

DOCKET NO. 215-SE-0204

Student, b/n/f	§	BEFORE A SPECIAL EDUCATION
Parent AND Parent	§	
	§	
VS.	§	HEARING OFFICER
	§	
NORTH EAST INDEPENDENT	§	
SCHOOL DISTRICT	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

This case arises under the Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. § 1400 et seq. Petitioner Student is represented by his parents and next friends, Parent and Parent. North East Independent School District is represented by its attorney, Ms. Jo Ann Collier.

The case was filed on February 20, 2004 and the original decision due date was April 5, 2004. The TEA transferred the case to me from another hearing officer on March 4, 2004. We held a prehearing conference on March 11, 2004, followed by the hearing on the merits on March 26, 2004. The parties extended the deadline to April 23, 2004 to allow time for written argument and to give me enough time to review the briefs and transcript and write a decision.

Petitioner is a disabled student. He requires door-to-door bus service from home to school and back, an attendant to help him get on and off the bus, and special equipment not now available on the district's regular school buses (a wheel chair lift and air conditioning). The issue presented is whether the District is required to carry him on a regular school bus with nondisabled students and to equip the regular school bus to meet his needs. He seeks an order directing the District to do this. Because the evidence establishes that based on Student's specific needs, the transportation on a special needs bus that the District now provides is the most appropriate means of transporting Student to and from school, I am denying all relief sought.

The Motion To Dismiss

A minor issue in the case arises under the "five day rule" See 34 CFR § 300.509(3) and 19 TAC § 89.1180(g). Petitioner's father filed a list of documents but did not list any witnesses when he made disclosure five days before the hearing date. In talking with him on the record, I learned that he thought he could just introduce the documents and did not need witnesses to identify them or connect them with the facts of petitioner's claim. When told that he needed a witness and asked if he intended to testify he said that he would do so if necessary. He did not seek to call any witnesses other than himself. The District moved to dismiss the case with prejudice on the theory that because the father did not list any witnesses in his disclosure five days before the hearing, he was precluded from putting on any evidence. I think dismissal with prejudice is too severe a sanction to impose on a pro se litigant for an innocent mistake.

Therefore, I said that I would, if necessary, continue the hearing so the father could disclose names of witnesses five days before a new hearing date. Counsel for the District agreed to go forward if I noted her objections to this procedure on the record. I have authority to "restart the clock" on the five day rule by continuing the case and reopening disclosure. See Letter to Steinke, 18 IDELR 739, 18 LRP 1710 (Office of Special Education Programs 1992). An analogous Texas Rule of Civil Procedure imposes as a sanction prohibition of testimony by witnesses not listed in response to a discovery request. See Rule 193.6(c), Texas Rules of Civil Procedure. The Rule expressly gives the judge discretion to grant a continuance as justice may require to allow the person who failed to list witnesses to supplement his or her witness list and avoid the sanction

Findings of Fact

1. Student is a ***-year-old *** student in NEISD. He has above average intellectual ability but has been diagnosed as having muscular dystrophy; and he is confined to a wheelchair. He requires total assistance for all motor activities, has poor head control, requires proper head support, and receives tube feeding.
2. An ARD Committee meeting was held on September 11, 2003. The ARD committee decided that the *** School should include Student in all general education *** program activities, assign him an aide, and provide him each day a half-hour of support from a special education teacher. The committee also decided that Student should take part in nonacademic activities (such as lunch and recess) with his nondisabled peers.¹ The ARD Committee determined that related services were necessary to enable Student to receive an education.² These related services included occupational therapy, physical therapy, health services, and door-to-door transportation on a climate-controlled bus equipped with a wheelchair lift.³ Student's parents signed the September 11, 2003 ARD indicating their agreement.⁴ In December 2003, Student's parents requested a new ARD to revise Student's bus service.⁵ The ARD Committee recommended that the District continue to transport Student on a special needs bus.⁶ Student's parents did not agree with that decision, and in February 2004, they requested this due process hearing.

