

ART WANG
Chief Administrative
Law Judge



STATE OF WASHINGTON

OFFICE OF ADMINISTRATIVE HEARINGS

January 22, 2002 ^{One} Union Square Suite 1500 • 600 University Street • Seattle WA 98101
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Parent


RECEIVED
JAN 24 2002
Superintendent of Public Instruction
Legal Services

Becky Scholl, Ex. Director Student Services
Pat Laffey, Director Special Education
Yakima School District
104 N. 4th Ave
Yakima, WA 98902

Rocky Jackson
Attorney at Law
807 N. 39th Ave
Yakima, WA 98902

In re: Yakima School District - Special Education Cause No. 2001-SE-0098

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(e) (Individuals with Disabilities Education Act) or RCW 34.05.510-598 (State Administrative Procedure 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 the Legal Services office at OSPI at (360) 725-6133.

Sincerely,

Mary L. Radcliffe
Administrative Law Judge

c: Legal Services, OSPI
Deputy Chief ALJ, Jan Grant
Jill Geary, OAH/OSPI Coordinator



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

IN THE MATTER OF:

YAKIMA SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2001-SE-0098

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

A hearing in the above-entitled matter was held before Administrative Law Judge Mary L. Radcliffe in Yakima, Washington, on December 14, 2001 and December 20, 2001. The interested parents, [REDACTED] and [REDACTED] ("Parents"), appeared on their own behalf. Yakima School District ("YSD") was represented by Rocky Jackson, attorney at law. The Administrative Law Judge ("ALJ"), having sworn the witnesses, heard testimony, and considered the admitted exhibits and arguments of the parties, hereby enters the following:

STATEMENT OF THE CASE

On September 18, 2001, the Parent filed with the Office of Superintendent of Public Instruction (OSPI) a request for due process hearing against the Zillah School District ("ZSD"). It states, in relevant part:

Zillah School District sen[t] paperwork that states that the choice school is to provide transportation. Davis sent me paperwork that states that they will not provide transportation. [The Student] attends school in Yakima (about 25 miles from her home) because Zillah does not have a program for her. OSPI can give Davis money to transport [the Student] to school.

On September 20, 2001, the Office of Administrative Hearings ("OAH") mailed to ZSD and the Parent a Notice of Prehearing Conference and a Notice of Hearing. On September 27, 2001, a prehearing telephone conference was held, as scheduled. ZSD asserted that YSD was responsible for transportation as a related service. The Parent asserted that YSD refused to provide transportation to 'Choice' students. On September 29, 2001, the ALJ issued a Prehearing Order which struck the hearing date, joined YSD and scheduled another prehearing conference. A letter, a copy of the Prehearing Order and a Notice of Prehearing Conference, were mailed to YSD.

On October 8, 2001, a second prehearing conference was held, wherein the Parent appeared, Greg Stevens, attorney at law, appeared for ZSD and Rocky Jackson, attorney

at law, appeared for YSD. The Parent informed the ALJ that she wanted ZSD to provide transportation but did not want them involved in any way in the delivery of services at YSD.

Thereafter, ZSD filed a motion to dismiss itself as a party because it did not have current IDEA responsibility to the Student. YSD filed a Motion for Summary Judgment based on its assertions that the Parent was required to pursue due process against ZSD before any responsibility could be attributed to YSD, and that, as a matter of law, the Student was not entitled to transportation as a related service because she attends YSD as a non-resident transfer student.

After submissions by all parties and no objection to the process by which the matter was decided, on November 3, 2001, the ALJ entered an Order on Zillah's Motion to Dismiss and Yakima's Motion for Summary Judgment. It is incorporated herein by reference. In summary, the ALJ concluded that the Parent chose an interdistrict transfer in lieu of filing a due process hearing with ZSD. That the Student placement in YSD is a statutory creature, which effectively transfers the responsibility for a FAPE to the accepting non-resident district, YSD. The ALJ concluded that the Parent's request for hearing was focused on the need for transportation as a current issue, not a compensatory education claim involving ZSD. Without addressing the merits of a potential compensatory education claim against ZSD, the ALJ dismissed ZSD and denied YSD's Motion for Summary Judgment. The issue for hearing identified in the November 3, 2001 Order is re-stated below.

