

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

██████████,)
)
Petitioner,)
)
vs.) Case No. 13-0577E
)
BROWARD COUNTY SCHOOL BOARD,)
)
Respondent.)
_____)

SUMMARY FINAL ORDER

Pursuant to the stipulation of the parties, the undersigned administrative law judge, ██████████, has decided this case summarily, without an evidentiary hearing, there being no disputed issues of material fact.

APPEARANCES

For Petitioner: ██████████, Esquire
██████████, Esquire
Disability Rights Florida
██████████, ██████████

For Respondent: ██████████, Esquire
Broward County School Board
██████████

STATEMENT OF THE ISSUES

Whether the Broward County School Board (School Board) has [REDACTED] Petitioner of a free appropriate public education in the manner alleged in Petitioner's request for a due process hearing and, if so, what relief, if any, should be granted.

PRELIMINARY STATEMENT

On [REDACTED], Petitioner, through counsel (acting with the permission of Petitioner's parent), submitted to the School Board a request for a due process hearing (Complaint), alleging that, "for the past two [school] years," the School Board has denied Petitioner a free appropriate public education by [REDACTED] to provide Petitioner "the appropriate related service of door-to-door transportation" prescribed by Petitioners' IEPs. In the Complaint, the following "proposed resolutions" were offered:

- (1) Appropriate transportation accommodations for the school bus to pick up and drop off [REDACTED] in front of [REDACTED] home;
- (2) Compensatory education for days [REDACTED] missed from school due to ***** of appropriate transportation;
- (3) Compensatory related services for days [REDACTED] missed from school due to denial of appropriate transportation;
- (4) Monetary compensation to reimburse

██████████ mother for her mileage and time to transport ██████████ to school;

- (5) A new wheel chair;
- (6) Attorney's fees; and
- (7) Any and all other remedies deemed appropriate.

The Complaint was transmitted to DOAH the following day, ██████████. The case was assigned to the undersigned, who, on ██████████, issued a Notice of Hearing by Webcast, scheduling the due process hearing in this case for ██████████ (as agreed upon by the parties during a telephone conference call held on ██████████).

On ██████████, the School Board filed its Response to the Complaint, in which stated the following, among other things:

After a careful review of the due process complaint, we are proposing the following action(s):

- 1. To provide reimbursement to the parent for documented transportation for ██████████ to and from school for the 2011-2012 and 2012-2013 school years.
- 2. Arrange for transportation for ██████████ to and from school. The District will continue to reimburse the parent for documented transportation of the student until arrangements are finalized.

The action(s) described above are proposed because:

- 1. According [to] the IEP dated ██████████ and the continued needs of the student, transportation to and from

school is the responsibility of the District. [REDACTED] has been provided transportation from [REDACTED] home throughout elementary school. Upon review by the transportation department, it was determined that it was not safe for the District school bus to safely continue transporting the student as there was no bus that could navigate the family's driveway safely without reversing the vehicle. The family has intermittently transported [REDACTED] to school, therefore, the District agrees to reimburse the family for transporting the student according to the guidelines for contracting the parent's car.

2. It is the District's responsibility to provide transportation for [REDACTED]

After a careful review of the due process complaint, we are refusing the following action(s):

1. Provide compensatory services for [REDACTED] [a]s a direct result of the District's failure to provide transportation during the 2011-2012 and 2012-2013 school years.
2. To purchase a wheelchair.
3. Reimburse [a]ttorney fees.

The action(s) described above are refused because:

1. [REDACTED] attended school regularly for the 2011-2012 and 2012-2013 school years, missing a total of 6 school days combined for both school years. [REDACTED] was provided with all of the supports and services listed on [REDACTED] IEPs during this time period and was [REDACTED] a free appropriate public education. Therefore, there are no compensatory services that the student is entitled to receive.

2. The[re] are no known declared damages to the private wheelchair provided by the parent of which the school has assumed liability. Upon further discussion with service providers at the school, the private wheelchair is functional.

3. There is no provision for [a]ttorney's fees without an affirmative decision from an Administrative Law Judge.

On [REDACTED], Petitioner filed a Motion for Summary Judgment or, in the Alternative, Motion for Judgment on the Pleadings (Summary Disposition Motion), the body and "WHEREFORE" clause of which read as follows:

MOTION FOR SUMMARY JUDGMENT

1. Pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, a party may seek to recover upon a claim, with or without affidavits, when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.

2. Petitioner is an Exceptional Student Education (ESE) student who [REDACTED] in [REDACTED] and attends [REDACTED] a school in [REDACTED]

3. Petitioner is a student with [REDACTED] and who is [REDACTED].

4. A [REDACTED] measuring approximately [REDACTED] is the [REDACTED] road that leads to Petitioner's [REDACTED]

5. Petitioner's parent has significant [REDACTED] pushing Petitioner's [REDACTED] across the [REDACTED], [REDACTED] road.

