

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
07 EDC 0005

COUNTY OF FORSYTH

Student o/b/o Father,
Petitioner,

vs.

Winston-Salem/Forsyth County Board of
Education,
Respondent.

FINAL DECISION

THIS CONTESTED CASE came on to be heard and was heard before the Honorable Selina M. Brooks, Administrative Law Judge, on April 17, 2007, in the Martin Courtroom, Guilford County Courthouse, High Point, North Carolina.

WHEREAS, *Student*, Petitioner, appeared *pro se*, and Drew H. Davis, General Counsel, appeared on behalf of the Winston-Salem/Forsyth County Board of Education (“WS/FCS”), Respondent.

ISSUE PRESENTED AT HEARING

Whether the Bus Behavior Plan, dated January 5, 2007, is a part of the Individualized Education Plan (“IEP”) for minor Petitioner?

PROTECTIVE ORDER

Any information related to the Petitioner or the minor Petitioner discussed in hearing on this matter shall be considered confidential and not for distribution to non-parties.

FINDINGS OF FACT

The undersigned, having reviewed the pleadings, motions, exhibits and briefs submitted and filed in this matter, and having listened to the testimony of witnesses at hearing, upon the greater weight of the evidence, hereby makes FINDINGS OF FACT as follows:

Procedural Facts

1. This is a special education case filed pursuant to 20 U.S.C. § 1400, *et seq.*, and its implementing regulations, 34 C.F.R. 300, *et seq.*, and Article 9 of Chapter 115C of the North Carolina General Statutes, alleging Respondent failed to provide

Petitioner with a free appropriate public education by failing to include a Bus Behavioral Plan in the IEP as a related service as required by the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400, *et seq.* (2004).

2. Petitioner, on behalf of her minor son (“minor Petitioner”), filed a Petition for a Contested Case Hearing on January 3, 2007.
3. Notice of Contested Case and Assignment was issued on January 11, 2007.
4. Respondent filed a Response to Petition for Contested Case Hearing and Pre-Hearing Statement, and a Motion to Dismiss Petition for Contested Case Hearing Based Upon Insufficiency pursuant to 20 U.S.C. § 1415(c)(2)(B)(i)(II) on January 22, 2007.
5. On January 22, 2007, Petitioner filed a second Petition for Contested Case Hearing (the “Amended Petition”) requesting related services in the form of a “one to one assistant and transportation” be provided to the minor Petitioner.
6. A Resolution Meeting was held on January 25, 2007, at which the issue of a one to one assistant was resolved. The issue of transportation was not resolved.
7. On February 1, 2007, Respondent filed a Motion in the Cause, in accordance with Rule 15 of the North Carolina Rules of Civil Procedure, in which Respondent “gives notifies [sic] this Court of its consent to allow Petitioner to amend the Petition for Contested Case Hearing.”
8. On February 2, 2007, Respondent filed its Response to Amended Petition for Contested Case Hearing and Pre-Hearing Statement.
9. On February 2, 2007, the Honorable Julian Mann, III, Chief Administrative Law Judge, served a Notice of Hearing upon the parties scheduling this matter for hearing on March 19, 2007.
10. On February 5, 2007, Judge Mann reassigned this case to the Honorable Augustus B. Elkins, II, Administrative Law Judge.
11. On February 21, 2007, Respondent filed its Amended Response to Amended Petition for Contested Case Hearing, which included a Motion to Dismiss based upon Petitioner’s alleged failure to exhaust administrative remedies and Respondent’s Proposed Issues which included as one of the issues “whether Respondent is required to expressly include in Petitioner’s IEP the provision of transportation services... .”
12. Also on February 21, 2007, the Honorable Augustus B. Elkins, II, entered an Order Setting Hearing and General Pre-Hearing Order. Judge Elkins found the

issue regarding the minor Petitioner's one on one assistant to be resolved and dismissed such claim. He further found Respondent's Motion to Dismiss based upon insufficiency to be moot as Respondent consented to allow Petitioner to amend the Petition in this matter. Judge Elkins further set hearing in this matter on April 17, 2007. The parties continued to follow the pre-hearing schedule set forth in Judge Elkins's Order.

