

COLORADO DEPARTMENT OF EDUCATION

SPECIAL EDUCATION SERVICES UNIT

Due Process Hearing L2005:122

IMPARTIAL HEARING OFFICER'S FINDINGS AND DECISION

In the Matter Of:

[STUDENT], by and through his parents [PARENTS],

Petitioner,

and

BOULDER VALLEY PUBLIC SCHOOLS,

Respondent

I. INTRODUCTION

This matter is a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA) (20 USC §1415(f)(1)), its implementing regulations (34 CFR §300.507), and the implementing regulations of the Colorado Exceptional Children's Educational Act (1 CCR 301-8, 2220-R-6.03(6)). [STUDENT], through his parents [PARENTS] (the Parents) requested a due process hearing on November 18, 2005.

The due process hearing in this case was initially scheduled for January 17 and 18, 2006. The hearing was continued at the request of the Parents due to a medical emergency. In an order dated January 17, 2006 the Impartial Hearing Officer (IHO) continued the hearing date and granted an extension of time for issuing this decision beyond the 45 day time limit provided in the regulations. 34 CFR §300.511(c); 1 CCR 301-8, 2220-R-6.03(6)(b).

The IHO conducted this due process hearing on February 1 and 2, 2006 in Boulder, Colorado. The Parents appeared without counsel and represented themselves. Kate J. Kelley, Esq. and Richard E. Bump, Esq. represented Boulder Valley Public Schools (the District). The parties filed written post-hearing

briefs and submissions which were received by February 21, 2006, at which time this matter was ready for the issuance of this Findings and Decision.

The IHO issues this Findings and Decision pursuant to 1 CCR 301-8, 2220-R-6.03(6)(d).

II. ISSUES AND RELIEF REQUESTED

The issue in this case involves [STUDENT]'s method of transport to and from school. Currently, [STUDENT] transfers from his wheelchair to a District-owned Convaid stroller. He is then transported to school in the Convaid stroller on a District bus. When he reaches his school he transfers back to his own wheelchair. The issue to be determined is whether [STUDENT] must be transported in some other fashion in order to receive a free appropriate public education. The Parents assert that the failure to transport [STUDENT] to and from school in a regular bus seat denies him a free appropriate public education. The District maintains that transporting [STUDENT] in a regular bus seat threatens the safety of both [STUDENT] and District staff, and that transporting him in the Convaid stroller does not deny [STUDENT] a free appropriate public education.

The Parents request as relief that in the future [STUDENT] be transported to school in a regular bus seat with a restraining harness, not in a Convaid stroller.

III. FINDINGS OF FACT

Based on the evidence presented at the due process hearing the IHO makes the following Findings of Fact:

1. [STUDENT] is an 8 year old child with a date of birth of [DOB]. He attends Eisenhower Elementary School in the District.

2. [STUDENT] has multiple physical and developmental disabilities, including cerebral palsy and hydrocephalus. [STUDENT] is unable to walk and uses a wheelchair to access the school environment and his educational program.

3. Prior to August, 2004 [STUDENT] was transported in a District school bus while sitting in a regular bus seat. He would enter the bus on his personal wheelchair by a mechanical lift and District staff (bus aides) would then physically lift [STUDENT] from his wheelchair and transfer him to the bus seat. [STUDENT] was then secured in the bus seat with a safety harness.

[STUDENT]'s Transportation in the 2004-05 School Year

4. In August, 2004 District staff expressed concerns with the safety and feasibility of transferring [STUDENT] from his wheelchair to a bus seat and his riding in a bus seat. The District convened an Individualized Education Program (IEP) team meeting on August 18, 2004 to discuss the means of transporting [STUDENT] to and from school.

5. At the August 18 meeting the Parents expressed a preference that [STUDENT] ride in a regular bus seat. However, District staff no longer wanted to physically lift [STUDENT] into the regular bus seat because doing so endangered the safety of the staff. Due to the confined interior of the bus, aides were unable to position themselves so as to use proper body mechanics for safe lifting, thus risking back injury.

6. The Parents believed that [STUDENT] could safely be transferred to a bus seat without the need for District staff to physically lift him onto the seat. [STUDENT] would accomplish this transfer using what is known as a stand-pivot-transfer. In a stand-pivot-transfer [STUDENT] would stand up out of his wheelchair, stiffen his legs, an adult would guide him to turn his body, and [STUDENT] would then sit on the bus seat. An adult assisting with the stand-pivot-transfer maneuver uses minimal physical assistance and does not have to lift [STUDENT] to accomplish this transfer. [STUDENT] had been working on the stand-pivot-transfer maneuver with a private physical therapist over the summer.

