

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 8774-16

AGENCY DKT. NO. 2016 24465

L.S. ON BEHALF OF B.S.,

Petitioner,

v.

BEVERLY CITY BOARD

OF EDUCATION,

Respondent.

L.S., petitioner, pro se

David Rubin, Esq., for respondent

Record Closed: September 27, 2016

Decided: October 31, 2016

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 to 1482. Petitioner L.S. on behalf of her minor son, B.S., opposes Beverly City Board of Education's (Board) Individualized Education Plan that does not include transportation services for the minor student, B.S., and seeks an order to maintain such services.

PROCEDURAL HISTORY

Petitioner L.S. filed a petition for due process with the Office of Special Education Programs (OSEP) on May 11, 2016. Petitioner filed a request for emergent relief on May 13, 2016. The case was transmitted to the Office of Administrative Law (OAL) on June 14, 2016. The parties settled the emergent relief application with the Board agreeing to continue to provide transportation voluntarily pending the outcome of the due process hearing. I scheduled the hearing on the due process petition for September 27, 2016. On that date, I heard the case and closed the record.

ISSUE PRESENTED

Whether Beverly City School District must continue to provide transportation to B.S., a ten-year-old boy classified as Emotionally Disturbed (ED) with Oppositional Defiant Disorder (ODD), where the route to school is approximately one-half mile and transportation is not provided for in the student's Individualized Education Program (IEP).

FACTUAL DISCUSSION

This case arises from petitioner's challenge to the Board's decision to discontinue transportation for L.S.'s son, B.S. B.S. is a ten-year-old boy currently enrolled in the Beverly City School District. He is classified as ED. He has been diagnosed with ODD, Rule out Mood Disorder, NOS, with associated Posttraumatic Stress Disorder. (R-1 at 38.)

Prior to attending school in Beverly, B.S. was a student at Aloysius L. Fitzpatrick School in Philadelphia, Pennsylvania. While a student in Philadelphia, B.S. received transportation both to and from his school building, which was located approximately 5.3 miles away from his home. (R-14.) The Board contends that transportation was provided to B.S. solely on the basis of his remoteness from the Fitzpatrick School. (Respondent's Pre-Hearing Brief, 2.) Petitioner argues that transportation was intentionally included in B.S.'s IEP, citing a Notice of Recommended Educational

Placement, dated May 20, 2015, in which the School District of Philadelphia noted “[B.S.] requires curb to curb transportation to insure safe transport.” (R-1, pg. 30.)

B.S. became a student in the Beverly City School District in February 2016 when his family moved to a home located approximately one-half mile away from Beverly City School. (R-15.) Because B.S. lives less than two miles away from the school building, he is ineligible for transportation based on remoteness. However, since B.S. had been receiving transportation at his previous school, the District elected to provide a bus for him until the child study team (CST) could determine if this service was disability-driven. (Respondent’s Prehearing Brief, 2.) Ultimately, the Beverly CST proposed its own IEP, dated March 4, 2016, which provided for an in-district placement at Beverly City School, without transportation. (R-2.) The IEP was revised on April 4, 2016, but transportation was still not included in the plan. (R-3.)

L.S. disagreed with this determination and served the District with a due process petition on April 19, 2016. (R-4.) After confirming that the petition had not been properly filed with the Department of Education, the District’s counsel wrote to L.S. on May 4, 2016, advising her that transportation for B.S. would cease after May 13, 2016. (R-5.) On May 13, 2016, L.S. properly filed a parental request for a due process hearing, indicating that the District had discontinued her son’s transportation services and requesting that these services be reinstated. (R-6.)

Elizabeth Giacobbe, principal and superintendent for the Beverly City School District, testified that she has had many interactions with B.S. since he transferred to Beverly, mainly in the hallways and in the bus line. She described B.S. as “polite,” “friendly,” “positive,” and “cheerful,” and referred to him as a “happy, nice young man.” She stated that B.S. follows directions and has never acted in a physically aggressive way while in her presence.

In addition to these interactions, Superintendent Giacobbe indicated that she has encountered B.S. after school hours as well. On May 25, 2016, while driving in Beverly, she witnessed B.S. walking several blocks away from his home. (R-16.)

Superintendent Giacobbe stopped and asked B.S. where he was going, and B.S. replied that he was on his way to a pizza shop, which is located very close to the school. He appeared to be alone. On June 1, 2016, while following a road detour, Superintendent Giacobbe witnessed B.S. riding his bike around Edgewater Park. (R-17.) This time, she did not stop to talk to B.S. but waved to him as she passed. Again, B.S. appeared to be alone. After clocking the mileage the next day, Superintendent Giacobbe determined that B.S. was approximately .57 miles away from his home when she saw him on his bicycle. Superintendent Giacobbe described the route from B.S.'s home to the school. To get to Beverly City School, B.S. would have to walk down Bentley Ave., a suburban neighborhood street, and then turn on Warren St., which she characterized as the "main street" of town. She noted that there are sidewalks and crossing guards throughout the route.

