entered into by the parties, matters of which the impartial hearing officer took judicial notice during the proceedings, assessing the credibility of the witnesses, and weighing the evidence in consideration of same, the impartial hearing officer makes the following findings of fact and conclusions of law. To the extent that these findings of fact and conclusions of law are consistent with any proposed findings of fact and conclusions of law submitted by the parties, the same are hereby adopted by the impartial hearing officer, and conversely, to the extent that the same are inconsistent with these findings and conclusions, they are rejected. To the extent that the testimony of any witness is not in accord with these findings and conclusions, such testimony is not credited. Any proposed finding of fact, conclusion of law, or argument proposed and submitted by a party but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

VI. Findings of Fact

1. The student is currently years old and attends School in the county. He also has a work experience with his school job coach at [name of business] in the afternoon.

2. The student's mother filed a complaint on December 12, 2004, in accordance with the complaint procedure identified in Policy 2419, claiming that the LEA failed to implement the student's IEP as to transportation services. The State Department of Education's Letter of Findings [LoF] that resulted noted that while there had been discussions regarding door-to-door transportation, no language within the student's IEP required door-to-door transportation. The LoF determined that the student was currently accessing the county school system transportation and attending school on a regular basis. Finally, the State Department of Education found that the county school system was implementing the IEP and that no violation had occurred.

3. The student's mother filed another complaint on September 6, 2005, in accordance with the complaint procedure identified in Policy 2419, claiming that the student's IEP required door-to-

door transportation and the county school system was violating the IEP. The State Department of Education's Letter of Findings [LoF] reflected that information considered in investigating this complaint included the handwritten note contained in the student's May 10, 2005, IEP stating "Parent and advocate are requesting door to door transportation for [name of student] to attend school"; the prior written notice dated May 13, 2005, refusing the student's mother's request to be reimbursed for mileage associated with the transportation of the student between home and the bus turnaround; statements by the student's mother that she had been informed that the IEP form did not permit door-to-door transportation to be included in the section describing related services; and, information regarding improvements to the road by the Department of Highways and the opinion from the county school system Director of Transportation that the improvements did not render the road safe for an extension of the bus run in question.

4. The LoF issued in response to the September 6, 2005, complaint cited West Virginia Board of Education Policy 4336 §§ 5.1, 5.8 and 10.2 in concluding that the county school system had thoroughly considered and investigated the student's mother's request for door-to-door transportation but had determined that the student would continue to be transported from the established bus stop. This LoF also concluded that no violation had occurred.

5. The distance from the student's home to the established bus stop is approximately one mile. The student is unable to walk from his home to the bus stop unsupervised.

6. The county school system's Director of Transportation believes that an extension of the bus run would not be safe for a school bus.

7. The student's mother has had medical difficulties; she has been awarded disability benefits by the state of [name of state]. There was no evidence that this disability prevents her from transporting the student to and from the bus stop or arranging for transportation for the student.

8. The student's parents have a [make of car], and have applied for a disabled person's license plate citing the student's disability.

9. The student's mother requested reimbursement from the county school system for her transportation of her son to and from the school bus stop beginning January 24, 2005, through June 1, 2005. She received a travel reimbursement check for the period beginning August 26, 2004, to January 20, 2005.

10. The student is currently accessing the county school system's transportation and is attending school on a regular basis.

11. The student rides a regular education bus from his school to his worksite at [name of business] and back to home after work. His job coach, an experienced and caring special education teacher, works with him before, during and after his work at [name of business] and helps him participate in lunch in the employees' break-room.

12. The student's IEP reflects that he is to ride a special education bus morning and afternoon.

13. The county highways department made some improvements in [year] to the road beyond the current bus stop.

14. Both highways employees deferred to the county school system's Director of Transportation as they did not drive school buses and he does.

15. The student's mother and her advocate requested door-to-door transportation be provided by the county school system for the student on his IEP.

16. The student's mother requested mileage reimbursement for the first part of 2005 which was denied by the county school system.

17. The student's mother requested that the county school system change the bus stop to a location closer to the student's home. The county school system refused to extend the bus run.