6. Petitioner's parent has suffered [REDACTED] attempting to push Petitioner's [REDACTED] across the [REDACTED], [REDACTED] road.

7. Respondent, [REDACTED] School Board, is responsible for providing Petitioner a Free and Appropriate Public Education (FAPE).

8. Petitioner's Individualized Education Plan (IEP) team has determined that due to Petitioner's needs, Petitioner [REDACTED] transportation to and from school at a place that is closest and safest to Petitioner's home. Historically, Petitioner's IEP team has determined that this means door-to-door transportation for Petitioner.

9. Transportation is an element of what constitutes FAPE for Petitioner and it is, therefore, an obligation on the part of Respondent.^[1/]

10. In [Petitioner's] Due Process Complaint, Petitioner alleged that Respondent had [REDACTED] to provide Petitioner with transportation in accordance with Petitioner's IEP and in a way that met Petitioner's needs and that, as a result, Respondent had [REDACTED] to provide Petitioner FAPE.

11. As relief, Petitioner requested, among other things, that Respondent provide Petitioner with door-to-door transportation and that Respondent [REDACTED] Petitioner's parent for having to transport Petitioner to school.

12. In its Answer to Petitioner's Due Process Complaint, Respondent admits that, as part of its obligation to provide FAPE, it is responsible for providing transportation to Petitioner as is indicated on Petitioner's IEP. Respondent additionally admits that Respondent's transportation department determined that it was [REDACTED] for Respondent's school bus to continue transporting the student because there was [REDACTED] bus that could navigate the family's driveway safely [REDACTED] reversing

the vehicle. Respondent additionally [REDACTED] that, as a result, Petitioner's parent had to transport Petitioner to school.

13. Respondent, in its Answer to Petitioner's Due Process Complaint, has agreed to provide reimbursement to Petitioner's parent for documented transportation for Petitioner to and from school for the 2011-2012 and 2012-2013 school years. Respondent additionally agrees to provide Petitioner with transportation in a way that meets Petitioner's needs.

14. The existing case law is clear that if a student's unique needs requires that the [School] Board provide transportation to the student, as is the undisputed case with Petitioner, then the Board is obligated to provide transportation to that student in a way that meets the student's needs irrespective of some of the difficulties the Board may face in providing that transportation. In Kennedy v. Bd. of Education, 557 IDELR 232 (W. Va. 1985), the Court determined that the Board could not escape its obligation to provide transportation to ESE students because of its safety concerns related to the poor conditions of the road on which the students lived. The Court reasoned that the Board's excuse for not transporting the children to school was unacceptable and that if safety required it, then the Board ought to purchase a new vehicle to traverse the [REDACTED] road. Similarly, the tribunal in Fort Sage Unified Sch. Dist. v. Lassen County Office of Education, 23 IDELR 1078 (SEA CA 1995) opined that an unofficial Board policy that [REDACTED] allow school buses to travel on [REDACTED] denied the ESE student transportation as a [REDACTED]. The Court encouraged creativity on the part of the Board by indicating that a traditional school bus is not the only

vehicle the Board could consider for transporting the student. See e.g. Los Angeles Unified Sch. Dist., 48 IDELR 83 (SEA CA 2007) (holding that even though the Board could [REDACTED] maneuver a school bus on a narrow, unpaved road on which an ESE student's home was located, the Board still was [REDACTED] to provide the student door-to-door transportation because that met the student's needs and a [REDACTED] van could be an option); Shrewsbury v. Bd. of Education, 265 SE.2d 767 (W. Va. 1980) (holding that the Board was still required to provide transportation to students even though there was evidence that the road used could prove [REDACTED] for an average school bus to traverse and the Board owned only one small bus. These were not legitimate defenses); Norton Sch. Dist. 21 IDELR 974 (SEA VT 1994) (holding that the Board must provide alternate means of transportation if the Board feels that its school bus [REDACTED] go to the student's home and turn around in [REDACTED] driveway).

15. Petitioner will forego its request that Respondent provide Petitioner a new wheelchair and provide Petitioner with compensatory education.

16. Petitioner submits that there are [REDACTED] disputes of material facts to be determined at trial in this matter and that Petitioner is entitled to relief as a matter of law.

17. As required pursuant to Florida Administrative Code 28-106.204(3), Petitioner's counsel has attempted to confer with Respondent's counsel regarding this Motion but has been unsuccessful. Petitioner's counsel attempted to reach Respondent's counsel via telephone and email but Respondent's counsel has indicated that [REDACTED] is unavailable until March 25, 2013 (See emails 1 and 2 attached). Given the time sensitive nature of this matter,

Petitioner's counsel believes it is appropriate to proceed with filing this Motion.

