

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

EASTSIDE UNION SCHOOL DISTRICT.

OAH Case No. 2018040246

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on April 4, 2018, naming Eastside Union School District. Eastside served its written response to Student's complaint on April 16, 2018. Administrative Law Judge Robert G. Martin heard this matter in Lancaster, California on August 21, 2018.

Leon Ozeran, Attorney at Law, represented Student. Mother attended the hearing on behalf of Student. Sundee Johnson, Attorney at Law, represented Eastside. Eastside Director of Special Education and Student Services Margo Deal attended the hearing on behalf of Eastside.

At the parties' request, OAH continued the matter to September 6, 2018, for written closing arguments. The record closed on September 6, 2018, upon the parties' timely filing of their closing briefs.

ISSUE

Did Eastside deny Student a free appropriate public education by failing to include transportation to and from his home to school as a service in Student's individualized

education program dated March 2, 2018?¹

SUMMARY OF DECISION

Student did not prove that he was entitled to transportation to and from preschool as a related service in his March 2, 2018 IEP. District did not provide transportation to general education preschool students, and Student did not require transportation as a direct result of his disability. Student did require assistance traveling to school because of his age, but Parent or other family members were able to take Student safely the one mile to and from Student's preschool. Student therefore was able to access, and benefit from, his special education, and did not require district transportation as a related service. Although it was inconvenient for Parent to arrange Student's travel to and from school, District was not required to deviate from its general policy of not providing transportation to preschool students based on inconvenience to Parent.

FACTUAL FINDINGS

JURISDICTION

1. At the time of the complaint, Student was a five-year-old preschool student qualified by Eastside for special education and related services under the eligibility categories speech and language impairment, and multiple disabilities based on intellectual disability and autism. Student resided with Parent within Eastside's boundaries at all relevant times.

¹ This decision does not address whether Eastside should have provided Student transportation as a related service in his May 22, 2018 IEP. That IEP was developed after Student filed his complaint, which was not amended.

2015-2017: PRESCHOOL WITH TRANSPORTATION

2. Following his birth in December 2012, Student received regional center early intervention services including occupational therapy, speech and language therapy, physical therapy, and socialization classes. Student qualified for special education when he was three years old in December 2015.

3. In December 2015, Eastside placed Student in its early childhood special education preschool program. Through November 2017, Student attended a special day class for students with moderate to severe disabilities four mornings per week, for 150 minutes each day. Student also received group speech and language services.

4. Eastside did not provide transportation to general education preschool students. Eastside did offer home-to-school transportation to all students in the moderate-severe program, including Student, on the rationale that students who qualified for placement in the program needed transportation because of the level of their impairment. The program was located at Tierra Bonita Elementary School, which was not Student's home school. Tierra Bonita was approximately one mile from Student's home. Student's home school, Columbia Elementary School, was located 0.3 miles from Student's home, but did not offer preschool classes.

5. In November 2017, Student's special education teacher, Jamielly Kreger, assessed Student's development in the areas of pre-academics, communication, fine motor skills, social emotional skills, play skills and behavior, adaptive and daily living skills, and health. Student demonstrated pre-academic skills appropriate for his age of four years and eleven months, with the abilities typical of a slightly older child to recite the alphabet, count, and identify shapes. His communication development was age appropriate in articulation, voice, and fluency, but he was moderately delayed in his development of receptive and expressive language. Student's fine-motor skills in pre-handwriting were significantly delayed, being typical for a child age two. Student's social-emotional and behavioral development was slightly delayed, and Student exhibited

excessive attention-seeking behaviors, including refusals to follow adult directions, and touching others' belongings. Student's adaptive and daily living skills, and his health, were good.

NOVEMBER 2017 IEP: CHANGE OF PLACEMENT AND WITHDRAWAL OF TRANSPORTATION

6. Ms. Kreger's assessment results were presented at Student's annual IEP team meeting on November 30, 2017. The IEP team also reviewed Student's progress on his annual goals. Student met his goals in the areas of pre-academics, daily living skills, and speech, and partially met goals for his social-emotional and behavioral development.

7. Based on Student's developmental progress, and concerns that Student might be modeling atypical behaviors of other students in his moderate-severe class, the IEP team decided to change Student's placement to a special day class for students with mild to moderate disabilities. This would allow Student to participate with higher-functioning peers with language and play skills more appropriate for Student. The mild-moderate class met Mondays and Tuesdays from 11:30 a.m. to 1:00 p.m. at Tierra Bonita. The IEP team reduced Student's group speech and language services from 1,300 minutes to 1,200 minutes per year.