18. The student wore his [name of business] uniform to the hearing both days after school and appears to be enjoying and benefitting from his work experience.

VII. Conclusions of Law

1. The *Education for All Handicapped Children Act* (EHA) of 1975, as amended by the *Individuals with Disabilities Education Act* (IDEA) of 1990, as further amended by the IDEA amendments of 1997 and 2004 as found at 20 U.S.C. 1400 *et seq.* and its implementing regulations at 34 CFR Part 300 *et seq.* as revised, establishes that school system must provide a free appropriate public education to all students including those who have special education needs. It establishes specific criteria for individual education plans (IEPs) and mandates certain procedural safeguards.

2. West Virginia Department of Education Policy 2419: *Regulations for the Education of Exceptional Children*, 126 C.S.R. Series 16, implementing W. Va. Code § 18-20-5, Education of Exceptional Children Act, provides the specific process and program regulations applicable to this due process.

3. The burden of proof is upon the parent to prove facts that support the claim for relief. Schaffer v. Weast, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005)

4. Other relevant cases, U.S. Department of Education Office of Special Education Program (OSEP) letter rulings and memoranda, Office of Civil Rights (OCR) rulings and any applicable state or local boards of education policies are cited in the Discussion below.

VIII. Discussion

A. CREDIBILITY OF WITNESSES, TESTIMONY AND EXHIBITS

The hearing officer was and is satisfied that each and every witness brought on by the parties was credible and truthful except as noted. Neither the demeanor of any witness nor the substance of any testimony suggested any inconsistency, conflict, or ulterior motive except as noted below. No evidence suggested any personal gain to be achieved by any witness as a result of testifying.

Some of the witnesses testified inconsistently with either their own testimony or with the well-established record. It appears to this hearing officer that the witnesses who did so did not understand or were confused by the questions and probably did not deliberately testify untruthfully.

The hearing officer was and is satisfied that all records and documents entered as exhibits are authentic and valid and that they were entered with the proper evidentiary foundations.

B. ISSUES

1. Whether the county school system must provide door-to-door transportation for the student or, in the alternative, move the bus stop closer to his home?

a. Door-to-door Transportation

The student/parent's initial issue involved door-to-door transportation of the student by the county school system.

The term "door-to-door" transportation is not included in federal or state statute or rules. Neither IDEA nor West Virginia Board of Education Policy 2419 define the scope of a county school system's obligation to transport a student in terms as to the physical location where its obligation begins and where it ends.

Courts generally consider the scope of a county school's duty to transport students on a case-by-case basis, with the availability of family means to assist in providing transportation a permissible factor that can be considered. *Donald B. v. Board of School Commissioners of Mobile County, Alabama*, 117 F.3d 1371 (11th Cir. 1997); *Malehorn v. Hill City Sch. Dist.*, 987 F.Supp. 772 (S.D. 1997). In *Donald B.* the student went to private school and had speech therapy at a public school that was three blocks away. The student's mother offered evidence that her work prevented her from supervising her son the distance of three blocks. However, the Court found that such evidence was not persuasive because the parent failed to show that the family lacked the means to provide such supervision, holding that the burden was on the parent to prove that the student would be unable to travel to and from without the Board's provision of transportation. *Donald B.*, 117 F.3d at 1375. Likewise, in *Malehorn*, the District Court for the District of South Dakota rejected the parent's argument that a Court may not consider a parent's ability to provide transportation in determining whether transportation is to be provided as a related service under the IDEA and found that it may consider the student's access to private assistance, and in that case, the parent failed to prove that the student could not be transported by the family. *Malehorn*, 987 F. Supp. at 783.

Before *Donald B.*, some courts determined that the distance the student has to travel is the critical factor as to whether or not transportation should be a related service. *See, e. g. Fort Sage Unified School Dist / Lassen County Office of Educ.*, 23 IDELR 1078 (1995). However, no evidence was introduced in this case as to what are the actual distances between the student's home and school and work site.

The Eleventh Circuit in *Donald B.* established the factors to consider in determining whether transportation as a related service was necessary: the age of the disabled student; the distance the student has to travel; the area through which the student would travel; the student's access to private assistance in making the trip and the availability of other forms of public assistance in route such as crossing guards or public transit. The burden of proof is on the student/parent to demonstrate that transportation as a related service was necessary to permit the student to participate in a special

education program *Donald B.*, 117 F.3d at 1375.

