

COPY

ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

In the Matter of:

[REDACTED] by his parents)
[REDACTED] and B [REDACTED])
)
and)
)
[REDACTED])
Local School District.)

DEC 08 2009
Special Education Services

ISBE Case No.: 2010 - 0097

W. David Utley
Impartial Hearing Officer

Decision and Order

The Hearing in the above captioned matter took place on December 1, 2009 at [REDACTED]. The parties had been advised of their rights under Section 14.08.02 (a) of the School Code, 34 CFR 300.512 and 23 Illinois Administrative Code 226.625. The undersigned Hearing Officer has jurisdiction to hear and decide this case under 105 ILCS 5/14-8.02 (a) of Illinois School Code, 23 Illinois Administrative Code 226.600 et seq., and the Individuals with Disabilities Education Act 20 USC 1415. The Student was represented by his mother and father and the School District was represented by [REDACTED] of the firm of [REDACTED].

1. Procedural Background

The request for an Impartial Due Process Hearing was dated September 6, 2009 and submitted on the Student's behalf by his parents. Based upon the parties' agreement to participate in both a resolution session and Mediation and joint request for continuance, the initial Pre-Hearing Conference and Hearing dates were vacated and a Pre-Hearing Conference was set for November 9, 2009. As both the resolution session and the Mediation were unsuccessful in resolving the issue between the parties, a Pre-Hearing Conference was held on November 9, 2009 and a Hearing date of December 1, 2009 was set. As the Parents had not forwarded the required documents and witness list pursuant to the Pre-Hearing Conference Summary, the School District filed a Motion to Bar Introduction of Evidence pursuant to 105 ILCS 5/14-802 a (g-50), 23 Ill. Adm. Code 226.625 and 34 C.F.R 300.512. (Five - Business Day Exchange). Two (2) status calls were held on November 30, 2009 relative to this Motion. After hearing the respective parties and argument, the Hearing Officer, over objection from the School District, granted the Parent's Motion to Continue the Hearing Date. As both parties ultimately agreed that they wanted to proceed on the scheduled Hearing date, the Parents and School District entered into a compromise as to the witnesses and documents. The School District agreed to withdraw its objection to certain documents that the Parent wanted to introduce including medical record(s), DCFS record(s) and a transportation letter. The Parents agreed to withdraw three witnesses that they had suggested on their Pre-Hearing Conference submissions. After the conclusion of all the evidence, the parties agreed and stipulated to the admission of all the documents in the Parents' document folder [Parent Document (hereinafter PD) 001 - 035] and the School District Document booklet (School District Documents (hereinafter SD) 0001 - 01 to 42].

The Parent called as witnesses: [REDACTED], the principal at [REDACTED] and [REDACTED] the former Special Education Coordinator for [REDACTED]. The District called as witnesses: [REDACTED], the current Special Education Coordinator, and [REDACTED], the current Superintendent of [REDACTED]

2. Issue Presented

The only issue presented in this Due Process Hearing is the issue of transportation. The Parent believes that the current mode of transportation – parent driven – is the optimum mode of transportation for the Student. The District contends that it now has the capability and the legal obligation to transport the student from his home to the [REDACTED]. Therefore, the issue before this Hearing Office is whether or not the current mode of transportation is appropriate and that the Districts proposed mode of transportation for the Student is an inappropriate method.

3. Relief Sought

The Parent's Request for Relief is to maintain the current mode of transportation as agreed to at the April 29, 2009 IEP meeting, i.e. parent provided with re-imbusement. The District proposes to transport the Student via a small school bus with a specially trained driver to assist the Student.

4. Findings of Fact

Disclaimer: Hearing Officer was not provided the transcript in this case and had no access to it as it has not yet been transcribed. The recitations of the facts of this case were gleaned from a review of the documents and the Hearing Officer's notes as to the facts elicited or facts that could have been inferred from the testimony of the witnesses herein.

A-1 [REDACTED] has been the Director of Education and Principal at [REDACTED] for the past 10 years. [REDACTED] is a private non-public special education facility which serves students with severe social, emotional and behavioral disorders.