7. The District was concerned that [STUDENT] did not have the ability to consistently perform a stand-pivot-transfer, particularly in the confined space of a school bus aisle. The August 18 IEP team meeting resulted in a plan to have a District physical therapist evaluate [STUDENT].

8. Carolyn Armstrong, a physical therapist working for the District, conducted an evaluation of [STUDENT] after the August 18 meeting. The evaluation demonstrated that, working with a parent, [STUDENT] could execute a stand-pivot-transfer to a bus seat.

9. The IEP team reconvened on August 24, 2004. The IEP team reached a consensus that [STUDENT] would ride on a regular bus seat and that the District would train bus aides and drivers to safely transfer [STUDENT] onto the bus seat using the stand-pivot-transfer method. Armstrong and the District's Director of Transportation, Bob Young, had reservations about transferring [STUDENT] onto a regular bus seat and transporting him in a bus seat. While [STUDENT] could safely make the transfer when his parent or physical therapist assisted in the stand-pivot-transfer, Armstrong had concerns about whether [STUDENT] could also do so when assisted by District bus aides that he did not know as well.

10. By October, 2004 District transportation staff reported that [STUDENT] was not able to consistently execute the stand-pivot-transfer maneuver in a safe fashion. The IHO finds that [STUDENT] was not consistent in safely executing the stand-pivot-transfer to the regular bus seat. He did not always maintain a standing position and would often lift his legs or buckle his knees so as to drop down and require the aides assisting him in the transfer to support [STUDENT]'s entire weight. Aides would have to lift [STUDENT] onto the seat when he dropped to the floor or failed to cooperate with his transfer.

11. [STUDENT]'s riding in the regular bus seat at the start of the 2004-05 school year caused safety risks to both [STUDENT] and the bus aides. These safety risks resulted from [STUDENT]'s inconsistent execution of the stand-pivot-transfer and the need for aides suddenly to catch his weight if he dropped or buckled or did not support his own weight. In addition, when [STUDENT] did not cooperate in the transfer to the bus seat aides would have to lift him onto the seat. Lifting [STUDENT] onto the seat required bus aides to lean over the back of [STUDENT]'s seat and also over the back of the seat in front of him. This lifting maneuver resulted in the aides utilizing improper body mechanics for lifting. The transfer to the bus seat created a safety risk to bus aides because they could not safely position themselves to catch and lift [STUDENT] in the confined area inside the bus.

12. [STUDENT]'s IEP team held a meeting on October 28, 2004 to discuss the safety concerns that the District's Transportation Department had raised regarding [STUDENT]'s mode of transport.¹ The IEP team was unable to reach consensus on the best way to transport [STUDENT] to and from school. The District therefore decided that in the future it would transport [STUDENT] by transferring him to a District-owned wheelchair, known as a Convoid stroller, which would be secured within the bus.

13. The Parents disagreed with the decision to transport [STUDENT] in the Convoid stroller. After the October 28, 2004 IEP meeting the Parents filed a request for a due process hearing.

14. On January 6, 2005 the Parents and the District settled the issues related to the 2004 due process hearing request and entered into a Memorandum of Understanding (MOU). As relevant to the current due process hearing the parties agreed to the following provisions in the MOU:

1. At this meeting the District's Transportation Department raised additional safety issues besides those described in Paragraphs 10 and 11 of the Findings of Fact. The IHO has previously determined that concerns regarding [STUDENT]'s safety in the harness that secured him in the bus seat are not at issue in this case (Prehearing Order, December 9, 2005, Paragraph 2, C; Second Prehearing Order, January 6, 2006, Paragraph 2). Other safety issues raised in the fall of 2004 are not material to the determination of this due process hearing.

A. [STUDENT] would be transported in the Convaid stroller for the remainder of the 2004-05 school year.

B. [STUDENT] would be the last child on the bus and the first off, in order to provide him with a short bus ride.

C. By August, 2005 the parties would meet to plan [STUDENT]'s mode of transport for the 2005-06 school year.

D. The District would practice the stand-pivot-transfer with [STUDENT] during the school day. The District would provide a bus seat in the classroom for [STUDENT]'s use in practicing this maneuver.

[STUDENT]'s Transportation in the 2005-06 School Year

15. The parties did not hold a meeting in August, 2005, as contemplated by the MOU. This meeting was not held until September.

