

New Jersey Commissioner of Education

Final Decision

J.S. and S.S., on behalf of minor child, A.S.,

Petitioner,

v.

Board of Education of the West Morris
Regional High School District, Morris County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, along with petitioners' exceptions filed in accordance with *N.J.A.C. 1:1-18.4*. The Board did not file a reply.¹

In this matter, petitioners claim that the Board discriminated against A.S. by failing to provide door-to-door transportation to and from her out-of-district placement. A.S. is a high school student who attends Sage Alliance (Sage) due to her special education needs. At the time her placement began at the start of the 2021-22 school year, the Board secured Cassidy Transportation (Cassidy) to transport A.S. to and from Sage. As petitioners live on a hazardous,

¹ The Commissioner was not provided with a transcript of the October 7, 2022 hearing, which included the limited testimony of one witness. The parties agreed that the testimony and record in a related special education matter – *J.S. and S.S., on behalf of A.S. v. West Morris Regional Board of Education*, EDS 08829-21, Final Decision dated December 7, 2022 – was duplicative of the record in this matter, and therefore the testimony of all witnesses and the corresponding exhibits from that matter were incorporated by reference in this matter. The Commissioner was not provided with a transcript of the hearing or the exhibits from the special education matter.

steep mountain road, Cassidy determined that it would be unsafe to stop directly in front of petitioners' home because it is utilizing a smaller bus rather than a full-sized bus which would have the ability to safely stop traffic.² As such, Cassidy picks A.S. up and drops her off at the municipal building located one-third of a mile from petitioners' home. Petitioners filed the instant petition claiming that the Board is discriminating against A.S. based on her disability and seeking an order requiring the Board to provide door-to-door transportation.

The Administrative Law Judge (ALJ) found that petitioners' claims under the New Jersey Law Against Discrimination (LAD) and the Americans with Disabilities Act (ADA) do not arise under the New Jersey School Laws and are therefore outside the Commissioner's jurisdiction pursuant to *N.J.S.A. 18A:6-9*.³ The ALJ found, however, that petitioners' claim under New Jersey's Equality and Equity in Education Law, *N.J.S.A. 18A:36-20* – which prohibits discrimination "in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex or national origin" – is properly before the Commissioner. Considering the merits of petitioners' argument that A.S.'s disability is the reason that the Board has denied the curb-to-curb transportation service that other general education students on her road enjoy, the ALJ found that A.S.'s disability is not the proximate cause of why she is not being picked up in front of her house. Instead, the ALJ found that it is the hazardous road where petitioners live that prevents the shorter bus from stopping in front

² The type of vehicle being used to transport A.S. to and from school is unclear. The director of transportation for Washington Township School District referred to the vehicle as a van but clarified that it was a smaller yellow school bus, while the transportation supervisor at West Morris Regional High School District testified in the related special education matter that a seven-passenger minivan is utilized to transport A.S.

³ The ALJ found the Board's argument that petitioners had failed to exhaust their remedies under the Individuals with Disabilities Education Act (IDEA) was moot, because a final decision has been issued in petitioners' due process petition.

of the home; thus, utilizing the municipal building for pick up and drop off is an “unintended consequence” of A.S.’s placement at Sage.⁴

In their exceptions, petitioners argue that the ALJ should have addressed their claims under Section 504 of the Rehabilitation Act (504), the ADA, and the LAD because, according to petitioners, the Commissioner has concurrent jurisdiction with the Division on Civil Rights over LAD matters when it involves schools, and the OAL has jurisdiction to hear cases involving Section 504 and the ADA. Petitioners also argue that the ALJ failed to address the fact that the Board does not allow child study teams to offer curb-to-curb transportation for people with mental health or psychiatric disabilities, regardless of their needs, and only offers it if there is a physical impairment requiring door to door transportation. Petitioners contend that because there is disparate treatment between children with physical disabilities and children with mental health or psychiatric disabilities, disability-based discrimination is apparent. Additionally, petitioners argue that A.S. was treated differently than general education students who are picked up at their homes on the same hazardous road as A.S.’s house. In support of their contention, petitioners point out that the Board did not have to use Cassidy to transport their daughter, as it could have considered other options or transported A.S. on its own using a larger bus rather than requiring her to walk along a hazardous route or rely on her parents to drive her to the municipal building.