A-2 The Student's eligibility for Special Education are (1) a specific learning disability including math, reading with difficulty staying on task and following directions including emotional issues that have led to a Behavior Intervention Plan (BIP); and (2) an other health impairment - due to hearing loss. He has a profound hearing loss in one of his ears, almost 100 % and a partial hearing loss in his other ear.

A-3 He has known the student since the 7 or 8th grade when he attended [REDACTED] for about a year and a half and then was re-referred to [REDACTED] in April, 2008. The Student is one of the more challenging students at [REDACTED]. He has experienced periods of success and has made educational progress at [REDACTED]. Conversely, he has periods where he can be difficult to deal with.

A-4 He has formed a close relationship with the Student both as to his success at school and his conduct/behavior. They have spent hours and hours conversing regarding the Student's motivation at school, his difficulties with staff, curriculum and his challenges. In his opinion, school is a great challenge for this Student.

A-5 He was in attendance at the April 28, 2009 IEP meeting which was conducted by [REDACTED], special education coordinator for [REDACTED]. Transportation was discussed with the understanding that transportation for 2009-2010 school year would be the same as 2008 - 2009 - that the parents would continue to provide transportation. This was specifically agreed by inference – there was no objection or discussion. It was mentioned that the parents would provide transportation and the team agreed that this was okay.

A-6 In terms of the IEP document itself, [PD10] the reason that “no” was marked for transportation was that the parent’s had been transporting the student and the IEP team decided to continue the same mode of transport for the 2009 - 2010 school year. He agreed that special transportation is required for this Student to and from school and/or between schools even though it is checked “no”. Regardless of whether the School District or the parent would provide transportation, it should have been marked “yes”. [SD00001-13]

A-7 The Student has had a lot of behavioral issues even before this. Although there was no emotional disturbance listed in any of his IEP’s [SD 0001-05], the Student has had emotional issues since the start of 7th grade. As the IEP team is led by the school district, it was determined that eligibility based upon a learning disability was the Student’s most prevalent disability and needed to be addressed. Staff/personnel from [REDACTED] have brought up the issue of behaviors and most of the goal statements reflect his behavior issues. He has personally stated that the Student should be evaluated for emotional/behavior issues.

A-8 Based upon the Student’s attitude and need for routine, the Student does not handle transitions well. Therefore, at least initially, in his opinion, a transition to the school district providing transportation would hinder the student’s preparation for school and potentially interfere with his desire to come to school. He is concerned that the Student will resist coming to school and will not be in a state of mind to be productive. Although he cannot say that the Student’s recent behavior (more oppositional, refusing to go to class more often, etc. with a concomitant 1st quarter drop in grades) is a result of this issue, it certainly is a possibility.

A-9 He agreed that even with the parents providing transportation, the Student still has had behavioral challenges. These behaviors occur typically throughout the day - based upon the class i.e., where he doesn’t feel confident such as creative writing. This can even occur in the morning after being brought by the parents. He agreed that the policies/strategies/interventions at [REDACTED] would not change with district providing transportation.

A-10 Since [REDACTED] has not provided transportation, he does not know if/how the Student’s behavior would change and does not know if his behavior issues would be affected if the School District provided transportation.

A-11 If proper procedures are put in place, i.e. proper/appropriate training for driver including establishing a relationship with the Student, it would be feasible for the School District to provide transportation.

A-12 Based upon his experience so far with the Student, it is his opinion that the Student will struggle academically and emotionally with a change to the District transportation.

A-13 Principal [REDACTED] was a very credible witness with an understanding and knowledge of this particular Student.

B-1 [REDACTED] has 12 years teaching at the junior high school and high school level. She was the coordinator for Special Education at [REDACTED] and is now the principal at Project Insight. She was the Student's Special Education coordinator at [REDACTED].

B-2 The Student is a great kid but he has to know that he can trust someone. That person is going to have to listen to him before getting to know him. Once that happens, the Student is more receptive, is able to learn and respond to re-direction. He also needs to know that he is trusted – whether by the other students, staff and teacher(s).

