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STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

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June 26, 2017

Parent



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In re: Tukwila School District
OSPI Cause No. 2017-SE-0010
OAH Docket No. 01-2017-OSPI-00234

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order in the above-referenced matter. This completes the administrative process regarding this case. Pursuant to 20 USC 1415(i) (Individuals with Disabilities Education Act) this matter may be further appealed to either a federal or state court of law.

After mailing of this Order, the file (including the exhibits) will be closed and sent to the Office of Superintendent of Public Instruction (OSPI). If you have any questions regarding this process, please contact Administrative Resource Services at OSPI at (360) 725-6133.

Sincerely,

A handwritten signature in black ink that reads "L. Dublin".

Lisa N. W. Dublin
Administrative Law Judge

cc: Administrative Resource Services, OSPI
Matthew D. Wacker, Senior ALJ, OAH/OSPI Caseload Coordinator

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STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

SEATTLE-OAH

IN THE MATTER OF:

OSPI CAUSE NO. 2017-SE-0010

TUKWILA SCHOOL DISTRICT

OAH DOCKET NO. 01-2017-OSPI-00234

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Lisa N. W. Dublin in Tacoma, Washington, on April 13-14, 2017. The Parents of the Student whose education is at issue¹ (Parents) appeared and were represented by Alan Harvey, attorney at law. The Tukwila School District (District) was represented by Alicia Feichtmeir, attorney at law. The following is hereby entered:

STATEMENT OF THE CASE

Parents filed a due process hearing request (Complaint) on January 30, 2017. Prehearing conferences were held on March 9, 2017, March 14, 2017, and April 12, 2017. A First Prehearing Order was issued on March 16, 2017, 2017.

The due date for the written decision was continued to May 14, 2017, [thirty (30) calendar days after the close of the hearing record], pursuant to a request for continuance made by the parties. See First Prehearing Order of March 16, 2017. The hearing record closed with the filing of Parents' post-hearing brief on May 27, 2017. Thirty days thereafter is June 26, 2017. The due date for the written decision is therefore June 26, 2017.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Joint Exhibits: J-1 – J-14

Parent Exhibit: AP1

The following witnesses testified under oath. They are listed in order of their appearance:

1. Katherine Breault, Director of Transportation, Tukwila School District
2. Andrew Mitchell, IEP Case Manager, Tukwila School District

¹ In the interest of preserving family privacy, the names of all family members of the Student are omitted from this decision. Instead, they are identified as, e.g., "Parents," "Mother," "Father," "Student," or "Sibling."

3. Joan Lawson, Director of Special Education, Tukwila School District
4. Barbara Tantrum, Mental Health Counselor
5. Brett Christopher, Showalter Middle School Principal, Tukwila School District
6. Father of Student (Father)
7. Mother of Student (Mother)

ISSUE

Whether the District is required to provide transportation between school and Mother's work as part of the Student's individualized education program for purposes of affording the Student a free appropriate public education (FAPE) in compliance with the Individuals with Disabilities Education Act (IDEA)?

FINDINGS OF FACT

In making these Findings of Fact, the logical consistency, persuasiveness and plausibility of the evidence has been considered and weighed. To the extent a Finding of Fact adopts one version of a matter on which the evidence is in conflict, the evidence adopted has been determined more credible than the conflicting evidence. A more detailed analysis of credibility and weight of the evidence may be discussed regarding specific facts at issue.

Student

1. In approximately mid-November 2012, Parents became foster parents to Student, then age 8, and Student's two younger siblings, who came from a living environment where they suffered repeated physical and mental abuse. Parents later adopted the three children, and resided in Auburn, Washington.
2. During sixth grade, Student attended elementary school in the Auburn School District, where an individualized education program (IEP) was in place for the one year period of May 6, 2016 to May 5, 2017. Ex. J-2. The IEP provided for specially designed instruction to Student in the areas of reading comprehension and writing. *Id.* It did not provide for any special transportation to and from school. *Id.*, p.9.
3. The summer before the 2016-2017 school year, Student's Mother accepted an administrative position with the Tukwila School District (District), at Tukwila Elementary School. Although Parents did not live in the District, the District allowed Parents to enroll Student in middle school in the District. Student thus attended Showalter Middle School (Showalter) for the 2016-2017 school year, subject to the same IEP as was in place in Auburn.