13. On February 28, 2007, Petitioner responded to Respondent's Motion to Dismiss.
14. On March 8, 2007, Judge Elkins denied Respondent's Motion to Dismiss on the ground that the "Petition contains implementation of transportation as a related service of the IEP within the meaning of federal regulations" and this issue is within the jurisdiction of the Office of Administrative Hearings.
15. On March 9, 2007, Judge Mann assigned the undersigned Administrative Law Judge to preside over further proceedings in this matter.
16. On April 4, 2007, the day of the Pre-Hearing Conference, Respondent filed a Motion for Summary Judgment, Motion to Seal Record, and Motion to Compel and to Continue Hearing.
17. The Pre-Hearing Conference was held and the motions were discussed. Both parties consented to seal the record. Respondent provided its final witness list and marked exhibits to Petitioner. Petitioner orally provided her witness list to counsel for Respondent and told him which documents she had previously given to Respondent that she would be presenting at the hearing.
18. The undersigned issued an Order on Pre-Trial Conference on April 9, 2007.
19. On April 12, 2007, Petitioner filed responses to the motions in compliance with the Order on Pre-Trial Conference.
20. In an Order issued April 16, 2007, the undersigned denied Respondent's Motion for Summary Judgment, noting that the "lack of reference to transportation services in the IEPs or other documents do not show that modifications in transportation services are not needed, but rather that they were not made a part of the IEP."

Substantive Facts

21. The minor Petitioner was born on *** 1997, to *Student*. He remains domiciled with his mother.
22. The minor Petitioner began receiving special education services in Pennsylvania in *** 2005.

23. On January **, 2006, the minor Petitioner transferred from *** to the *** New Jersey (NJ) Public Schools where the minor Petitioner was classified as “Emotionally Disturbed” and placed in a program for students with behavioral disabilities.
24. On March 31, 2006, Petitioner and NJ Schools personnel held a Resolution Session at which it agreed the minor Petitioner would be transferred to the County Special Services School District beginning on April **, 2006. The NJ Public Schools further provided transportation for the minor Petitioner to attend the Burlington County Special Services School District. The minor Petitioner’s IEP was amended on March **, 2006, to reflect his transfer and to provide for transportation to his new school district as a related service. (Respondent’s Exhibit 1, p. 7.)
25. The minor Petitioner enrolled in Respondent’s school system at the beginning of the 2006-2007 school year.
26. On September **, 2006, an IEP team meeting was held and an IEP developed. (Respondent’s Exhibit 2)
27. IEP forms are completed by an IEP team member employed by Respondent who determines what comments are noted. (Testimony of EC Case Manager)
28. The IEP does not contain a note concerning transportation.
29. Petitioner testified that she raised the issue of transportation at the meeting.
30. Respondent witness testified that Petitioner must not have raised the issue because it was not noted on the IEP. (Testimony of EC Elementary Program Manager)
31. Minor Petitioner was suspended from school on September **, 2006. (Petitioner’s Exhibit 10)
32. On September ____ (date illegible), 2006, a School Bus Conduct Notice for “failure to respect authority of the bus driver” was issued. (Petitioner’s Exhibit 10)
33. On September **, 2006, a School Bus Conduct Notice for “failure to respect authority of the bus driver” and for “failure to observe appropriate bus conduct” was issued. (Petitioner’s Exhibit 10)
34. On October **, 2006, a School Bus Conduct Notice for “failure to respect authority of the bus driver” and for “failure to observe appropriate bus conduct” was issued. (Petitioner’s Exhibit 10)