B-3 During the first part of school year (freshman) at [REDACTED], he transitioned well and had a good start to the school year. Most of his academic instruction was in a self contained classroom. Due to certain reasons, he was transferred to [REDACTED] again in the Spring, 2008.

B-4 The School District is responsible for transportation. However, during the 2008–09 school year, the school district did not have the resources to transport the Student to [REDACTED]. As such, there was the opportunity for the parents to transport the Student with reimbursement. As part of the 05-09-08 IEP, for the Student's attendance at [REDACTED], transportation was arranged through [REDACTED] that the parents would transport and would be paid mileage. In 2009, as the Student's transition was going smoothly, transportation was continued as it was with the parent(s) providing the transportation.

B-5 The Student has difficulty transitioning into new situations. What this means for transportation is that the Student will have to develop a level of trust with the bus driver. If the district takes steps to develop a relation between the Student and the driver, district transportation could be successful. There needs to be training on the driver's part as to handle behavior issues.

B-6 Her opinion is that until a level of trust is established with the bus driver, transportation will not be successful – it took almost a year for her to establish level of trust.

B-7 [REDACTED] also was a very credible witness and knew the Student well.

C-1 [REDACTED] is currently the Special Education coordinator for the [REDACTED]. She oversees all the operations of the Special Education department.

C-2 She is familiar with the Student as he was on her case load when he attended [REDACTED] in 2007. She was responsible for all of the paperwork, IEP's, general operations/monitoring of students on her case load including this Student. She got along well with him but never had him in a classroom. He would seek her out during day to discuss various matters.

C-3 The Student was not determined to have an emotional disability. During the April 29, 2009 IEP meeting, the parents didn't feel a need for re-evaluation as to any emotional issues. Their signature attests to this. [SD0001-05]

C-4 The Parents requested that the Student be placed at [REDACTED] after he encountered difficulties at [REDACTED].

C-5 Based upon her observations and review of records, she agreed that the Student had/has behavior issues, i.e., tardy to class; not prepared for class (homework, supplies), disrespect for teachers, etc.

C-6 The School District does have an obligation to provide transportation. Last year, the parents transported the Student to [REDACTED] pursuant to agreement with the parent as the School District didn't have any means to transport students - no vehicle and no drivers. They now have vehicles and drivers.

C-7 The School District transports other Special Education students with most going on the regular school bus. If there are behavior issues on the bus, the district makes accommodations. For example, if a student can't follow the rules, they will provide a bus aide or work with the bus driver as to that issue.

C-8 She agreed that there is a certain way to approach the Student. Basically, one has to earn his respect. Bringing in a driver without establishing this respect would be problem for the Student. The driver would have to have to create a relationship with him and approach him in the right way. She agreed that the School District is willing to invest time in training a driver.

C-9 This is the only student that attends [REDACTED] from [REDACTED] and would be the only student riding this particular bus to [REDACTED]

C-10 Although there is no reason to believe that there would be a problem with the Student relative to transportation, she didn't actually know if it would interfere with his education.

C-11 Ms. [REDACTED] did not seem to have sufficient current particularized knowledge of this Student to provide opinion(s) as to whether the School District providing transportation would or would not adversely affect the Student's education.

D-1 **Superintendent** [REDACTED] has a Bachelor degree in Social Studies and a Master of Science degree in Administration. He served as a teacher at Springfield (MO) [REDACTED] and had two years teaching in college. He served 17 years as principal in Missouri and 17 years as superintendent in Illinois. He has served as the Superintendent for [REDACTED] since March 2007. He has worked with learning disabled students as administrator over the years and has developed programs for them. His responsibilities include the day to day operations of the school district.

D-2 On July 1, 2007, [REDACTED] officially became a school district.

D-3 The District has the legal obligation to provide transportation.

D-4 When the District started, it owned no school buses and was dependent upon other districts to provide transportation. He is trying every year to build the school district's transportation capabilities as it is cheaper to run its own transportation system than depend upon others.