16. On August 30, 2005 District physical therapist Carolyn Armstrong evaluated [STUDENT]'s ability to transfer from his wheelchair to a bus seat. Armstrong concluded that [STUDENT] was unable to execute a stand-pivot-transfer to the bus seat without moderate to maximum physical assistance from an aide (that is, an aide would have to support 50% or more of [STUDENT]'s weight during the transfer). Armstrong found that although [STUDENT] was able momentarily to bear his weight on extended legs, he could not maintain a safe, straight posture without the physical assistance of an adult. Armstrong also determined that [STUDENT] could not turn to get into the proper position to sit on the bus seat and that District staff had to physically shift him into a proper sitting position.

17. The IEP team next met on September 22, 2005. Based on Armstrong's report the District decided that [STUDENT] would continue to be transported in the Convaid stroller. The District declined the Parents' request that [STUDENT] be transported in a bus seat for several reasons, including the following: [STUDENT] could not complete a stand-pivot-transfer without significant adult support; he had to be lifted onto the bus seat; and because [STUDENT] did not consistently support himself to complete a transfer, bus aides had to bear [STUDENT]'s weight and maneuver him into position in a confined space that does not allow for safe completion of the transfer.

18. Currently, [STUDENT] is transferred on the bus from his personal wheelchair to the Convaid stroller. Bus aides execute a two-person lift from the wheelchair to the stroller. When the bus arrives at [STUDENT]'s school the stroller is transported from the bus to the classroom and [STUDENT] transfers from the stroller to his personal wheelchair while in the classroom. At the end of the day he transfers from the wheelchair to the stroller in the classroom and is

transported to the bus in the stroller, which is then secured on the bus. When the bus arrives at [STUDENT]'s home he is transferred from the stroller to his wheelchair while on the bus.

19. The IHO finds that it is currently impractical and unsafe for [STUDENT] to be transferred from his wheelchair to the bus seat. The IHO makes this finding based upon the facts found in paragraphs 10 and 11 of these Findings of Fact, above. In addition, the evidence did not establish that if he buckles or drops during a stand-pivot-transfer maneuver [STUDENT] will consistently stand up on his own if told to do so. The evidence also did not establish that [STUDENT] consistently will return to a seated position if he has difficulty standing during the transfer. Even if on his own [STUDENT] can correct for dropping or buckling when he is transferred by his parents (by standing up when cued or by reseating himself), he does not consistently do so on the bus.

20. The District's preferred option is to transport [STUDENT] in his personal wheelchair, secured in the bus. The District believes that this option is the safest and most comfortable for [STUDENT]. The Parents do not want to have [STUDENT] transferred in his wheelchair because they believe that [STUDENT]'s wheelchair is not designed for transport and does not meet safety requirements in a crash.

21. The District has agreed to transport [STUDENT] in the Convaid stroller as a compromise with the Parents. The Convaid stroller meets crash test requirements. In addition, because the stroller is smaller than the bus seat it is easier and safer for bus aides to transfer [STUDENT] from his wheelchair to the stroller than it is to transfer him to a bus seat. Use of the Convaid stroller allows aides to apply proper lifting techniques and to ensure that neither they nor [STUDENT] will fall during the transfer process.

22. The District could adopt accommodations that might make transferring to a bus seat safer for [STUDENT] and bus aides. For example, the seats in the bus could be reconfigured to provide more room for a stand-pivot-transfer and to create a better environment for bus aides to support [STUDENT] in that maneuver. Also, bus routes could be modified to allow [STUDENT] to be the first on and last off (in this way no other wheelchairs would be on the bus, thus creating more space for a transfer). In addition, although the District and the Parents disagree as to whether [STUDENT] is capable of positioning himself in the bus seat without requiring lifting, a stool could in any event be provided on which [STUDENT] could push himself into position. Further, bus aides could receive additional training that might allow them to better deal with [STUDENT] if he drops or buckles during a transfer.²

2. The evidence was in conflict as to whether additional training of bus aides or drivers would be effective. The IHO does not have to resolve this dispute in order to reach a decision in this case.

[STUDENT]’s Educational Program

23. The Parents want [STUDENT] to ride in a bus seat, rather than the Convaid stroller, for several reasons, including:

A. They want [STUDENT] to be able to ride on a bus with children who are not disabled or have special needs.

B. If [STUDENT] learns to transfer to a bus seat, that skill will carry over to other parts of his life.

C. Sitting on a seat may assist [STUDENT] to develop balance and to react to stimuli (such as catching himself before he falls).