⁴ In a related special education matter, petitioners filed a due process petition similarly challenging the Board’s failure to provide door-to-door transportation for A.S. to Sage and arguing that the lack of door-to-door transportation violates A.S.’s right to a free and appropriate public education (FAPE). *J.S. and S.S., on behalf of A.S. v. West Morris Regional Board of Education*, EDS 08829-21, Final Decision dated December 7, 2022. In a Final Decision, the ALJ found that there was no medical evidence in the record that A.S. required drop-off and pick-up immediately outside of her house. As such, the ALJ found that while a bus stop at her home may be preferable, transportation to and from the municipal building does not rise to the level of a denial of FAPE or a deprivation of educational benefits.

Upon review, the Commissioner finds that the Board is not meeting its responsibility to provide A.S. with appropriate transportation to and from school. Notably, the Board has not provided persuasive evidence that it is incapable of safely stopping in front of A.S.'s house but yet it is requiring her to walk along a hazardous road without sidewalks or a shoulder to the location of her assigned bus stop.

Pursuant to *N.J.A.C. 6A:27-1.3(a)*:

District boards of education shall provide transportation to public school students who reside remote from their assigned school of attendance, nonpublic school students who reside remote from their school of attendance and meet the eligibility criteria of *N.J.A.C. 6A:27-2.2*, and students with disabilities who reside remote from their assigned school or who require transportation services in accordance with their individualized education program (IEP).

In this matter, A.S. is a student with a disability who resides remote from her assigned out-of-district placement, and as such, she is entitled to transportation to and from school. In order for A.S. to utilize the provided transportation, she must travel one-third of a mile down a steep, hazardous road to a municipal parking lot because, according to Cassidy, it is unsafe to stop along such a dangerous route. The Commissioner cannot reconcile why the Board would accept Cassidy's representation that the road is so unsafe that a vehicle cannot safely pick up a student (especially when other buses have previously stopped in front of her house), but at the same time find it acceptable for a student to walk down the same hazardous road, without a shoulder or sidewalks, to reach her assigned bus stop. The Commissioner understands that petitioners have been driving A.S. to the municipal building; while petitioners have been taking extra efforts to ensure that their child reaches the bus safely, they should not be required to do so. It is the Board's responsibility to provide A.S. with transportation under *N.J.A.C. 6A:27-*

1.3(a), and her parents should not be burdened with the additional responsibility of driving her back and forth because the Board has chosen a location that is indisputably unsafe for her to traverse on her own.

The Commissioner is uncertain why Cassidy transportation cannot effectuate a safe stop at or near petitioners' home. It is clear that full-sized school buses routinely stop along petitioners' road, and even at their house, while utilizing flashing lights to safely stop. If Cassidy is providing a shorter yellow school bus as one witness testified, then it is unclear why such a school bus would not be equipped with flashing lights and a stop sign in order to stop traffic. If, on the other hand, Cassidy is utilizing a seven-passenger minivan as another witness testified, then it is unclear why a van cannot pull into petitioners' driveway, or a safe pull-off location away from traffic. Notably, the record is devoid of testimony from a representative of Cassidy to explain its rationale in detail.

Considering the specific circumstances in this matter – including the treacherous route A.S. would be required to walk to her assigned bus stop and the fact that transportation vehicles have safely stopped at A.S.'s home in the past – the Commissioner finds that the Board should provide curb-to-curb transportation to and from A.S.'s out-of-district placement at Sage beginning in the 2023-24 school year. The Commissioner notes that if the Board is unable to meet its responsibility while utilizing a short yellow bus or a seven-passenger minivan, it is free to utilize a large school bus, which has already been determined to be able to safely stop along petitioners' road. Given that petitioners' requested relief of curb-to-curb transportation is being granted, it is unnecessary for the Commissioner to reach the remaining discrimination arguments in this case.

Accordingly, the Initial Decision of the OAL is rejected. The Board is required to provide A.S. with curb-to-curb transportation to and from Sage beginning in the 2023-24 school year.

IT IS SO ORDERED.⁵


ANGELINA ALLEN McMILLAN, J.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 24, 2023

Date of Mailing: April 26, 2023

⁵ This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 02066-22

AGENCY DKT. NO. 15-2/22

J.S. AND S.S. ON BEHALF OF A.S.,

Petitioner,

v.

**WEST MORRIS REGIONAL HIGH
SCHOOL BOARD OF EDUCATION,**

Respondent.