1 Ex. 7.

2 Ex. 7.

3 Ex. 7.

4 Ex. 7.

5 Ex. 9.

6 Ex. 9.

3. Student's physical problems are severe.⁷ Nonetheless, except for placing him on the specially equipped bus which he rides with other disabled students and the half-hour each day he spends with a special education teacher, the District has kept Student with nondisabled children throughout the school day.⁸ Student's father concedes that Student is benefiting from his education, school has been a positive experience, and the education Student is receiving is "excellent."⁹
4. Student is very social and gets along well with adults and nondisabled students.¹⁰ He has no goals and objectives related to socializing with other students while on the bus in his IEP. He needs transportation as a "related service" to carry him to and from school so that he can receive a free appropriate public education.¹¹
5. Student is transported to school with five other students with disabilities.¹² On his ride home, there are a total of seven disabled students on the bus.¹³ Based on Student's specific needs and the school's available resources, the District contends that the service it is providing is the one that best serves Student's needs. Student's father admits the special needs bus provides safe transportation.¹⁴
6. Student's wheelchair contains a device that comes down to secure his head.¹⁵ ***, NEISD Executive Director for Special Education, described his observations of Student being placed on the bus. Student is assisted onto the lift, while an aide waits inside the bus. Once Student is in the bus, his wheelchair must be strapped down. It takes approximately 8-12 minutes to load him onto the bus.¹⁶

7 Tr. 45; Ex. 7, 8, 9.

8 Tr. 25, 47.

9 Tr. 27, 90.

10 Tr. 27, 43.

11 Tr. 50, 85. If transportation is being provided solely to enable the student to travel to and from school, not to provide instruction, no goals and objectives are included in the student's IEP. Ltr. to Smith, 23 IDELR 344 (OSEP 1995); see also Amy B. v. Arlington ISD, Dkt. No. 073-SE-190 (SEA TX 1990).

12 Tr. 86; Ex. 15.

13 Tr. 86; Ex. 16.

14 Tr. 25.

15 Tr. 26-27, 77-78.

16 Tr. 75.

7. Dr. *** also testified regarding situations that occur on regular NEISD school buses that could cause problems for Student.¹⁷ He also described the specialized training bus personnel receive in handling students with special needs.¹⁸ He testified that in his opinion Student's needs can be much better and more safely attended to on the special needs bus than would be possible on a regular school bus.¹⁹
8. Dr. *** made a very creditable witness and I believed all his testimony.
9. Student's father concedes (and I find) that the District cannot ensure Student's safety unless the bus is equipped to handle Student's specific needs.²⁰
10. Dr. *** is the NEISD Executive Director for Special Education. Dr. *** testified (and I find) that there are approximately 8,700 students in NEISD who are entitled to services under the IDEA.²¹ Only about 1,100 of those students are assigned to special needs buses.²²
11. I find that the evidence establishes that the majority of students with disabilities participate with nondisabled children in transportation.²³ Only those students “with special needs that the regular school buses are not equipped to handle” are placed on special needs buses.
12. Both Dr. *** and Dr. *** testified (and I find) that NEISD decisions regarding special needs transportation are made on a case-by-case basis.²⁴ Placement decisions are made after taking into consideration the severity of each child's disabilities and the safest manner of transporting the child to and from his or her destination.²⁵

17 Tr. 69.

18 Tr. 70, 71; Ex. 20, 21, 22.

19 Tr. 28, 30-31, 80-81

20 In the eleven years Dr. *** has been involved in transportation, this is the first time there has been a disagreement as to how a special needs child is transported to and from school. Tr. 73.