D-5 In 2008 - 2009, it was able to add some buses. For the school year, 2009 - 2010, it was able to purchase a van and a driver's ed car.

D-6 Due to funding issues, he only became aware that the District would actually be able to provide for transportation for the Student in late July, 2009. At that point, when he knew that the funding was in place, he wrote a letter to the Parents (on or about August 5, 2009) [PD 31] explaining that [REDACTED] would provide transportation for the Student.

D-7 The 2009 – 2010 school year started on August 17, 2009. There was an IEP meeting as to the transportation issue held at end of August [SD 0001-04] in which the parents were given the opportunity to provide input. [SD 00001-02 and 03] Principal [REDACTED] from [REDACTED] was there. Unfortunately, no consensus was reached on the transportation issue

D-8 On the prior IEP's, he agreed that the transportation section of the IEP's should be marked "yes" as to transportation and that it was an error in marking them "no". [See SD 0001-13 and SD 0001-31]

D-9 He knew and approved the agreement with the parents as to re-imbursement in years past. For the parents, the reimbursement rate for transportation per the IRS regulations is \$.55 per mile in 2009.

D-10 He approximates that it would cost \$53.00 per day for the District to transport the Student. Although the District could save a few dollars if it provided transportation, basically it's a wash.

D-11 He did talk to the professionals [REDACTED], [REDACTED] and [REDACTED] (former ass't principal at [REDACTED] and director of transportation)] about the transportation issue with this Student and did not get any negative feedback.

D-12 The District is willing to hire a driver that is an easy going gentlemen. They will also put an aide on the bus if necessary although typically high school students will not want an aide. The District is also willing to have period of a week or so where the driver can interact with the Student at [REDACTED] as well as receiving training from the [REDACTED] staff as to how to deal with issues as they come up.

D-13 In his opinion, the District provided transportation can benefit the Student as it provides him with another experience. He will graduate shortly (following the 2010-2011 school year) and he will have standards when he leaves school. As such, he needs to learn how to deal with other people. High School is a place to learn - a safety net.

D-14 He does not believe that the Student would be negatively impacted by the bus. He believes that the Student's transportation through the District can be done without interfering with his education. He concedes that there may be a period that the Student will be aloof/not caring but after a period of time, he will acclimate. As such, he does not foresee any long term difficulty.

D-15 Once the District transportation option is in place, he doesn't want to go back to the parents providing transportation. This is not an option. If there are problems, another IEP meeting will be required. As to the possibility that the Student dropping out of school, they could treat this as a home school situation

D-16 He has only met the Student once or twice and has little familiarity with him. However, he is familiar with the parents as he has had on-going discussions with them over the past three years.

D-17 He agreed that he doesn't know the Student in terms of his attitude, goals, what type of kid he is. He has only a vague recollection that the Student was suspended from the bus but he does not recall the specifics of it.

D-18 Although Superintendent [REDACTED] is a very sincere and dedicated individual, it is clear that he has only limited knowledge of the Student and that his opinions are generic opinions unrelated to the specifics of this particular student. Therefore, hearing officer accorded little weight to his testimony as to the Student's particular potential difficulties and/or ability to adapt to the school vehicle and its effect on his education.

5. CONCLUSIONS OF LAW

There is no dispute that the School District is obligated to provide transportation. IDEA and the School Code mandate this. The School District does not disagree. The testimony from the School District is that it is obligated to provide transportation (see Findings of Fact C-6 & D-3). The rub comes in as to the manner and mode of transportation. Up to the school year 2009 – 2010, the parties all agree that the District did not have the capability or resources to provide transportation (see Findings of Fact B-4 & C-6). The District fulfilled its obligation to provide transportation by agreeing with the parents to provide transportation for their son with the school district reimbursing the parents (see Findings of Fact D-9). The parents, for their part, have transported the Student from their home in [REDACTED] to the [REDACTED], IL during this period.