MOTION FOR JUDGMENT ON THE PLEADINGS

18. Petitioner reasserts all of the claims in paragraphs 2-15 above.

19. Pursuant to Rule 1.140(c) of the Florida Rules of Civil Procedure, any party may move for judgment on the pleadings after the pleadings are closed but within such time as to not delay the trial.

20. Petitioner submits that based on the pleadings on file, all material facts, for which there are [REDACTED] disputes, are all [REDACTED] on the pleadings and only questions of law remain.

21. Petitioner submits that the only question of law presented in this matter and which involves Respondent's [REDACTED] to provide transportation should be resolved [REDACTED] [REDACTED] of Petitioner.

22. As required pursuant to Florida Administrative Code 28-106.204(3), Petitioner's counsel has attempted to confer with Respondent's counsel regarding this Motion but has been [REDACTED]. Petitioner's counsel attempted to reach Respondent's counsel via telephone and email but Respondent's counsel has indicated that she is unavailable until March 25, 2013 (See emails 1 and 2 attached). Given the time sensitive nature of this matter, Petitioner's counsel believes it is appropriate to proceed with filing this Motion.

WHEREFORE, Petitioner respectfully requests that this tribunal grant PETITIONER'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR JUDGMENT ON THE PLEADINGS, declare Petitioner the [REDACTED] party in

this matter, order Respondent to provide Petitioner door-to-door transportation [and to] reimburse[] . . . Petitioner's parent for transportation [] provided for Petitioner for the 2011-2012 and 2012-2013 school years [and for] reasonable attorney['s] fees, [and award] any other remedies the tribunal deems appropriate.

On March 25, 2013, Petitioner, on behalf of both parties, filed a Statement of Undisputed Facts, which contained the following "undisputed facts":

1. Petitioner is an Exceptional Student Education (ESE) student who resides in [] and attends [], a school in [].
2. Petitioner is a student with [] and who is [].
3. A long, dirt road measuring approximately 500 feet is the [] that [] to Petitioner's [].
4. Petitioner's current and previous Individualized Educational Plans (IEPs) provide that Petitioner [] transportation from home to school at a [] and [] to Petitioner's home.
5. Closest and safest is defined by Petitioner's unique needs based on [].
6. Petitioner's current bus stop is located at the end of the long, dirt road leading to Petitioner's [].
7. Due to the nature of Petitioner's disability, [] is [] to navigate the road to access the bus stop.

8. Respondent provided door-to-door transportation to Petitioner throughout [REDACTED] of Petitioner's [REDACTED] school years.

9. Petitioner's needs for transportation [REDACTED] changed and Petitioner's residence [REDACTED] changed.

10. Respondent is responsible for providing Petitioner a Free and Appropriate Public Education (FAPE).

11. Transportation is an element of what constitutes FAPE for Petitioner and it is, therefore, an obligation on the part of Respondent.

12. On or about [REDACTED], Respondent [REDACTED] providing Petitioner door-to-door transportation from home to school.

13. As a result, Petitioner's parent had to transport Petitioner to school on many occasions for the past [REDACTED].

On [REDACTED], a telephone hearing was held on Petitioner's Summary Disposition Motion. During the hearing (at which both parties were represented by counsel), the School Board indicated that it neither opposed the Summary Disposition Motion nor disputed the accuracy of any of the factual assertions made in the motion. Both parties agreed that, inasmuch as there were no remaining disputed issues of material fact in the instant case, there was no need for the due process hearing scheduled for [REDACTED]. They also waived the opportunity to file any further pleadings and requested that the undersigned issue a final order based on the existing pleadings, which the

undersigned agreed to do. Following the hearing on March 26, 2013, the undersigned issued a Notice of Cancellation of Hearing, which read as follows:

The parties' having agreed during a telephone conference call held on [REDACTED], and the undersigned's having determined upon a review of the record, that there are no disputed issues of material fact in the instant case, the hearing in this case, scheduled for [REDACTED], is cancelled. The undersigned will issue a summary final order in this case no later than [REDACTED].

FACTS

1. The facts set forth in Petitioner's Summary Disposition Motion and the parties' Statement of Undisputed Facts have been accepted by the undersigned and are hereby incorporated in this Summary Final Order.

CONCLUSIONS OF LAW

2. District school boards are required by the "Florida K-20 Education Code"^{2/} to "[p]rovide for an appropriate program of special instruction, facilities, and services for exceptional students [such as Petitioner] as prescribed by the State Board of Education as acceptable." §§ 1001.42(4)(1) and 1003.57, Fla. Stat.

3. The "Florida K-20 Education Code's" imposition of such a requirement is necessary in order for the State of Florida to be eligible to receive federal funding under the Individuals

with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., as most recently amended (IDEA), which mandates, among other things, that participating states ensure, with limited exceptions, that "[a] free appropriate public education [FAPE] is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." 20 U.S.C. § 1412(a)(1).