21 Tr. 33.

22 Tr. 35, 49, 60. NEISD transports approximately 17,000 students on regular buses. Tr. 60.

23 Tr. 49.

24 Tr. 35, 49, 50, 54.

25 Tr. 35-36, 49.

13. The District does not have the resources available to put specialized equipment on all of its regular buses.²⁶
14. The law prohibits the District from using special needs buses to transport students who do not qualify for special education funds.²⁷ The District receives separate funds from the state to provide transportation for special needs students.²⁸ The Texas Education Agency reimbursement rules for school districts provide that "[e]ligible route services [for the special education funds] are restricted to the transportation of only eligible special needs students."²⁹

Conclusions of Law

An out-of-state hearing officer decision found at 29 IDELR 1010, 29 LRP 5430, Harris County School System, Georgia State Educational Agency (1998), states what I believe to be the law applicable to this case. The decision reads in part as follows:

This hearing concerns a school bus ride for five-year old Mathew, a child receiving special ed services His current IEP, first dated September 4, 1998 and later revisited on September 18, 1998 places him in regular kindergarten, with full inclusion, but with an aide one hour each day. The educational component of the IEP is with the agreement of all parties.

The transportation issue arose at the beginning of the 1998-1999 school year when the school system's bus scheme was changed and Mathew no longer rode the same bus as his older brother, Adam. Adam now rides the middle school-high school bus It was decided [by an IEP meeting] that the related service of transportation would be changed to a mini-bus, also known as a special ed bus, so that a full time monitor or attendant would always be available on the bus. The parents requested that Mathew continue to ride the regular bus and that a monitor be placed on the regular bus to provide supervision and behavior modification for the child. When the IEP Committee decided otherwise, the parents requested a due process hearing. . . .

A review of Mathew's educational history shows that he is developing in every way and that mainstreaming is right for this child. The school system is obligated to provide each child with a disability participation with non-disabled children in services and activities to the maximum extent appropriate to the needs of that child. Mathew needs safe transportation. . . .

A review of the statutes, rules, regulations and case law shows that "mainstreaming" centers around classroom and education. I have not located case law that connects related

26 Tr. 66-67.

27 Tr. 52-53, 74; Ex. 24, 25.

28 Tr. 60.

29 Tr. 76; Ex. 25.

services or transportation directly to classroom or education. DeLeon v. Susquehanna, 747 F.2d 149, (U.S. Ct. of Appeals, 3rd Circuit) held that a change in the method of transporting a special ed child did not constitute a change in the educational placement. In general, related services appear to be more akin to procedure than to product. The primary purpose of transportation is a means to an end, the end being the delivery of a child to a place where an educational opportunity awaits. Although a bus ride can and should be a social and learning experience, its purpose is to provide safe and dependable transportation to school. I look upon a school bus as I would a wheelchair. A non-ambulatory child needs a wheelchair appropriate to his needs. It should be safe, dependable and manageable so that the goal of getting to a classroom, a swimming pool or an art studio can be accomplished. Thus, the designation of related service.

Potential socialization skills and occupational training are always probable secondary benefits to result from a mainstream bus ride. But these are secondary and the reason transportation is designated as a related service. Harris County School System has a duty to provide Mathew with safe, dependable transportation, appropriate to his current physical, academic and social development. If the definition of "mainstreaming" is expanded to include school buses, it seems that every bus must stand at the ready to be fitted with equipment and personnel necessary to transport each student, with or without unique needs, so that all children on each bus route would be together during the transportation time. I have carefully read and considered all of the case law, rules, regulations, and statutes submitted by both parties and I do not find a requirement nor encouragement to expand the definition of mainstreaming to include the related service of transportation. I find that the provision of a bus attendant for Mathew is proper, based upon the facts not in dispute and the procedure provided to make the decision.

. . . I find that the proposed change in the related service of transportation from a regular bus to a mini-bus is a reasonable way for Harris County School System to fulfill its responsibility to Mathew. . . . I conclude that the IEP Committee made a reasonable decision for the provision of safe and dependable transportation services for Mathew.