District Transportation

4. Bus transportation within the District is geared toward transporting students between home and school, and any other education programs that are part of students' IEPs. The District transportation policy does not provide for transporting students to parents' workplaces. Nor does it provide bus transportation to students living outside the District under any circumstances. Ex. J-7.
5. The District transportation policy provides, in relevant part, as follows:

The superintendent shall be responsible for scheduling bus transportation, including the determination of routes and bus stops as well as overseeing the transportation program.

Routes should be established so as to:...E. Provide transportation to students who live within the distance specified for state funding from school or who would have to walk on a roadway declared unsafe by the board.

Id.

6. The District's Special Services Transportation Guide provides, "No one may assign a student to a bus or reassign a student to a different bus without the permission of the Transportation office." J-8, p.3. This Guide further provides,

Bus routes are scheduled to accommodate the arrival and dismissal times for each school and to maximize the efficiency of the transportation for ALL STUDENTS transported to and from school. The TSD Transportation Office cannot honor requests to lengthen or shorten a student's bus ride to accommodate daycare schedules or parent work schedules.

Id., p.4.

7. On August 29, 2016, School Counselor Brian Gregg emailed Transportation Director Katherine Breault and others, stating he received an inquiry from Student's Mother about whether Student could "ride the bus down to Tukwila Elementary (or nearby) after school to be able to meet her there?" Ex. J-9. The following morning, Ms. Breault responded by denying Parents' request, stating "Although we do see the dilemma, we don't provide that service for any other employee of the district...[O]ut of district students have always been self transport even if they are district employees." *Id.*, p.2. Special Education Director Joan Lawson also responded to Mr. Gregg, calling for a meeting to discuss Student's IEP, and stating she "defer[red] to Kathy" regarding Parents' transportation request. *Id.*, p.3.
8. In an attempt to accommodate the Student's Parents, Ms. Breault identified the closest bus stop to Tukwila Elementary on any school bus route from Showalter. Ms. Breault notified Parents that Student could take the school bus from Showalter to this bus stop, and then walk the rest of the way to Tukwila Elementary. On September 6, 2016, Student did not board the school bus, and thus did get off at the above bus stop. This prompted Student's Mother to again email Ms. Breault asking for transportation of

Student to Tukwila Elementary. Ex. J-10. Ms. Breault again denied the request. *Id.*, p.2. Ms. Breault stated in part:

I do appreciate your frustration with this situation but if we made the exception for you, we would have to make it for every teacher or staff who have asked for special accommodations to drop their student off to their places of work as well. ... It's not about convenience, it's about every student in the district receiving the same level of service.

Id.

Student's IEP

9. On or about September 27, 2016, Student's IEP team met to discuss Student's needs, including transportation. Present at the meeting was Student's Mother, the school principal, two general education teachers, and Student's IEP Case Manager Andrew Mitchell. Ms. Breault was not included in this meeting. At this meeting, all present agreed that Student's IEP should include special transportation to Tukwila Elementary after school. The team determined to continue the IEP from Auburn School District with regard to assistance with reading and writing, and to amend the IEP to provide "Special" transportation. Ex. J-3, pp. 11-13. The box on the IEP identifying "Special" transportation was checked. *Id.* The District did not re-evaluate Student; nor did Parents request re-evaluation. The Auburn School District had not evaluated Student in the area of "social/emotional" or "behavior" before preparing its IEP. See Ex. J-1, p.20.
10. Following this meeting, Mr. Mitchell submitted an electronic request for Special Transportation to the Transportation Department, stating Student "needs to be dropped off at Tukwila Elementary after school in order to meet his Mom." Ex. J-4. The electronic request specified that the request was for a "special education bus" to drop off the Student at Tukwila Elementary School. *Id.* In October 2016, Mr. Mitchell emailed Ms. Breault regarding the status of bus transportation arrangements, stating "This accommodation is for his safety and part of his IEP." Ex. J-11, p.2. Ms. Breault forwarded Mr. Mitchell's email on to Deputy Superintendent Judith Berry, stating in particular part:

[S]tudent is an out of district student who's [sic] parent is staff at Tukwila Elementary school. We have had several requests in the past by staff that have wanted their child to be dropped off at the school they work for, these [sic] requests have been denied because we do not have the resources provide [sic] this service. ... I'm a little concerned about an IEP that states a student needs to be shuttled to a different school – not home or an educational program. My concern is that this accommodation is not for the students [sic] educational benefit but for the parent convenience.

Ex. J-11, pp. 1-2.

11. Dr. Berry agreed with Ms. Breault's decision to deny Parents' request. *Id.*, p.1. Ms. Breault continued to offer the accommodation of transporting Student to the bus stop closest to Tukwila Elementary. Dropping Student at Tukwila Elementary would require

the development of a new bus route, at significant cost to the District, because there was no existing bus route from Showalter that stopped at Tukwila Elementary. Even though the bus Student took to the bus stop nearest Tukwila Elementary actually went to Tukwila Elementary to start a new route after dropping off all Showalter students, the bus driver had duties to complete beforehand, including a bathroom break, that made it untenable to the District to keep Student on the bus to Tukwila Elementary.

12. On or around January 25, 2017, another IEP meeting took place which Ms. Breault attended. This meeting was to address Parents' repeated request to bus Student directly to Tukwila Elementary. At the meeting, Student's Father distributed a letter from Student's mental health care provider, Barbara Tantrum, stating she supported this accommodation. Ex. AP1. Ms. Tantrum believed this accommodation was appropriate due to Student's PTSD and heightened vulnerability, that it was already part of Student's IEP, and that it would not cost the District any additional funds or inconvenience. *Id.*
13. Ms. Breault's denial remained unchanged. Tukwila Elementary had no special education programs suited to Student's IEP. Ms. Breault, on behalf of the District, offered to transport Student to the Tukwila Community Center, which was another designated bus stop from Showalter. There, Student would receive adult supervision at no extra cost until Parents came to get him. Parents declined, in part because they were uncomfortable with the adult supervision options the Tukwila Community Center could provide. See Exs. J-5, J-6.
14. Following this meeting, Student's IEP was again amended, this time to include occupational therapy as a related service to the specially designed instruction in writing Student was already receiving. Ex. J-13. The IEP team also decided to amend the IEP to discontinue special transportation for the Student to the Mother's employment at Tukwila Elementary School at the end of each school day. But due to what is more likely than not a clerical error, the box on the amended IEP identifying "Special" transportation remained checked.² Student's older sister made arrangements with her employer to leave work in the afternoon to pick up Student from school and take him to Tukwila Elementary. As of April 2017, Student was receiving high grades and attending school regularly.

CONCLUSIONS OF LAW

The IDEA

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 United States Code (USC) §1400 *et seq.*, the Individuals with Disabilities Education Act (IDEA), Chapter 28A.155 Revised Code of Washington (RCW), Chapter 34.05 RCW,

² The decision of the IEP team and the clerical nature of the error on the amended IEP are made clear with reference to the Prior Written Notice (PWN) dated January 26, 2017. Exhibit J-5. The PWN states that the IEP meeting was held to discuss transportation options, the options of using District transportation to transport the Student to Tukwila Elementary School or to the Tukwila Community Center After School Program were discussed, and both those options were rejected. *Id.*

Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) Part 300, and Chapter 392-172A Washington Administrative Code (WAC).

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief, in this case the Parents. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).
3. The IDEA and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and condition such funding upon a state's compliance with extensive goals and procedures. In *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982) (*Rowley*), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Rowley, supra, 458 U.S. at 206-207 (footnotes omitted). For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Rowley*, 458 U.S. at 200 - 201.