8. Eastside members of the IEP team told Parent that Student no longer qualified for transportation, because he was now functioning at a higher level. Eastside did not offer any additional explanation for its decision at the meeting. Eastside's written offer of FAPE indicated that transportation was not being provided because Student "will be attending the part-time program." The IEP team members told Parent to contact Special Education Director Margo Deal regarding any transportation questions. Although Parent disagreed with the decision to end Student's transportation, she gave signed consent to all parts of the IEP.

MARCH 2, 2018 AMENDMENT IEP

9. In January 2018, after the winter school break, Student began attending Eastside's mild-moderate preschool program. Although Parent and her partner both worked, Parent, with the help of her mother and her partner, was able to drive Student the mile to his class at Tierra Bonita, and home after school, each Monday and Tuesday, on time and without incident.

10. Parent contacted Ms. Deal to follow up on the transportation issue. Ultimately, an amendment IEP team meeting was scheduled for March 2, 2018 to further discuss Student's need for transportation. The March 2, 2018 IEP team meeting was led by Eastside Program Specialist Dennison Winchell. Parent, Ms. Kreger, and Tierra Bonita Principal Christa Waldvogel also attended. At the meeting, Parent reiterated her request that Eastside transport Student. She stated that she did not think that Student could safely walk to and from school because of his cognitive abilities and behaviors. She told the IEP team that Student would not be able to navigate his way to his school or his home. He did not understand waiting for traffic lights, and would not be able to safely cross busy streets. Student would engage with any stranger who approached him. Parent explained that it was difficult for her to arrange transportation because she and her partner worked, and her mother disliked driving Student and had to be begged to do so.

11. Mr. Winchell reiterated Eastside's opinion, based on Ms. Kreger's assessment of Student's progress, that his disabilities were not severe enough to qualify Student for transportation as a related service. Eastside did not dispute that Student would not be able to safely get to school without the assistance of an adult or older student, but noted that Student's needs in this regard were comparable to general education students the same age as Student, who also could not safely walk to and from school unaided. Mr. Winchell concluded that Student's need for assistance to get to school arose from his age rather than his disabilities, and for that reason did not entitle Student to transportation as a related service.

12. In reaching their conclusion that Student did not qualify for district transportation, the Eastside members of Student's IEP team did not employ any formal guidelines or criteria for evaluating a special education student's need for transportation, as Eastside had none. Although Mr. Winchell and Ms. Kreger did not say so at the IEP team meeting, they considered whether Student's disabilities were severe enough to make it unsafe for Parent to transport Student, and whether Student was missing class due to transportation issues. Eastside ultimately concluded that Student's disabilities did not prevent Parent from safely and reliably transporting Student to and from school, although it was inconvenient for Parent to do so. Student thus was able to access and benefit from his educational program without district transportation. Eastside also concluded that Eastside was not legally required to provide Student transportation as a related service because Student needed assistance traveling to school due to his age, not his disabilities.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)³ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education

² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

³ All subsequent references to the Code of Federal Regulations are to the 2006 version.

(FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for higher education, employment, and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically

developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) In *Endrew F. v. Douglas County School District* (2017) 580 U.S. __, __ [137 S.Ct. 988] (*Endrew F.*), the Court considered the meaning of the phrase “some educational benefit.” For a child fully integrated in the regular classroom, an IEP typically should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” (*Id.*, 137 S.Ct. at p. 999, quoting *Rowley*, *supra*, 458 U.S. at pp. 203-204.) For a child not being educated in a general education classroom, the Court rejected the contention that the IDEA was satisfied by a program providing “merely more than *de minimis*” progress. The Court clarified FAPE as “markedly more demanding than the ‘merely more than the *de minimis* test’ . . . To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.*, 137 S. Ct. at p. 1001.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (j).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is

preponderance of the evidence].) Student filed the complaint in this matter, and therefore had the burden of persuasion.

5. A claim that an IEP failed to offer a FAPE is evaluated in light of information available at the time the IEP was developed; the IEP is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F. 3d 1141, 1149.) An IEP is a snapshot, not a retrospective. (*Ibid.*, citing *Furhmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

ISSUE: EASTSIDE'S FAILURE TO OFFER STUDENT HOME TO SCHOOL TRANSPORTATION

6. Student contends that he was automatically entitled to transportation from home to school as a related service once he qualified for special education, and Eastside denied him a FAPE by failing to offer him transportation in his March 2, 2018 amendment IEP. Eastside contends that a special education student is only entitled to transportation as a related service if, as a result of his or her disability, the student requires assistance to travel safely, and the parent is either unable to provide any transportation, or cannot transport the student safely because of the student's disability. Eastside contends Student needed assistance traveling to school because of his young age, not his disability, and could be transported safely by Parent. Finally, Eastside contends that Parent's difficulties arranging Student's transportation were an inconvenience to Parent that did not require Eastside to deviate from its general policy of not providing students transportation to preschool.