Margaret Gunkel currently serves as B.S.'s resource room teacher and previously served as B.S.'s teacher during the 2015-2016 school year. Ms. Gunkel described B.S. as "polite" and "kind" and stated that he does his work "most of the time." Ms. Gunkel noted that B.S. can become verbally defiant at times. However, Ms. Gunkel stated that she has never seen signs of B.S. acting in a physically aggressive way. He has never "eloped," and he typically follows classroom directions.

Chelsea Light, a school psychologist, served as B.S.'s case manager from June 6, 2016 until the end of the 2015-2016 school year. Although she acted as B.S.'s case manager for only a short period of time, she has continuously observed B.S. as part of her afterschool duty as a bus runner. Ms. Light described B.S. as "happy" and "trustworthy." She recalled that she has relied on B.S. to run errands in the past. For example, on at least one occasion, she asked B.S. to retrieve a pen from her desk, and he completed the task without incident. Ms. Light noted that B.S. exits school appropriately at the end of the day, and nothing would give her pause about allowing B.S. to walk home by himself. At one time, Ms. Light reached out to B.S.'s former school in Philadelphia and spoke to the school psychologist there. The psychologist informed Ms. Light that the reason why B.S. was receiving transportation in Philadelphia was because he was attending a school outside of his neighborhood.

Kathleen Huber is a Registered Behavior Technician employed by the Verbal Behavior Institute. For the last four years, she has been contracted by Beverly City as a behavioral consultant. She has twenty years of experience working in multiple school districts. Ms. Huber visits B.S.'s classroom for approximately one hour, twice per week. During this time, she reviews B.S.'s daily behavior recordings.

Although B.S. is classified as "emotionally disturbed," Ms. Huber has never witnessed any signs of physical aggression. Ms. Huber expressed that B.S. will sometimes make vocal refusals. During these occasions, B.S. will fold his arms and put his head down. He responds to re-direction, although it may take two or three times for him to ultimately follow instructions. On other occasions, B.S. will go to a designated "calming area" in the classroom and will refuse to come out. Ms. Huber noted that B.S. gets along well with other students. In fact, when a kindergartener was having a difficult time following directions, B.S. helped to calm the younger student down. She also noted, however, that there is one female student with whom B.S. "gets annoyed."

Ms. Huber explained that B.S. exhibited only a few episodes of problem behavior when he first arrived at Beverly, indicating that a "honeymoon period" is common when a child is first introduced to a new environment. The frequency and duration of these episodes has since fluctuated. Ms. Huber hypothesized that B.S. is likely responding differently to the suburban environment of Beverly than he did to the urban environment of Philadelphia, which may explain why the episodes of physical aggression have ceased.

B.S. has expressed to Ms. Huber that he wants to be put in mainstream classrooms, where he can be with his friends. Superintendent Giacobbe explained that she has had similar conversations with B.S. and that the specialists at the school were currently looking into putting him into different classes for study hall and science.

Petitioner testified on her own behalf. According to her, her son's issues began when he was in pre-school. During the summer of 2013, B.S. and his family moved to

Hainesport, N.J. from Mt. Laurel, N.J. due to mold issues in the family home. Upon beginning school in Hainesport, B.S. was referred for a child study team evaluation due to ongoing behavioral difficulties. (R-4, pg. 3.) In October 2013, unbeknownst to his mother, B.S. took a bus to another student's home. When asked why he did not go to his own home, B.S. made allegations of physical abuse. B.S. was placed in foster care for several weeks and, during this time, ran away. He was subsequently placed with a relative, where petitioner visited him frequently.

B.S. was returned to his mother in April 2014. The family moved to Philadelphia, where B.S. attended Aloysius L. Fitzpatrick School. B.S. experienced a series of behavioral episodes while a student at Fitzpatrick, including one incident where he brought a butter knife to school. B.S. was also involved in bullying another student. Petitioner cited to B.S.'s IEP from Fitzpatrick, which indicated that B.S.'s behavior "affect[s] the student's safety or that of others in the school setting" and "affect[s] the student's safety or that of others on the district's transportation." (R-1, pg. 6.)