4. The Supreme Court recently clarified the substantive portion of the *Rowley* test quoted above:

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. . . [H]is educational program must be appropriately ambitious in light of his circumstances . . .

Andrew F. v. Douglas County Sch. Dist. RE-1, ___ U.S. ___, 137 S. Ct. 988, 999-1000 (2017). The Ninth Circuit has explained the *Andrew F.* standard as follows:

In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can "make progress in the general education curriculum," 137 S. Ct. at 994 (citation omitted), taking into account the progress of his non-disabled peers, and the child's potential.

M.C. v. Antelope Valley Union High Sch. Dist., ___ F.3d ___, 2017 U.S. App. LEXIS 9359, at 22 (9th Cir. 2017).

Related Services

5. The rules set out in Chapter 392-172A WAC are meant to "ensure that all students eligible for special education have available to them a free appropriate public education

that emphasizes special education and *related services* designed to meet their unique needs and prepare them for further education, employment, and independent living.” WAC 392-172A-01005(2)(emphasis added).

6. “Related services” means transportation and such developmental, corrective, and other supportive services as are required to assist a student eligible for special education to benefit from special education. WAC 392-172A-01155(1). “Transportation” includes travel to and from school and between schools. *Id.*, (3)(p)(i).
7. The Act makes specific provision for services, like transportation, that enable a child to be physically present in class. *Irving Independent School District v. Tatro*, 468 U.S. 883, 891 (1984)(Without CIC services available during the school day, respondents’ child cannot attend school and thereby benefit from special education.) Transportation that is unnecessary to assist a student eligible for special education to be present in class and benefit from that education, including transportation that is geared toward parental convenience or non-educational preferences, is not a service designed to meet their unique education needs. *See N. Allegheny Sch. Dist. v. Gregory P.*, 687 A.2d 37, 40 (Pa. Commw. Ct. 1996)(The IDEA “requires that the district provide each exceptional student with an appropriate education, transportation between his residence and his school, and additional transportation or other related services where needed to address his educational needs. This is an important and sometimes heavy responsibility, but it does not extend to accommodating all the lifestyle preferences and personal needs of parents whose children happen to have special educational needs.”).
8. In the present matter, Student thrived during the 2016-2017 school year under the terms of the amended IEPs, receiving high grades and attending school regularly. The IEPs called for specially designed instruction with reading and writing. Student received this specially designed instruction at Showalter during regular school hours. Student also had transportation provided to him that met if not exceeded the District’s transportation policy. This transportation delivered Student to the closest bus stop to Tukwila Elementary, where he could then walk the additional distance. Alternative transportation could have delivered Student to the Tukwila Community Center, also a designated bus stop, where Student would have been supervised until the Parents could have picked him up. But the Parents declined that option.
9. It is concluded that the Student received FAPE under the amended IEPs during the school year. The Student was not denied FAPE due to the District’s refusal to provide special transportation after the IEP was amended in September 2016, or the subsequent January amendment to his IEP by the IEP team that did not include special transportation. Requiring the District to incur substantial expense to create and staff a new bus route to accommodate Student when (a) other, less burdensome, though less desirable, alternatives exist, and (b) Student received FAPE under his amended IEPs, goes beyond IDEA’s mandate of making FAPE available to Student. District has thus not violated the IDEA as implemented by Chapter 28A.155 RCW and Chapter 392-172A WAC.

ORDER

Parents have not established that the District violated the IDEA. Parents are therefore not entitled to their requested remedies.

Signed at Seattle, Washington on June 26, 2017.



Lisa N. W. Dublin
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

Pursuant to 20 U.S.C. 1415(i)(2), any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. The civil action must be brought within ninety days after the ALJ has mailed the final decision to the parties. The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. *msl*

Parent


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cc: Administrative Resource Services, OSPI

Matthew D. Wacker, Senior ALJ, OAH/OSPI Caseload Coordinator