David R. Giles, Esq., for petitioner

Jodi S. Howlett, Esq., for respondent (Cleary, Giacobbe, Alfieri, and Jacobs,
attorneys)

Record Closed: December 15, 2022

Decided: January 30, 2023

BEFORE **JUDE-ANTHONY TISCORNIA, ALJ:**

STATEMENT OF THE CASE

J.S. and S.S. on behalf of A.S. (petitioners) filed a petition claiming, among other related items, that the West Morris Regional High School District (District) discriminated against A.S. due to its failure to provide door-to-door transportation to and from A.S.'s out-of-district placement.

PROCEDURAL HISTORY

On February 1, 2022, J.S. and S.S. on behalf of A.S. filed a petition seeking the following:

- A.) a declaration that the District has discriminated against A.S. by not providing her with door-to-door transportation;
- B.) an order directing the District to provide door-to-door transportation;
- C.) an order directing the District to reimburse A.S.'s parents for out-of-pocket expenses and for their time;
- D.) attorney's fees; and
- E.) other relief as appropriate.

The matter was transmitted to the Office of Administrative Law on March 16, 2022, as a contested case. A hearing was conducted by the undersigned on October 7, 2022. Final submissions were received by the parties on December 15, 2022, at which point the record was closed.

FINDINGS OF FACTS

I **FIND** the following to be the facts of the case:

Petitioners reside on Schooley's Mountain Road, Long Valley, New Jersey 07853, and, as such, the West Morris Regional High School District is the local education agency responsible for providing A.S. with a free, appropriate public education (FAPE). The parties agree that Schooley's Mountain Road is dangerous and hazardous.

A.S. is currently fifteen years old and in the tenth grade. At the time of the filing of the due-process petition, A.S. was fourteen years old and attending Sage Alliance (Sage)

as a ninth-grade student. A.S. has been deemed eligible for special education and related services under the classification of “other health impaired.”

Prior to becoming a student in the West Morris Regional High School District, A.S. was a special-education student in the Washington Township School District (Washington Township). While students of Washington Township, both A.S. and her brother were picked up and dropped off by a Washington Township school bus in front of their house on Schooley’s Mountain Road.

On June 10, 2020, Washington Township proposed an IEP (“6/10/20 IEP”) placing A.S. at the Newmark School in Scotch Plains, New Jersey. Transportation was added as a related service to her IEP.

On January 14, 2021, Washington Township issued an IEP (“1/14/2021 IEP”) placing A.S. at Barnstable Academy in Oakland, New Jersey, for the remainder of her eighth-grade year. The Washington Township School District provided A.S. with “curb-to-curb” transportation as a related service in her IEP through June 10, 2021.

On April 23, 2021, Washington Township convened an Annual Review IEP meeting (“4/23/21 IEP”). At that meeting, it was contemplated that A.S. was in need of a more therapeutic placement than Barnstable Academy for her ninth-grade year. Accordingly, the 4/23/21 IEP provides for A.S. to remain at Barnstable Academy for the remainder of the 2020–2021 school year. Washington Township sent records to potential out-of-district placements with a therapeutic component in preparation for A.S.’s freshman year of high school.

On July 1, 2021, following the completion of A.S.’s eighth-grade year, A.S. became a student of the West Morris Regional High School District. On July 14, 2021, at the request of petitioners, the West Morris Regional High School District convened an IEP meeting. At that time, petitioners advised the District that they wished to discuss Barnstable Academy’s decision to discontinue A.S.’s placement in the program. The IEP team determined that, in reviewing the recommendations from Long Valley Middle School and Barnstable Academy, a more therapeutic out-of-district placement would most

appropriately meet A.S.'s social-emotional needs. Petitioners and A.S. attended the July 14, 2021, IEP meeting virtually.

The IEP drafted as a result of the July 14, 2021, meeting ("7/14/21 IEP") placed A.S. on home instruction pending her acceptance to an appropriate out-of-district placement. Because A.S. would be receiving home instruction, transportation was not provided as a "related service" in the 7/14/21 IEP. The 7/14/21 IEP was implemented after expiration of the fifteen-day notice period pursuant to N.J.A.C. 6A:14-2.3(h).

Subsequent to the 7/14/21 IEP meeting, the West Morris Regional High School District secured A.S.'s placement at Sage Day High School in Boonton, New Jersey, for the 2021–2022 school year. A.S. started her ninth-grade year at Sage on September 10, 2021. Upon A.S.'s placement at Sage, the West Morris Regional High School District worked to secure A.S.'s transportation to the out-of-district placement.