A second out-of-state hearing officer decision on this same issue is found at 102 LRP 2903, Shawnee Mission Unified School District No. 512, (Kansas State Educational Agency 2000), a case involving an unnamed 15-year old ninth grade disabled student requiring a wheelchair and legally entitled to services under the IDEA. The student filed a due process hearing asking to be placed on a school bus with non-disabled students and the hearing officer wrote in part:

The issue presented . . . is whether under IDEA, and the facts and circumstances of this case, the Shawnee Mission School District is required to provide transportation to [the unnamed student] to and from school with non-disabled/non-special need students. . . . One of the purposes of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. See, 20 U.S.C. § 1400(d)(1)(A). "Related services" are defined in the IDEA Final Regulations (34 C.F.R. Parts 300 & 303) under § 300.24(a), which states, in pertinent part, that "The term related services means transportation. and other supportive services

as are required to assist a child with a disability to benefit from special education. Specifically, under § 300.24(b)(15), the term "transportation" is defined to include travel to and from school.

I believe it is critical that the definition of "related services" found in the Regulations includes the phrase, "as are required to assist a child with a disability to benefit from special education." This concept that related services are those that assist the child to benefit from what might be best referred to as "core" special education services, is particularly highlighted in the case of transportation. As is pointed out in a Harris County School System's Case, 29 IDELR 1010 (December 23, 1998), "The primary purpose of transportation is a means to an end, the end being the delivery of a child to a place where an educational opportunity awaits." There is, therefore, of necessity, a distinction between "related services" and those services specifically designed to meet a child's needs as expressed through the goals stated in an IEP. . . .

Section 300.553 of the IDEA Regulations states that:

In providing or arranging for the provision of non-academic and extracurricular services and activities, including meals, recess periods and services and activities set forth in § 300.306 [specifically including transportation], each public agency shall ensure that each child with a disability participates with non-disabled children in those services and activities to the maximum extent appropriate to the needs of that child. (Emphasis added).

The School District is, therefore, obligated ("shall ensure") to provide bus transportation for [the unnamed student] in an integrated setting "to the maximum extent appropriate to [the unnamed student]'s needs." I want to make it clear, that in this case, I am not speaking about a moral or ethical obligation that may or may not exist on the School District's part to enhance [the unnamed student]'s integration into the able bodied world. Rather, I am specifically speaking of the legal obligation that the School District has to ensure that [the unnamed student] participates with non-disabled children in those non-academic settings and services provided by the School District.

The School District's obligation in this regard is statutorily limited under the regulatory caveat, "to the maximum extent appropriate to the needs of that child." It is, therefore, necessary to determine, first, what are the needs of the child in question. There can be no question but that one of [the unnamed student]'s needs in terms of the bus transportation services provided by the School District is for those transportation services to be provided in a safe manner. I find that the School District has met its obligation in this regard. The School District provides a wheelchair accessible bus, safety restraints are used to secure the wheelchair, a paraprofessional travels on the bus in addition to the bus driver for [the unnamed student]'s benefit and the bus route is structured so that [the unnamed student] is required to spend as little time as necessary on the bus.

I conclude that under the applicable law, the North East Independent School District has provided transportation to Student meeting the applicable requirements of IDEA. Based on Student's specific needs, transportation on a special needs bus is the most appropriate means of transporting Student to and from school.

Order

All relief requested by the Petitioner is hereby denied.

Entered at Austin, Texas, April 23, 2004.

/s/Larry J. Craddock
Larry J. Craddock
Special Education Hearing Officer

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SYNOPSIS

ISSUE Whether the district was obligated to outfit its regular school buses with special equipment including a wheel chair lift and air conditioning in order to enable a student with a disability requiring these accommodations to ride to and from school on the district's regular school buses with classmates who do not have disabilities requiring these accommodations instead of being transported on a special needs bus limited to students with disabilities requiring these accommodations?

CFR Citations 34 C.F.R. § 300.24(b)(15); 34 § 300.306; 34 C.F.R. §300.553

Texas Citations Tex. Educ. Code § 29.002(2)

HELD For the School District