D. Sitting on a seat will give [STUDENT] the opportunity to learn how to move and control his body.

24. Some of [STUDENT]’s IEP goals would assist with a stand-pivot-transfer.³ However, [STUDENT]’s current IEP does not include learning a stand-pivot-transfer. Although he practices transfers on the bus seat in the classroom, that activity results from the agreement reached in the January 6, 2005 MOU and is not part of [STUDENT]’s IEP.

25. [STUDENT] receives educational instruction pursuant to an individually designed IEP. The Parents have not objected to or challenged [STUDENT]’s IEP.⁴

26. [STUDENT]’s IEP is implemented in the classroom and he receives educational benefit from the IEP. His educational needs, as set forth in the IEP, are being met in the classroom. There is no dispute that he is making good progress on his IEP goals and the IHO so finds.

27. There is no educational staff on the school bus. Based upon [STUDENT]’s IEP there is no educational benefit to having him ride in the bus seat. Riding in a bus seat does not allow [STUDENT] to practice any of his IEP goals.

IV. DISCUSSION AND CONCLUSIONS

A. Requirement of a Free Appropriate Public Education

3. One of these IEP goals is to stand from sitting in a chair and stand independently for one minute. Another goal is for [STUDENT] to take side steps when supporting himself at a table.

4. In their post-hearing submission the Parents refer to the fact that Federal regulations include “travel training” as part of the definition of special education. 34 CFR §§300.26(a)(2)(ii), (b)(4). However, the Parents’ request for a due process hearing did not raise deficiencies in the IEP as an issue in this case and no evidence was presented at the hearing that [STUDENT]’s IEP did not provide for special education as required by the regulations.

The IDEA requires that disabled students receive a free appropriate public education (FAPE). 20 USC §1412 (a)(1)(A). The issue to be decided by the IHO in this due process hearing is whether [STUDENT]'s method of transportation to and from school is consistent with the requirement that the District provide [STUDENT] with a FAPE. 20 USC §1415 (f)(3)(E)(1).

In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) (*Rowley*) the United States Supreme Court held that the IDEA's minimum requirement is that the state provide a disabled student with (1) access to specialized instruction and related services; (2) which are individually designed; (3) to provide educational benefit to the student. *Rowley* at 201. *Rowley* established that if a state educational agency complies with the procedures of the IDEA, and if the individualized education program developed pursuant to those procedures is reasonably calculated to enable the student to receive educational benefit, the state has complied with the IDEA. *Rowley* at 206-07; *Johnson v. Independent School District No. 4 of Bixby*, 921 F. 2d 1022, 1025-26 (10th Cir. 1990). A child receives a FAPE when he is provided with sufficient supportive services to benefit from his instructional program. *Rowley* at 188-89.

The IDEA requires that a student receive some educational benefit in order to obtain a FAPE. The law does not require a school district to provide services needed to maximize the student's educational potential. *Rowley* at 198-200; *Johnson v. Independent School District No. 4 of Bixby*, *supra* at 1028-29; *Urban v. Jefferson County School District R-1*, 870 F. Supp. 1558, 1562 (D. Colo. 1994). A school district provides the required educational benefit when the student is making progress toward his educational goals. See *O'Toole v. Olathe District Schools Unified District No. 233*, 144 F.3d 692, 707 n. 20 (10th Cir. 1998).

[STUDENT] is receiving a free appropriate public education under the legal standards described above. He is in an educational program that is individually designed and set forth in his IEP. He benefits from this educational program and is making good progress in meeting his IEP goals. Therefore, under *Rowley* and the other authorities cited above [STUDENT] is receiving a FAPE because he has access to individually designed instruction from which he receives educational benefit.

[STUDENT] will not receive additional educational benefit under his IEP if he is transported to and from school in a regular bus seat (Findings of Fact, Paragraph 27). The Parents believe, however, that there are several educational and developmental advantages to be gained if [STUDENT] rides in a regular bus seat (see Findings of Fact, Paragraph 23). The Parents argue that there are steps the District could take to overcome any safety issues and thus provide this additional benefit to [STUDENT] (see Findings of Fact, Paragraph 22). Even if these advantages can be accomplished, the fact remains that [STUDENT] receives educational benefit, and thus a FAPE, as he is presently

transported. The District is not required to provide additional services to maximize [STUDENT]'s educational potential. *Rowley* at 198 –200; *Johnson v. Independent School District No. 4 of Bixby, supra* at 1028-29; *Urban v. Jefferson County School District R-1, supra* at 1562 (D. Colo. 1994).