Petitioner addressed the two occasions during which Superintendent Giacobbe witnessed B.S. outside of school. During the first incident, B.S. was supposed to be accompanying his grandfather to a pizza shop. Without his grandfather realizing it, B.S. wandered out of the pizza shop alone. This was when Superintendent Giacobbe ran into him. On the second occasion, petitioner had dropped B.S. off at a friend's house, and he should not have been riding his bicycle in Edgewater Park.

Petitioner testified that her son needs structure and routine. She believes that without transportation, B.S. will never make it to school on time. According to petitioner, B.S. has mentioned that he does not know how to get to school and is "panicking" at the idea of walking by himself. Petitioner expressed doubts as to the accuracy of the testimony of Superintendent Giacobbe, Ms. Gunkel, Ms. Light, and Ms. Huber regarding B.S.'s behavior at school. She indicated that their observations are at odds with what she has observed, noting that B.S. continues to act out at home.

FINDINGS OF FACT

Petitioner attempted to cast doubt on the credibility of the Board's witnesses regarding her son's behavior based on the behavior of B.S. that she sees at home. However, the Board witnesses were credible in their testimony and petitioner could not refute their testimony as she is viewing her son at home while they are viewing her son at school. Petitioner's testimony actually supported the testimony of Superintendent Giacobbe, although petitioner offered an explanation for it. Superintendent Giacobbe did see B.S. out of the house alone, not seeming at all lost or acting out in any way. I therefore **FIND** as **FACT** the testimony of the Board's witnesses that at school, B.S. is generally happy, positive and cheerful. At times he gets annoyed, particularly with one student, and he can be vocally defiant. However, he has not been seen at school to exhibit physical aggression. He has expressed a desire to be with his friends in mainstream classes and the CST will be looking into mainstreaming in the future. I **FIND** that B.S. lives one-half mile from the school on a route that has sidewalks and crossing guards. Last, I **FIND** that transportation was required in B.S.'s IEP from Philadelphia, but the IEP did not specifically note it as relating to his classification. The CST had a responsibility to determine whether transportation was required in Beverly and concluded that it was not based on the one-half mile distance and their observations of B.S. Transportation is not essential to B.S.'s attainment of the goals in his IEP.

LEGAL ANALYSIS

The Individuals with Disabilities Education Act (IDEA) requires that school districts provide disabled students with a free and appropriate public education (FAPE). 20 U.S.C. §§ 1400-87. A public school district's obligation is satisfied when the district provides a personalized educational program and the related services necessary to confer some educational benefit on the child. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). "Related services" may include transportation, as well as any developmental, corrective, and other support services that are required to assist a child with a disability to benefit from special education. 20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a).

New Jersey has enacted legislation and regulations adopting the language, purpose, and goals of the IDEA. See N.J.S.A. 18A:46-1 to -46; N.J.A.C. 6A:14-1.1 to -10.2. Under N.J.A.C. 6A:14-3.9, transportation “shall be provided to a student with a disability when required for the student to benefit from the educational program.” In addition, the New Jersey Administrative Code provides:

- (a) Transportation shall be provided 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 special education students who reside remote from their assigned school or who require transportation services in accordance with their Individualized Education Program (IEP) . . .**

- 1. The words “remote from school of attendance” shall mean beyond two and one-half miles for high school students (grades nine through 12) and beyond two miles for elementary school students (grades preschool through eight).

[N.J.A.C. 6A:27-1.4 (emphasis added).]

In L.R. o/b/o E.R. v. Middletown Township Board of Education, OAL Dkt. No. EDS 10263-09 (October 15, 2009), the Administrative Law Judge noted:

It is well established that transportation is a “related service.” However, this does not mean that a disabled child is entitled to transportation services simply because he or she is disabled. In order for a disabled child to receive transportation services, the plain language of the Act and its implementing regulations requires a finding that such services must be essential to the child’s attainment of the stated goals in the student’s IEP, and the services should be contemplated in the plan.

[L.R. o/b/o E.R., supra at 6-7.]

Thus, in order for a disabled child to receive transportation services, it must be listed as a related service in the child’s IEP. Id. at 7. Transportation services must be necessary to some fundamental part of the child’s education needs. Id. at 9. They

should not be provided “to accommodate the needs, work schedules, or domestic arrangements of parents or guardians.” Id. (citing North Allegheny Sch. District v. Gregory P., 687 A.2d 37, 40 (Pa. Commw. Ct. 1996)).