4. Under the IDEA, a "free appropriate public education" (FAPE) consists of "special education" and, when necessary, "related services." See 20 U.S.C. § 1401(9). The term "related services," as used in the IDEA, includes "transportation." 20 U.S.C. § 1401(26)(A).

5. For each "exceptional student," there must be developed, no less frequently than on an annual basis, an IEP addressing the unique needs of that student. See Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2489 n.1 (2009). An IEP provides the "the road map for a disabled child's education." M.C. ex rel. J.C. v. Cent'l Reg'l Sch. Dist., 81 F.3d 389, 396 (3d Cir. 1996).

6. "[A] material failure to implement an IEP, or, put another way, a failure to implement a material portion of an IEP, violates the IDEA." Sumter County Sch. Dist. 17 v. Heffernan, 642 F.3d 478, 484 (4th Cir. 2011); see also Neosho R-

V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 (8th Cir. 2003) ("[W]e cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually [REDACTED] to implement an essential element of the IEP that was necessary for the child to receive an educational benefit."). Transporting Petitioner from [REDACTED] home to school and back, as provided for in Petitioner's IEPs, was essential to Petitioner's receiving a FAPE and, thus, it was a "material portion" of those IEPs.

7. Under the IDEA, parents with "complaints with respect to any matter relating to . . . the provision of a free appropriate public education" must have an opportunity to have their complaint heard "by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f). In Florida, pursuant to section 1003.57(1)(b), Florida Statutes, such complaints must be heard by a DOAH administrative law judge, who may award appropriate relief if a [REDACTED] of FAPE is [REDACTED]. See Forest Grove Sch. Dist., 129, S. Ct. at 2494 n.11; and L. M. P. v. Fla. Dep't of Educ., 345 Fed. Appx. 428, 431 (11th Cir. 2009). The parents bear the burden of proving to the administrative law judge their entitlement to the relief they are seeking. See Schafer v. Weast, 546 U.S. 49, 62 (2005).

8. In the instant case, the undisputed facts establish that for the past [REDACTED]--the [REDACTED] and [REDACTED] school years--the School Board has [REDACTED] to provide Petitioner with the essential "related service" of door-to-door transportation as prescribed by the IEPs in effect during this time period, and it thereby has [REDACTED] Petitioner a FAPE.^{3/}

RELIEF

9. The following relief is hereby ORDERED:

(a) The School Board shall reimburse the parent for the transportation expenses the parent incurred in transporting Petitioner to and from school during the past [REDACTED]--a task that was the School Board's responsibility.

(b) The School Board shall provide Petitioner door-to-door transportation to and from school as contemplated by Petitioner's current IEP.

(c) While the undersigned does not have the authority to, and therefore [REDACTED] will not, make the attorney's fee award requested in Petitioner's Complaint and, again, in Petitioner's Summary Disposition Motion, [REDACTED] does note that this Summary Final Order "provides the requisite 'judicial imprimatur' for [Petitioner] to be considered a 'prevailing party' for attorney's fee purposes" should Petitioner seek such an award in a subsequent court proceeding. El Paso Indep. Sch. Dist. v. Richard R., 591 F.3d 417, 423 (5th Cir. 2009).

DONE AND ORDERED this 29th day of March, 2013, in
Tallahassee, Leon County, Florida.

S

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of March, 2013.

ENDNOTES

^{1/} See M. L. v. Bourbonnais Sch. Dist. 53, Case No. 08-CV-2203, 2010 U.S. Dist. LEXIS 23744 *40 (C.D. Ill. Mar. 15, 2010) ("[T]ransportation is a 'related service' encompassed by FAPE."); and Petties v. District of Columbia, 888 F. Supp. 165, 171 (D.D.C. 1995) ("The IDEA provides that transportation is a related service that a public school system is required to provide as part of its obligation to provide a free, appropriate public education for students with disabilities.").

^{2/} Chapters 1000 through 1013, Florida Statutes, are known as the "Florida K-20 Education Code." § 1000.01(1), Fla. Stat.

^{3/} This conclusion is supported by the case authority cited in paragraph 14 of Petitioner's Summary Disposition Motion, which the undersigned finds persuasive.

COPIES FURNISHED:

Ann Cintron-Siegel, Esquire
Catalina Urquijo, Esquire
Disability Rights Florida
1930 Harrison Street, Suite 104
Hollywood, Florida 33020

Barbara J. Myrick, Esquire
Office of the School Board Attorney
K. C. Wright Administration Building
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

Robert W. Runcie, Superintendent
Broward County School District
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301-3125

Matthew Carson, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

- a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(b), Florida Statutes, and Florida Administrative Code Rule 6A-6.03311(9)(w);
or
- b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).