Although the May 9, 2008 IEP [SC 0001-31] and the April 29, 2009 IEP [SD 0001-13] do not reflect this need for transportation, the parties all agree that clearly the Student does need transportation and that it was error for the IEP team to check "no" as to "Special transportation is required to and from schools and/or between schools" (see Findings of Fact A-6 & D-8). However, for the school year 2009 – 2010, the School District now has the capability and its own resources to provide transportation (see Findings of Fact C-6 & D-5). It has purchased its own vehicle and hired a driver which is able to transport the Student from his home to [REDACTED] (see Findings of Fact C-6 & C-7). This was communicated to the parents on or about August 5, 2009 (see Findings of Fact D-6) [PD31]. The School year commenced on August 17, 2009, only 12 days later (see Findings of Fact D-7). Although unspecified during the hearing, the parents have concerns about the School District bus transportation based upon the Student's previous experiences at [REDACTED] (see Findings of Fact D-17) as well as concerns as to how the current proposed transportation will affect the student (see Findings of Fact A-8, A-9, B-5 & B-6).

The School District cites to *Brett K, Jr. by Brett K, Sr. and Heather K. v Mokenca Community Unit School Dist., No. 1*, 47 IDELR 18047 as factually and legally similar to the instant case. And, on first blush, they certainly are similar. In the *Brett K* case, the student was found eligible for Special Education services. As part of his IEP, the district was to provide transportation and did so with an arrangement with a neighboring district as it did not own or operate its own transportation. Although a settlement agreement was entered, it did not refer to the precise method of transportation. The District agreed to acquire its own vehicle and driver but due to other issues, this option was never implemented. The facts suggested that the student was a difficult student with numerous acting out behaviors – both at school and home. The parents had suggested the

particular program that was chosen for the student. Unfortunately, this program was situated in such a location that a bus ride of over an hour was necessary. Allegedly due to the length of the bus ride, the student's behavior(s) at school were much worse after arrival. Although the student had made progress at this school, the parents alleged that the student would have made more progress but for the transportation problems. The Hearing Officer held in favor of the school district and the reviewing court agreed. The Judge held that parents were unable to sustain their burden as there was "no good comparative evidence to offer other than the subjective impression of one parent". Although there was testimony that the student was less able to engage in activities, there was "no showing that this directly impacted his educational opportunities ... The parent's whole claim rested on a premise not proved ... that increased acting out actually interfered with his appropriate education".

Similarly here, the parents point to their fear that based upon the need for structure and routine in the Student's life that the School District proffered transportation would adversely affect the Student's education with the Student resisting coming to school and not being in a state of mind to be productive once at school (see Findings of Fact A-8). However, as in the *Brett K.* case, the testimony is equivocal and subjective. Here, the concern expressed by Principal [REDACTED] and [REDACTED] is subjective. Although each opined that the Student may suffer academically (see Findings of Fact A-8 and B-5 & 6), Principal [REDACTED] testified that he cannot state that the Student's recent behavior relative to class, school, etc. is a result of the transportation issue (see Findings of Fact A-10 and A-11). In fact, even with the parents providing transportation, the Student has behavioral challenges throughout the day (see Findings of Fact A-9). [REDACTED] also agreed that the district transportation plan, with the proper training, could be successful (see Findings of Fact B-5). Although the School District personnel, Superintendent [REDACTED] and Ms. [REDACTED] testified that the School District transportation plan can be successful, their testimony is not afforded as much weight as each is not as intimately knowledgeable about the student as are Principal [REDACTED] and Ms. [REDACTED]. (see Findings of Fact C-2 and D-17). As in the *Brett K.* case, the flaw in the parents' argument is that there is no good comparative evidence other than the subjective impressions of several of the educators.

In this case, if the IEP team had determined that the District transportation plan was the appropriate mode of transportation for this student and had incorporated that finding in the Student's IEP plan, and based on the testimony is as it is here, the District would be allowed to implement its transportation plan. On the basis of the *Brett K.* case, the District would prevail as there is no objective or comparative evidence that the Student would necessarily be deprived of a FAPE merely by the method of transportation provided. The offered testimony is conclusory and subjective.