On September 10, and September 15, 2021, the District put the transportation route out for public bid to various vendors pursuant to N.J.S.A. 18A:18A-1 et seq. The District did not receive any bids for transportation from any vendors on A.S.'s route for Sage. On September 20, 2021, the District's director of special education, Michael Reinknecht, informed petitioners of the difficulties in securing a vendor to provide transportation to Sage. On October 1, 2021, the District put the transportation route out to public bid for a third time to transportation vendors pursuant to N.J.S.A. 18A:18A-1 et seq.

In October 2021 the District secured a sole vendor, Cassidy Transportation, to transport A.S. to and from Sage. Cassidy was then employed by the District to transport A.S. (via school bus) to Sage, beginning on October 10, 2021. Between the time A.S. started at Sage on September 10, 2021, and Cassidy being contracted to transport A.S. on October 10, 2021, her father, S.S., drove A.S. to and from Sage every school day for approximately twenty days.

As A.S. is the only student utilizing the bus route to Sage, Cassidy utilizes a smaller "short bus" to transport her to and from Sage. Due to the hazardous conditions of

Schooley's Mountain Road, Cassidy Transportation determined that it may prove unsafe to effectuate a stop immediately in front of A.S.'s house utilizing this sort of equipment. Cassidy Transportation, instead, picks up and drops off A.S. at the Washington Township Municipal Building, one-third mile from A.S.'s home.

On October 5, 2021, petitioners filed a request for a due-process hearing to challenge the District's refusal to provide "curb-to-curb" transportation pursuant to the 4/23/21 IEP created by A.S.'s previous district.

On October 12, 2021, West Morris Regional High School District convened a Thirty-Day Review IEP meeting ("10/12/21 IEP"). At that meeting, it was reported by A.S.'s teachers at Sage that she was transitioning well, and the input reflected strong clinical and academic feedback. The 10/12/21 IEP provides transportation to Sage as a related service with pickup and drop-off locations at the Washington Township Municipal Building. Cassidy Transportation has been safely transporting A.S. to and from Sage daily since October 11, 2021, and throughout the pendency of these proceedings.

SUMMARY OF RELEVANT TESTIMONY

As noted above, this matter was set down for a hearing on October 7, 2022. Prior to the hearing, it was decided among the parties that the bulk of the testimony to be presented was duplicative of the testimony already placed on the record in the related case, J.S. and S.S. on behalf of S.S. v. West Morris Regional Board of Education, OAL docket number EDS 08829-21. Thus, the testimony of all the witnesses taken in EDS 08829-21, along with the corresponding exhibits and transcripts, was incorporated by reference on the record on October 7, 2022. Only the limited testimony of Dr. Michael Reinknecht was taken at the October 7, 2022, hearing.

Michael Reinknecht

Michael Reinknecht is the District's director of special education. He testified that West Morris Regional High School District's own director of transportation is responsible for transporting their special-education students. He further testified that West Morris has

a contract with the Washington Township School District to transport general-education students. Reinknecht stated that he had no knowledge of the fact that all general-education high-school students who live on Schooley's Mountain Road are transported to and from school and picked up in front of their homes.

LEGAL DISCUSSION

In response to the petition, respondent argues that petitioners' discrimination claims are barred by the Individuals with Disabilities Education Act's (IDEA's) exhaustion requirement. In its brief, the District argues that the IDEA affords parents of a disabled child the opportunity to present a complaint "with respect to *any matter relating* to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" 20 U.S.C. § 1415(b)(6)(A) (emphasis added). The District argues that exhaustion of the IDEA's administrative process is required in non-IDEA actions where the petitioner seeks relief that can otherwise be obtained under the IDEA, noting that Congress provided an express "[r]ule of construction" in 20 U.S.C. § 1415(l), which provides:

Nothing in this title [20 U.S.C.S. §§ 1400 et seq.] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [29 U.S.C.S. §§ 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part [20 U.S.C.S. §§ 1411 et seq.], the [IDEA administrative process] shall be exhausted to the same extent as would be required had the action been brought under this part [20 U.S.C.S. §§ 1411 et seq.].

Thus, the District argues that it is only following the outcome of the due-process hearing that an aggrieved party shall have a right to bring the action filed with the commissioner. As noted above, petitioners had filed a due-process petition (EDS 08829-21) and a hearing was held. Although no decision was rendered in that matter when the instant matter was filed, a decision has since been made, with petitioners being largely

unsuccessful on their claims, thus, I **CONCLUDE** that respondent's exhaustion argument is, therefore, mute.