Moreover, just because transportation is provided to a child at some point in time for a disability-driven reason, the service need not continue indefinitely if circumstances change. In M.B. o/b/o K.B. v. Manville Board of Education, OAL Dkt. No. EDS 8084-02 (January 21, 2003), the parents of a five-year-old special education student requested that their child be provided transportation to her school, which was located approximately one-half mile away from the student’s home. Id. at 1, 14. The mother of the student testified that her child had a seizure disorder and lacked strength in her legs. Id. at 8. The court noted that the child had been seizure-free for two years and determined that transportation was not necessary for the child to continue to progress educationally. Id. at 13. The ALJ acknowledged the parents’ concerns with their child’s safety in crossing railroad tracks and in walking along a busy roadway, but recognized, “[t]hese concerns are common to parents and are not exclusive to the parents of children with disabilities.” Id. at 16. Thus, the court concluded that the child was not entitled to transportation, as her home was not remote from the school of attendance, and her IEP did not provide for transportation as a related service. Id.

Here, it is undisputed that B.S. is ineligible for transportation on the basis of remoteness, as his home is located approximately one-half mile from the school. Further, transportation is not listed as a necessary related service in B.S.’s Beverly IEP, the latest of which is dated April 4, 2016. Even if transportation was once a necessary service for B.S., there is no indication that B.S. currently requires transportation to progress educationally or to receive the free and appropriate education (FAPE) to which he is legally entitled. In that regard, although B.S. has a history of behavioral problems at his previous schools, the overwhelming testimony from the professionals at Beverly City School indicates that B.S. is capable of following instructions and appears to be making substantial progress. Notably, there have been no reports of physical aggression since B.S. has started at Beverly. In fact, according to Superintendent

Giacobbe, the specialists at the school are investigating whether it is possible to remove B.S. from his self-contained classroom for study hall and science.

While L.S. may have concerns about her son getting to school on time, this is a worry common to many parents of school-aged children. Like the student in M.B. o/b/o K.B., supra, B.S.'s home is located only one-half mile away from his school and like other parents, petitioner has the option of driving him to school if she continues to have concerns. Additionally, like K.B., B.S. continues to make progress, and his IEP continues to reflect this progress. For these reasons, B.S. is not entitled to continued transportation from the Beverly City School District.

CONCLUSIONS OF LAW

For the foregoing reasons, I **CONCLUDE** by a preponderance of the credible evidence in the record that the District is not required to continue transportation services for B.S. pursuant to N.J.A.C. 6A:14-3.9. Because B.S. resides less than two miles away from his school, the District is not required to provide transportation based on remoteness. Further, transportation is not a related service required by B.S.'s IEP, and there is no indication that transportation is necessary in order for B.S. to receive FAPE and to benefit from his educational program.

ORDER

It is hereby **ORDERED** that the petition of appeal is **DISMISSED** and the Board may discontinue transportation services that have been provided pending the outcome of the due process petition.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2015) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2015). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education.

October 31, 2016
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

cmo

APPENDIX
WITNESSES

For Petitioner:

L.S.

For Respondent:

Elizabeth Giacobbe
Margaret Gunkel
Chelsea Light
Kathleen Huber

EXHIBITS

For Petitioner:

- P-1 Letter from Y. Bright to L.S., undated
- P-2 Google Maps printout of route from home to J.H. Brown School
- P-3 Google Maps printout of route from home to Aloysius L. Fitzpatrick Elementary School
- P-4 Hainesport Township School District Draft IEP

For Respondent:

- R-1 Philadelphia School District IEP and related documentation
- R-2 Beverly City School District IEP, dated March 4, 2016
- R-3 Beverly City School District IEP, dated April 4, 2016
- R-4 Due Process Hearing Petition (served but unfiled), dated April 19, 2016
- R-5 Letter from D. Rubin, Esq. to L.S., dated May 4, 2016
- R-6 Due Process Hearing Petition, dated May 13, 2016

- R-7 Request for Emergent Relief, dated May 13, 2016
- R-8 NJDOE Emergency Relief/Due Process Hearing Request Acknowledgment, dated May 13, 2016
- R-9 Letter from D. Rubin, Esq. to Judge Patricia Kerins, dated May 16, 2016
- R-10 Letter from D. Rubin, Esq. to Judge Patricia Kerins, dated May 23, 2016
- R-11 Decision of Judge Patricia Kerins on Emergent Relief Application, dated June 28, 2016
- R-12 Behavior Summary and data prepared by K. Huber
- R-13 Anecdotal Notes and Parent Call Log prepared by P. Gunkel
- R-14 MapQuest printout of route from home to school in Philadelphia School District
- R-15 MapQuest printout of route from home to school in Beverly City School District
- R-16 E-mail from E. Giacobbe to D. Rubin, Esq., dated May 26, 2016
- R-17 E-mail from E. Giacobbe to M. Gill, dated June 2, 2016
- R-18 Hainesport documents with CST report