7. The IDEA's implementing regulations define transportation as: (i) travel to and from school and between schools; (ii) transportation in and around school buildings; and (iii) specialized equipment (such as adapted busses, lifts, and ramps), if required to provide transportation for a child with a disability. (34 C.F.R. § 300.34(c)(16).) The IDEA does not explicitly define transportation as door-to-door services.

8. A school district must offer a special education student transportation if it provides transportation to non-disabled students under the same circumstances. (U.S. Dept. of Educ., Office of Special Education Programs, *Letter to Smith* (1995) 23 IDELR 344 [23 LRP 3398]).

9. Also, because transportation is a related service under the Education Code and IDEA (Ed. Code, § 56363, subd. (a); 20 U.S.C. § 1401(26)(A)), a school district must offer it to any special education student who requires transportation to benefit from his or her special education. (*Ibid*; *Letter to Smith, supra*, 23 IDELR 344.)

10. A student may require transportation as a related service because his or her disabilities "create unique needs that make it especially problematic to get the child to school in the same manner that a nondisabled child would get to school in the same circumstances." OSEP, *Letter to Hamilton* (1996) 25 IDELR 520. Even if a student's disability does not directly cause a need for district transportation, the student may require transportation as a related service if the student would otherwise be unable to access his or her special education, or other related services. (*Donald B. v. Board of School Comrs of Mobile County, Ala.* (11th Cir. 1997) 117 F.3d 1371, 1374 (*Donald B.*), citing *Irving Indep. Sch. Dist. v. Tatro* (1984) 468 U.S. 883, 889 [104 S.Ct. 3371, 82 L.Ed.2d 664] (*Irving v. Tatro*).)⁴

11. If a school district does not provide transportation to non-disabled students, "the issue of transportation to students with disabilities must be decided on a case-by-case basis." (*Letter to Smith, supra*, 23 IDELR 344.) The determination of a

⁴ *Donald B.* contrasts a special education student's qualification for related services with the student's qualification for special education itself, which requires that the student's disability cause a degree of impairment that requires special education. (*Donald B. supra*, 117 F.3d 1371, 1374. See also California Code of Regulations, title 5, section 3030.)

student's need for a particular related service is left to the discretion of the student's IEP team. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed.Reg. 46576 (August 14, 2006).)

12. An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.) A district must provide "only those services necessary to aid a handicapped child to benefit from special education . . . , regardless how easily [the district] could furnish them." *Irving v. Tatro, supra*, 468 U.S. at 894.

13. Although all students educated outside their home or other place of residence must necessarily travel to receive their educational program, it is not the case that all special education students are therefore deemed to require district transportation as a related service. The Education Code and IDEA do not specify criteria for determining whether a child requires transportation as a related service. The Ninth Circuit also has not identified comprehensive criteria, but has held, "If a child's appropriate special education placement is at a non-residential program not within daily commuting distance of the family residence, transportation costs and lodging near the school are related services that are required to assist that child to benefit from the special education." (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, at p. 1527; cited in *D.B. v. Santa Monica-Malibu Unified School Dist.* (C.D. Cal., Dec. 19, 2012, No. 2:12-CV-3059-SVW-PJW) 2012 WL 12859841, at p.1[order denying reimbursement of parent's costs to transport student to a non-public school because the school was "within daily commuting distance of the family residence"].)

14. To determine whether students not requiring transportation as a direct result of their disability were otherwise entitled to transportation as a related service, other circuits have considered, at least: (1) the child's age; (2) the distance the child must travel; (3) the nature of the area through which the child must pass; (4) the child's access

to private assistance in making the trip; and (5) the availability of other forms of public assistance in route, such as crossing guards or public transit. (*Donald B.*, *supra*, 117 F.3d at pp. 1374-1375.) In *Donald B.*, the student, age six, sought district transportation three blocks from his private school to a public school that provided him speech and language therapy. The court found that student's disability of speech and language impairment did not prevent him from walking three blocks to receive his speech and language therapy. The court then considered the factors listed above, and concluded that the student could safely navigate the three blocks despite his young age, as there was no evidence of any high crime or high traffic areas that he could not traverse easily. Although his parent could not leave her job to assist him, the student did not offer evidence that he could not safely travel without parent's assistance by other means public or private. The court found student had not proved that he was unable to travel to the school where his speech and language services were provided, and therefore held he was not entitled to district transportation as a related service. *Ibid.*

15. Where a student needs assistance traveling to school, inconvenience to the parent in providing the assistance is not grounds for requiring district to provide transportation. A school district may apply a facially neutral transportation policy to a disabled child when the request for deviation from the policy is not based on the child's educational needs, but on the parents' convenience or preference. (*Fick ex rel. Fick v. Sioux Falls School Dist.* 49-5 (8th Cir. 2003) 337 F.3d 968, 970, citing *Timothy H. v. Cedar Rapids Community School Dist.* (8th Cir. 1999) 178 F.3d 968, 973; see also *Anchorage School Dist. v. N.S.* (D. Alaska, Nov. 8, 2007, No. 3:06-CV-264 JWS) 2007 WL 8058163, at pp. 8-10 [student entitled to district transportation including an aide to push student's wheelchair from the curb to the front door of his home, because student could not otherwise attend school, and the service was not "based on the guardians' mere convenience of [sic] preference," where "[b]oth guardians work full time . . . and are unavailable to push [the student] up the ramp at the end of his day"].)