Applying the *Donald B.* test to the evidence in this matter, the student/parents proved that the student was nineteen years old, that the daily trip to and from the established bus stop was approximately one mile (but as noted above there was no evidence as to the actual distances between the student's home and school and work site), and that the student had access to private assistance in making the trip, although there was evidence that the student's mother had difficulty in providing direct assistance because of some personal health problems². There was no evidence about the area through which the student would travel or the availability of other forms of public assistance in route such as crossing guards or public transit.

The records submitted by the student's mother for reimbursement for her transportation of her son to and from the school bus stop reveal that she was able to transport her son regularly from the period beginning January 24, 2005, through June 1, 2005. She received a travel reimbursement check for the period beginning August 26, 2004, to January 20, 2005. The Letters of Findings dated January 24, 2005, and October 31, 2005, contain findings that "the student is currently accessing the district's transportation and attending school on a regular basis."

There was simply insufficient evidence to prove that county school system provision of door-to-door transportation is necessary for this student to receive transportation as a related service.

²The mother offered documents that she was entitled to disability benefits and a letter from Dr. [name], dated August 26, 2005, conveying a request from the mother that the county school system provide door-to-door transportation based upon the "difficulty" the mother reported to him she was having in providing such transportation. The county school system's brief points out that Dr. [name]'s letter does not recite that the request is based upon his own evaluation of the student's mother's physical condition or abilities to drive, or a review of her medical records. The disability records do not address her ability to drive. The student's mother's submission of a copy of an application for a disabled person's license plate for a [make of car], citing the student's disability, demonstrates that the student's parents have a vehicle that is used to transport the student.

b. Change the Bus Stop

As an alternative to door-to-door transportation by the county school system, the student/parents requested that the county school system extend the bus run and move the student's designated school bus stop closer to their home. The student's mother believes that the current bus run which ends approximately [# of miles] mile from the student's home at the designated bus stop referred to as "[name]" could be safely extended one-half mile nearer to the student's home to a [name].

The student's mother brought several Department of Highways county employees to testify. Each of the two representatives of the West Virginia Department of Highways testified regarding the conditions of the stretch of road in question and the improvements that had been made to it. Neither refuted the testimony of the county school system's Director of Transportation that an extension of the bus run would not be safe for a school bus. There was no evidence that a school bus could safely navigate the portion of [name of road]. There was also no evidence that the county school system failed to follow the rules for locating and relocating school bus stops as contained in West Virginia Code of State Regulations 126 CSR 92 - 10.

2. Whether the county school system's provision of a regular education bus for the student in the afternoon violates the IEP's transportation notation of a special education bus AM and PM?

The IEP states that the student will ride a special education bus in the morning and in the evening. The student is actually riding a regular education bus in the afternoon from work. The special education director testified that the decision to use a regular education bus to transport the student to his home community for the work experience portion of his program and then to his home was the product of an agreement between the county school system and the student's mother. The special education director also testified that the student was provided with preferential seating with

the understanding that such an arrangement was acceptable to the student's mother. There was no conflicting evidence.

Nonetheless, the IEP does not reflect this agreement or the change in transportation provisions by the county school system. Because no harm to the student has been alleged or shown by this alteration in transportation, this failure to document is a technical violation which should be corrected at the next IEP meeting.

3. Whether the county school system must continue reimbursement for student's mother's mileage?

The student's IEP contains no provisions relating to reimbursement for mileage. The evidence reflected that the student's mother had been reimbursed for her mileage for taking her son to and from the bus stop in 2004 but had been denied reimbursement (via a Prior Written Notice) for 2005, based on Policy 4336.