The IHO therefore concludes that even if there were advantages to transporting [STUDENT] in a regular bus seat, and even if the District's safety issues could be addressed by various modifications in [STUDENT]'s method of transport, [STUDENT] receives a FAPE as he is currently transported.

B. Transportation Services Under the IDEA

The conclusion reached above in Section A of this Discussion is consistent with the IDEA's requirements that specifically address transportation. The IDEA and Federal regulations require a school district to provide "related services" as part of a free, appropriate public education. 20 USC §1401(9); 34 CFR §300.13. The IDEA defines "related services" to mean transportation and other supportive services as are required to assist a child with a disability to benefit from special education. 20 USC §1401(26); 34 CFR §300.24(a). See *Irving Independent School District v. Tatro*, 468 U.S. 883, 894 (1984). Transportation includes travel to and from school. 34 CFR §300.24(b)(15).

The related services incidental to transportation required by the IDEA are those necessary to assist a child to benefit from special education. *Macomb County Intermediate School District v. Joshua S.*, 715 F. Supp. 824, 826-27 (E.D. Mich. 1989) (a school district is required to provide transportation to and from school if necessary to afford a child meaningful access to education). Transportation is considered necessary for a child to benefit from special education if in its absence a disabled child would be denied a genuine opportunity for equitable participation in a special education program. See *Donald B. v. Board of School Commissioners of Mobile County, Alabama*, 117 F. 3d 1371 (11th Cir. 1997).

[STUDENT]'s current method of transportation gets him to and from his school where he can access his educational program. As concluded above, [STUDENT] receives educational benefit from this program. There is nothing in the record to suggest that the District's method of transporting [STUDENT] in any way prohibits him from participating in and benefiting from his individually designed educational program.

The Parents would prefer another method of transportation that they feel would provide additional advantages to [STUDENT]. However, a school district's obligation is to provide transportation based upon a student's educational needs.

A school district does not have to provide transportation based only on a parental preference for transportation in a particular fashion if the preference for that mode of transportation is unrelated to the child's educational needs. See *Fick v. Sioux Falls School District 49-5*, 337 F.3d 968 (8th Cir. 2003); see also *North Allegheny School District v. Gregory P.*, 687 A.2d 37, 40 (Pa. Commw. Ct. 1996) (a school district is not required to comply with a parent's request for transportation when that request is not based upon the child's special education needs).

[STUDENT]'s educational needs are set forth in his IEP and those needs are being met in the classroom. The purpose of [STUDENT]'s transportation by bus is to transport him to and from the school, where he has meaningful access to his educational program and engages in his educational activity pursuant to the IEP. The bus ride itself is not an educational activity and the Parents' preferred method of transport is not necessary to meeting [STUDENT]'s educational needs (Findings of Fact, Paragraph 27).⁵ Accordingly, the legal requirement to provide related services, including transportation, does not require that [STUDENT] be transported in the method requested by the Parents.⁶

V. DECISION

Based upon the above findings and conclusions, it is the decision of the Impartial Hearing Officer that the District's method of transporting [STUDENT] to and from his school does not deny [STUDENT] a free appropriate public education. The Parents' request for relief is denied and dismissed.

5. See *Harris County School System*, 29 IDELR 1010 (ALJ Decision, December 23, 1998) (despite any secondary benefits such as socialization, the purpose of bus transportation is to provide safe and dependable transportation to a student's school); *Ms. S. v. Scarborough School Committee*, 42 IDELR 117 (D. Me. 2004) (transportation is not an educational activity).

6. In their post-hearing submission the Parents refer to legal authorities related to procedural violations in developing [STUDENT]'s IEP and to the concept of "least restrictive environment". They also state that the District has not complied with the January 6, 2005 MOU and that the District is discriminating against [STUDENT]. The Parents' request for a due process hearing did not raise these additional issues and those issues were not identified in either the Prehearing Order or the Second Prehearing Order issued by the IHO. It is not clear whether the Parents intended their post-hearing submission to raise these additional issues for decision by the IHO. Regardless, the 2004 amendments to the IDEA prohibit the IHO from considering these additional arguments in this proceeding because they were not specified in the request for a due process hearing. 20 USC § 1415(f)(3)(B).

VI. APPEAL RIGHTS

A copy of the parties' appeal rights is enclosed with this decision. 1 CCR 301-8, 2220-R-6.03(9) through (14).

DATED: March 7, 2006

MARSHALL A. SNIDER
Impartial Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this **IMPARTIAL HEARING OFFICER'S FINDINGS AND DECISION** on the parties by certified mail, postage prepaid, on March 7, 2006, properly addressed to the following:

[PARENTS]
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