35. On November **, 2006, a School Bus Conduct Notice for “failure to respect authority of the bus driver” and for “failure to observe appropriate bus conduct” was issued. (Petitioner’s Exhibit 10)
36. On November **, 2006, the minor Petitioner’s IEP Team convened to review testing and evaluations performed since the September **, 2006, IEP Team meeting.
37. As a result of the evaluations, the minor Petitioner’s IEP Team determined he remained eligible for special education services as behaviorally emotionally disturbed (“BED”) and for occupational therapy services. (Respondent’s Exhibit 3)
38. No services listed on the IEP, dated September **, 2006, were discontinued as a result of the evaluations.
39. The IEP was completed and written by an IEP team member employed by Respondent.
40. The IEP does not contain a note concerning transportation.
41. Petitioner testified that she raised the issue of transportation at the meeting.
42. Respondent witnesses testified that Petitioner must not have raised the issue because it was not noted on the IEP. (Testimony of EC Elementary Program Manager and Principal)
43. In a letter dated December 8, 2006, Petitioner confirmed her request at the IEP meeting that transportation be included in the IEP. (Petitioner’s Exhibit 8)
44. In a letter to Petitioner, dated December 12, 2006, IEP team member EC Case Manager, states “Since *Student’s* behavior at this time does not necessitate bus modifications, transportation would not become a part of his IEP.” (Petitioner’s Exhibit 9)
45. On December **, 2006, a School Bus Conduct Notice for “failure to respect authority of the bus driver” and for “failure to observe appropriate bus conduct” was issued. (Petitioner’s Exhibit 10)
46. On January *, 2007, the minor Petitioner’s IEP team met to review his progress.
47. The IEP was completed and written by an IEP team member employed by Respondent.
48. The note “Transportation?” was written in the box for parent comments. (Respondent’s Exhibit 4, IEP, DEC 4, p. 1)

49. The IEP does not address transportation in any way even though the IEPO records the fact that Petitioner raised the issue at the IEP team meeting. (Respondent's Exhibit 4)
50. After the IEP meeting, Principal of Elementary School G and an IEP team member, developed a Bus Behavior Plan for the minor Petitioner with the participation of Petitioner.
51. On January **, 2007, Petitioner filed the Amended Petition, specifically, requesting "implementation of transportation with modifications suitable for his disability." In an attachment to the Amended Petition, Petitioner alleges "denial of transportation being implemented into [the minor Petitioner's] IEP does not allow for accommodations or modifications to be made to bus service due to any problems related to his disability. This denial of service on [the minor Petitioner's] IEP can, has, and will continue to cause interruptions in his transportation and academics."
52. A Resolution Meeting was held on January **, 2007 to discuss adding the Bus Behavior Plan to the minor Petitioner's Behavior Intervention Plan was discussed with the Petitioner. The IEP team and Petitioner participated. (Testimony of EC Program Director)
53. Petitioner did not want to add the Bus Behavior Plan to the minor Petitioner's Behavior Intervention Plan. (Testimony of Principal and EC Program Director)
54. Petitioner wanted the Bus Behavior Plan to be incorporated into the IEP. (Testimony of Principal, EC Program Director and Petitioner)
55. Principal testified that a Behavior Intervention Plan is a part of the IEP.
56. Principal testified that it is possible to have a Bus Behavior Plan without the Bus Behavior Plan being a part of the IEP.
57. A Resolution Meeting Results Form, dated January 25, 2007 and signed by the parties, contains the statement: "There is still a question regarding special transportation on the IEP." (The Resolution Meeting Results Form was filed with this court and is a part of the official record.)
58. No note was made on the Resolution Meeting Results Form that the IEP team discussed the Bus Behavior Plan as a component of the IEP.
59. Minor Petitioner was suspended from school on February 13, 2007. (Respondent's Exhibit 9)

60. Minor Petitioner was suspended from school on March 9, 2007. (Respondent's Exhibit 9)
61. On March 12, 2007, minor Petitioner's IEP team met to review his progress.
62. The IEP was completed and written by an IEP team member employed by respondent.
63. The note "Transportation needs for *Student*" was written in the box for parent comments. (Respondent's Exhibit 5, IEP DEC 4, p. 1)
64. The IEP does not address transportation in any way even though the IEP records the fact that Petitioner raised the issue. (Respondent's Exhibit 4).
65. On March 30, 2007, minor Petitioner was suspended from school. (Respondent's Exhibit 9)
66. Respondent is providing transportation for the minor Petitioner to and from school, even on school days in which he is suspended from the school bus.
67. Principal testified that throughout the school year, Respondent's employees have taken extraordinary steps when the minor Petitioner has been suspended from the school bus, so that the minor Petitioner is not otherwise removed from school. For example, the Gibson Home School Coordinator picked up the minor Petitioner from school on ten (10) separate occasions and took the minor Petitioner home from school on eight (8) separate occasions.
68. Minor Petitioner's bus behavior has improved since implementation of the Bus Behavior Plan. (Testimony of Principal)
69. A Bus Behavior Plan may be a modification of transportation as a related service. (Testimony of EC Program Director and Petitioner's Exhibit 9)
70. The Bus Behavior Plan addresses the minor Petitioner's disability and Petitioner's lack of transportation, as it puts a plan in place to minimize suspensions from school. (Testimony of EC Program Director)
71. The IEP should address behavior that affects transportation as a related service.
72. The Bus Behavior Plan is part of the Behavior Intervention Plan for the minor Petitioner.
73. The Behavior Intervention Plan is a part of the minor Petitioner's IEP.