The West Virginia Department of Education enacted a policy that addresses the parents' or guardians' responsibility to transport their children with disabilities to and from established bus stops. West Virginia Board of Education Policy 4336 provides in applicable part that

5.8 Parents/guardians of students with disabilities shall assist in the transportation of their child by:

5.8.1 Providing documentation on the special care needed.

5.8.2 Bringing the student to the bus stop and providing the necessary supervision.

5.8.3 Picking up the student at the designated time at the designated bus stop.

5.8.4 Contacting the school bus operator if the child is to

be absent. **(Emphasis added)**

West Virginia Code of State Regulations 126 CSR 92.

The student's mother provided no evidence, except the past practice, that authorizes the mileage reimbursement requested. The State policy appears to require parents to bring and pick up the student or make arrangements for getting the student to and from the bus stop so the county school system's refusal to reimburse was appropriate. However, it is certainly understandable that the student's mother was confused by first being reimbursed and then being refused reimbursement.

4. Whether the student's school day meets his IEP requirements and state law, in particular Policy 2510?

The student/parent alleged that the county school system failed to provide the student with the appropriate hours/minutes of instructional time. The parent³ in her complaint stated that "Policy 2510 requires that schools provide at a minimum of 345 minutes a day for grades 9-12. Per [name of student]'s IEP he receives 280 minutes of classroom and work experience. [Name of student] is losing at a minimum of 65 minutes a day. [Name of high school] school day has 430 minutes in the school day and [name of another high school] has 420 minutes a day. [Name of student] loses 45 minutes from 10:45 to 11:30 on a bus from [name of high school] to the job and 25 minutes from 2:10 to 2:45 sitting on a bus in front of [name of another high school] Senior High with his job coach talking about what he did at job until the dismissal bell at 2:35."

The student/parents alleged that the county school system failed to provide the student with the appropriate minutes of instructional time as established in the student's IEP. The student's IEP does establish the amount of time the student is to receive special education and related services.

³The student's mother who is also the guardian of the student chose to not testify.

The IEP does not require the county school system to provide the student with a minimum total number of instructional minutes per school day. The student's job coach explained her instructional time with the student before, during and after his [name of business] work experience each afternoon. Her testimony was that she uses the student's time on the bus to and from [name of business] to work with the student and considers it instructional time. There was no evidence offered to contradict this testimony. The student was offered the instructional time mandated by his IEP.

The student's mother also asserted that the county school system failed to provide the student with the appropriate minutes of instructional time pursuant to the state policy for all students. She is correct that West Virginia Board of Education Policy 2510 establishes a minimum number of instructional minutes that must be provided per school day to the students. The student/parent did not offer evidence, however, that the student's special education and/or related services were impacted by these alleged instructional time shortages. Without proof that the alleged violations of Policy 2510 were so frequent or severe as to deprive the student of FAPE, the due process procedure is not the appropriate forum to litigate general allegations of West Virginia Board of Education Policy violations.

The student's mother offered no evidence that the substance of the educational program provided to the student lacks educational benefit or that disputed time deficiencies are material to the quality of the student's educational program.

IX. Decision

Based on the foregoing findings of fact, conclusions of law, and discussion, it is hereby ORDERED as follows:

As to Issue 1- The county school system does not need to provide door-to-door transportation for the student or move the bus stop closer to his home, unless his situation changes.

As to Issue 2- The county school system's provision of a regular education bus for the student in the afternoon is not properly documented on the student's IEP and as a technical violation, should be corrected at the next IEP meeting.

As to Issue 3- The county school system is not required to reimburse the student's mother's mileage for transporting her son to and from the bus stop.

As to Issue 4- The student's school day meets his IEP requirements. There was insufficient evidence that any alleged violations of West Virginia Department of Education Policy 2510 by frequency or severity impacted the students FAPE.

X. Directives for Implementation

The county school system should comply with Policy 2419 directives concerning noting the actual transportation arrangements for this student on his IEP at the next IEP meeting.

XI. Appeal Rights

Any party aggrieved by the findings and decision made in this due process may bring a civil action in any state court of competent jurisdiction within one hundred twenty (120) calendar

days of the date of issuance of the impartial hearing officer's written decision or in a district court of the United States without regard to the amount in controversy.

ANNE WERUM LAMBRIGHT
Impartial Hearing Officer

DATED: the 28th day of February, 2006.

cc: Parent/Guardian of Student
Counsel for county school system
WV Office of Special Education