Respondent next argues that the commissioner of the Department of Education does not have jurisdiction over claims brought pursuant to the New Jersey Law Against Discrimination or the Americans With Disabilities Act, asserting that the extent of the jurisdiction of the commissioner is set forth in N.J.S.A. 18A:6-9, which provides the following:

The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner.

Thus, respondent argues, the statute clearly implies that where the controversy does not arise under the school laws, it is outside the commissioner's jurisdiction.

As petitioners rightfully point out in their brief, however, New Jersey's Equality and Equity in Education law provides that "[n]o pupil in a public school in this State shall be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex or national origin." N.J.S.A. 18A:36-20; see also N.J.A.C. 6A:7-1.1, which states:

The purpose of this chapter is to ensure all students, regardless of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, gender identity or expression, religion, disability, or socioeconomic status, are provided equal access to educational programs and services by district boards of education.

Based on the foregoing, I **CONCLUDE** that petitioners' current petition is properly before the commissioner of the New Jersey Department of Education as per the plain language of the above-referenced statutes and regulations.

With these jurisdictional and procedural issues now resolved, I turn to address petitioners' case-in-chief: the assertion that the Board discriminated against A.S. by denying her curb-to-curb transportation, a service, they claim, provided to all other students living on Schooley's Mountain Road, because A.S. has a disability.

As discussed in the factual findings above, and as discussed at length in the related special-education case, the District put A.S.'s transportation route out for public bid to various vendors, with Cassidy Transportation ultimately winning the bid and securing the contract to transport A.S. to and from Sage. This transportation route was put out to bid because A.S. is entitled to, and receives, special-education instruction at her out-of-district placement, Sage Academy. This placement was chosen by A.S.'s parents after evaluating other facilities and determining Sage to be the best placement for their child. As transportation is a related service to A.S.'s special-education programming, the District is obliged to put the transportation route out to bid so that A.S. may properly access her special-education programming, as she has been doing on a regular basis thus far.

After Cassidy won the bid and traveled to A.S.'s home, Cassidy determined that, due to the hazardous conditions of Schooley's Mountain Road, Cassidy could not safely pick up A.S. directly in front of her home with the equipment (short school bus) it utilizes to transport A.S. Thus, Cassidy resolved to pick A.S. up at the municipal building approximately one-third mile down the road from A.S.'s home, which Cassidy determined to be the closest location to A.S.'s house at which the bus may safely execute a stop.

Petitioners argue that if A.S. were a general-education student, she would be picked up by a larger bus, one that would, presumably, be able to stop in front of her home safely. Thus, they reason that, but for A.S.'s learning disability, which, in turn, brought forth an IEP calling for an out-of-district placement and transportation as a related service, A.S. would be picked up in front of her home by a larger bus on a daily basis. Petitioners argue that A.S.'s disability is the cause in fact, or the "but for" cause of A.S. not being picked up directly in front of her home. While this scenario may be a cause in fact, it is not the *only* cause in fact. One may argue, for instance, that "but for" the location of the petitioners' house being on a hazardous stretch of road, A.S. would be picked up

in front of her home. If, for example, she lived in a residential neighborhood with wide, straight, level lanes of traffic, effectuating a stop directly in front of her home with any motor vehicle—short bus, long bus, etc.—could be achieved with ease. Thus, while A.S.'s disability may be a cause in fact of why A.S. is not picked up immediately in front of her home, it is not the proximate cause, and, therefore, not the direct cause of why she is not picked up in front of her house. Rather, I **CONCLUDE** that A.S. being picked up at the municipal building is an unintended consequence of the Board's implementation of A.S.'s IEP, so that she may access a free and appropriate education as required by law.

ORDER

Based upon the foregoing, it is **ORDERED** that the petition of appeal be, and hereby is, **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 30, 2023
DATE



JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 1/30/23

Date Mailed to Parties: 1/30/23

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APPENDIX

LIST OF WITNESSES

Respondent's Witnesses:

None presented at hearing (See notes on page 5,above)

Petitioners' Witnesses:

Michael Reinknecht

EXHIBIT LIST

The respondent and petitioner's exhibit list and all accompanying exhibits in the related matter of J.S. and S.S. on behalf of S.S. v. West Morris Regional Board of Education, OAL docket number EDS 08829-21, is incorporated into this matter by reference. (See notes on page 5, above)