74. The Bus Behavior Plan is a part of the minor Petitioner's IEP even though there is no reference to it in either the completed Behavior Intervention Plan or IEP for minor Petitioner.
75. It not clear that the IEP team understands that if the Bus Behavior Plan is part of the Behavior Intervention Plan and the Behavior Intervention Plan is a part of the IEP, then the Bus Behavior Plan is a part of the IEP.
76. There is a lack of communication between Respondent and Petitioner concerning what documents compose an IEP.

BASED UPON the foregoing Findings of Fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction of this contested case pursuant to applicable State and Federal laws. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder. The parties received proper notice of the hearing in the matter. To the extent that the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.
2. A free appropriate public education (FAPE) includes the provision of "related services" to a child with a disability, such as the minor Petitioner.
3. The North Carolina definition of FAPE applies to students residing in North Carolina and is substantially the same as the definition set forth in IDEA 2004. See N.C.G.S. §§ 115C-107.1 and 115C-106.3(4)(2004).
4. Related services "means transportation . . . as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26) (2004)(emphasis added); See also 34 C.F.R. § 300.34(a).
5. N.C.G.S. § 115C-106.3(18) provides "related services" shall be as defined in the IDEA.
6. "[T]he term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§ 300.320 through 300.324 and that must include-- ... (4) A statement of the special education and related services ... to be provided to the child ... and a statement of the program modifications ... that will be provided" 34 C.F.R. § 300.320 (a)

7. The Bus Behavior Plan is a modification of a related service and, therefore, is a component of the minor Petitioner's IEP.
8. Respondent and its employees have acted beyond the scope of duty in providing personal transportation to and from school.
9. N.C.G.S. § 115C-107.7 provides discipline of students with disabilities shall be as set forth in IDEA 2004.
10. Further, N.C.G.S. § 115C-107.1(a)(3) provides school districts shall provide FAPE to students who are "suspended or expelled from school and entitled to continuing education services as provided in IDEA."
11. Pursuant to the provisions of IDEA 2004, Respondent may suspend a student for up to ten (10) cumulative school days in one school year without providing FAPE to such student during the initial ten (10) suspension or removal days. 20 U.S.C. § 1415(k)(1)(B).
12. After the tenth day of suspension or removal, school personnel must determine if continued suspension or removal constitutes a change of placement. 20 U.S.C. § 1415(k)(1)(A).
13. In the event the continued suspension or removal is a change of placement, the student's IEP Team will convene and determine if the student's behavior was a manifestation of his disability. 20 U.S.C. § 1415(k)(1)(E).
14. The minor Petitioner was suspended from school this year on four (4) occasions totaling four (4) school days. Such removals do not contravene federal or state law governing removals from school.
15. 20 U.S.C. § 1412(a)(5) requires school districts, "to the extent appropriate," place and educate children in the least restrictive environment with disabilities with children who are not disabled. 20 U.S.C. § 1412(a)(5).

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

DECISION

1. The Bus Behavior Plan is a Modification of a related service and, as such, is a component of the Behavior Intervention Plan. The Behavior Intervention is a component of the IEP. Thus, Petitioner's claim that the Bus Behavior Plan is not a part of the minor Petitioner's IEP is denied.

2. Respondent is the prevailing party for the purposes of attorney's fees, costs, and litigation expenses.
3. Each party shall be solely responsible for their own attorney's fees, costs and litigation expenses.

NOTICE

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 et seq.) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 (a contested case hearing). . . may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 107.2(b)(9) to receive notices." The State Board, through the Exceptional Children Division, has been designated:

Lynn M. Smith, Consultant for Dispute Resolution
NC Dept of Public Instruction, Exceptional Children Division
6356 Mail Service Center
Raleigh, NC 27699-6356
Phone: (919) 807-3978
Fax: (919) 807-3755

IT IS SO ORDERED, this the 11th day of May, 2007.

The Honorable Selina M. Brooks
Administrative Law Judge