However, the IEPs – both the current and the prior one – do not provide for district transportation via a school bus or other district owned vehicle. There was no IEP meeting/decision relative to a change of the Student's transportation other than the August, 2009 meeting where no action was taken.


Recently, the Office of Special Education and Rehabilitative Services (OCERS) issued a monogram on "Questions and Answers on Serving Children with Disabilities Eligible for Transportation", 109 LRP 72855 (Nov. 1, 2009). In that monogram, in referring to regulations for Part B of the Individuals with Disabilities Education Act (IDEA) published in the Federal Register on August 14, 2006 and effective on October 13, 2006 with additional regulations being published on

longer pay for transportation which led to the Due Process Hearing. The Hearing Officer found that "since there was no PET decision to change the student's transportation services, either at the November 17, 2003 PET meeting, or at any time since, his transportation service continues to be transportation provided by the Father."

Similarly here, the only notification provided to the Parents was on August 5, 2009 or thereof, when the School District unilaterally opted to change the method of transportation via the School District's letter to the parents (see Findings of Fact D-6) [SD 0001- 1 & 2]. The parents objected and a subsequent IEP meeting was convened to discuss transportation [SD 0001- 1 & 2]. No consensus was reached and no change of status of transportation was enacted [SD 0001-01]. As the IEP team did not change the mode/method of transportation, transportation remains that conceded at the April 29, 2009 IEP meeting (see Findings of Fact A-5, B-4, C-6 & D-9). As a child's individualized education program (IEP) Team is responsible for determining both if transportation is required to assist a child with a disability to benefit from special education and related services, and how the transportation service is to be implemented, the determination of the IEP team in the April 29, 2009 IEP meeting stands and the parents will continue to transport the Student to [REDACTED] until such time as the IEP team including members most knowledgeable about the Student from [REDACTED] school can convene and determine and formalize a transportation plan for the Student.

ORDER

1. Transportation remains the same as that "understood" from the April 29, 2009 IEP meeting – the parents shall continue to transport the child and be re-imbursed for that transportation;
2. The [REDACTED] will convene an IEP meeting within forty-five (45) days of receipt of this Order to determine if any additional evaluations are necessary for the Student as to transportation and to develop a transportation plan for the Student;
3. The School District is to provide proof of compliance with this Order to the Illinois Board of Education, Compliance Division, 100 N. First Street, Springfield, IL 62777-0001 or on or before January 31, 2010.


W. DAVID UTLEY
Impartial Hearing Officer

Dated this 4th day of December, 2009


RIGHT TO REQUEST CLARIFICATION

Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned Hearing Officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought and a copy of the request shall be mailed to the party and to the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, Illinois 62777. The right to request such a clarification does not permit a party to request reconsideration of the decision itself and the Hearing Officer is not authorized to entertain a request for reconsideration.

RIGHT TO FILE A CIVIL ACTION

This decision shall be binding upon the parties unless a civil action is commenced. Any party to this hearing aggrieved by this decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14.8.01 (I), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision was mailed to a party.

THE EFFECTIVE DATE OF THIS DECISION IS THE DATE OF RECEIPT OF ANY CLARIFICATION OF THIS DECISION.


W. DAVID UTLEY
Impartial Hearing Officer

Dated this 4th day of December , 2009

Post Office Box 681487
Schaumburg, IL 60168
(847) 321-1044

CERTIFICATE AND AFFIDAVIT OF DELIVERY BY MAIL

Under penalties as provided by law, pursuant to 735 ILCS 5/1-109, the undersigned certifies that he/she served the foregoing document by mailing a copy certified to the above named parent/attorney(s) at the address(es) indicated above and to the Illinois State Board of Education, 100 N. First Street, Springfield, IL 62777-0001 by depositing the same in the U.S. Mail at the United States Postal facility at Schaumburg, IL on the 5th day of December, 2009

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Illinois State Board of Education
Attn: Andrew Eulass, Esq.
Office of the Due Process Coordinator
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Via First Class Mail – Certified Only to the Above


W. DAVID UTLEY
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