16. The California Department of Education's Special Education Transportation Guidelines (<<https://www.cde.ca.gov/sp/se/lr/trnsprtgdlns.asp>> [as of Oct. 1, 2018]) are also instructive, although self-described as non-binding on local educational agencies. These were developed pursuant to Education Code section 41851.2, which required the State Superintendent of Public Instruction to develop guidelines for IEP teams to use to clarify "when special education transportation services . . . are required." The Guidelines state: "The specific needs of the pupil must be the primary consideration when an IEP team is determining any transportation needs." Suggested factors for consideration include: (1) medical diagnosis and health needs, consideration of whether long bus rides could affect the student's health (duration, temperature control, need for services, health emergencies), general ability and strength to walk or ride a bicycle, approximate distance from school, and the student's needs in inclement or very hot weather; (2) accessibility of curbs, sidewalks, streets, and public transportation systems; (3) the student's capacity to arrive at school on time, to avoid getting lost, to avoid dangerous traffic situations, and to avoid other potentially dangerous or exploitative situations on the way to and from school; (4) behavioral intervention plans and how to implement such plans while a pupil is being transported; (5) mid-day or other transportation needs as required on a pupil's IEP (for example, occupational or physical therapy or mental health services at another site, community based classes, etc.); and (6) the student's need for extended school year services. The Guidelines do not suggest that IEP teams consider the ability of the parent to assist the student's travel, or the inconvenience to the parent of doing so.

17. A district must deliver each child's FAPE in the least restrictive educational environment appropriate to the needs of the child. (20 U.S.C. § 1412(5)(A); 34 C.F.R. § 300.114; Ed. Code, § 56342, subd. (b).) To the maximum extent appropriate, children with disabilities must be educated with children who are not disabled, and removal of children with disabilities from the regular educational environment is appropriate only when the nature or severity of the disability of a child requires it. (20 U.S.C. § 1412 (a)(5)(A); 34

C.F.R. § 300.114(a)(2).) This concept of least restrictive environment applies to the provision of nonacademic and extracurricular services and activities, including transportation. (34 C.F.R. §§ 300.117 and 300.107.) The Department of Education Guidelines suggest a range of options for special education students requiring transportation as a related service. These include: walking, riding the regular school bus, utilizing available public transportation (for which any out-of-pocket costs to the pupil or parents are reimbursed by the local education agency), riding a special bus from a pick-up point, and portal-to-portal special education transportation via a school bus, taxi, or reimbursed parent's driving with a parent's voluntary participation. (*Id.*)

18. Student failed to prove he was entitled to transportation as a related service in Student's March 2, 2018 IEP. Contrary to Student's contention, Student was not automatically entitled to transportation because he qualified for special education. Eastside did not provide transportation to non-disabled preschool students, and could apply that policy to Student unless Student demonstrated either a need for district transportation arising directly from his disability, or an inability to travel to school to access his special education if Eastside did not provide him transportation.

19. Student did not prove that his disabilities created unique needs that made it especially problematic for him to get to school in the same manner as a nondisabled child. Student did prove that he needed assistance from someone to travel to school safely because of his age, but did not prove that he required district assistance. Contrary to Eastside's argument, it was not necessary for Student to prove that his need for district transportation arose directly from his disability. However, Parent's ability to get Student safely to and from school was relevant to determining whether Student qualified for transportation as a related service.

20. Parent did not dispute her ability to transport Student safely to and from school. Although Parent's work schedule, and her partner's, made it inconvenient for them to transport Student, they were able to do so, or to arrange the reluctant help of

Parent's mother when necessary. Eastside's application of its general policy of not providing preschool students transportation did not deny Student a FAPE. There was no evidence that Student's request for Eastside to deviate from this policy was based on considerations other than Parent's inconvenience in transporting Student one mile to and from school on Mondays and Tuesdays. Student is not entitled to relief in this matter.

ORDER

Student's request for relief is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Eastside prevailed on the sole issue presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: October 2, 2018

_____/s/_____

ROBERT G. MARTIN

Administrative Law Judge

Office of Administrative Hearings