On November 5, 2001, a prehearing conference was held with YSD and the Parent, as agreed, pursuant to the November 3, 2001 Order. A Prehearing Order was entered the same day, scheduling the hearing for November 30, 2001. The deadline for issuance of a written decision, pursuant to WAC 392-172-356 and 34 CFR 300.511(c), was continued to 30 days from the close of record, the close of record being the last day of hearing. On November 29, 2001, due to inclement weather, the hearing was rescheduled to December 14, 2001, by Order dated December 4, 2001.

On December 6, 2001, YSD filed a Motion to Join Zillah School District and Memorandum in Support. It is addressed below.

On December 14, 2001, the ALJ reserved ruling on YSD's Motion, and the hearing was held as scheduled. It did not conclude. The parties agreed to conclude the hearing, by telephone, on December 20, 2001. The matter concluded with the exception that the Parent was given until December 21, 2001 to provide authentication as to several of her proffered exhibits she had obtained via the internet. A letter memorializing these events was mailed to the parties December 20, 2001.

On December 21, 2001, the Parent submitted additional documentation regarding the articles/materials by Robert J. Shprintzen, Demetri Papolos, M.D., and Donna Landsman, M.S. On December 26, 2001, YSD filed an Objection to Materials and stated that it would not be filing any rebuttal evidence.

On or about December 20, 2001, ZSD submitted a letter to the ALJ requesting an opportunity to address YSD's motion. On December 28, 2001, the ALJ mailed a letter to ZSD, and the parties, that she would notify ZSD if it needed to respond. On December 28,

2001, ZSD filed a Motion and Memorandum in opposition to YSD's motion. The ALJ reserved reading of the submission and ultimately did not consider ZSD's submission because she determined YSD's motion to be without merit.

The record closed on December 21, 2001. Thirty days from that date is January 20, 2002. January 20, 2002 is a Sunday, and the following day, January 21, 2002, a national holiday. Therefore, according to computation of time pursuant to the Model Rules of Procedure, WAC 10-08-080, the due date falls on Tuesday, January 22, 2002.

All ALJ notices and Orders are incorporated herein by reference.

YSD's Motion to Join ZSD

As previously stated, on December 6, 2001, the YSD filed a Motion to Join Zillah School District and Memorandum in Support. YSD asserts that ZSD is an indispensable party and that its participation is needed in order to adjudicate the matter.

YSD asserts that it did not make this request at the time jurisdiction/responsibility for the Student's current special education and related services needs was addressed because it did not identify the issue until the eve of hearing, November 30, 2001. YSD asserts that the motion is timely because joinder of necessary parties may be made at any time, including at hearing.

YSD's motion is reserved for the taking of evidence and is addressed in the Conclusions of Law and Order.

Exhibits

Exhibits Considered:

Exhibits submitted by parties in consideration of November 3, 2001 Order;

YSD exhibits: Y-200 through, and including, Y379.

Parent exhibits: P-301 through and including , and P332 and P336 through 51; P354, P366, and P367 (additional material provided December 21, 2001).

Witnesses

The following witnesses testified: Mike Torres, ZSD asst. principal; Kathy Thomas, YSD special education teacher; Pat Laffey, YSD director of special education; Diane Peterson, M.A., Eileen Wilson, the Student, the Student's Mother. The Student's testimony was not under oath.

ISSUES

Whether the Student was, and is, entitled to transportation as a related service, pursuant to the IDEA and federal and state implementing regulations, during her attendance in the YSD. If so, if the YSD should be

Findings of Fact, Conclusions of Law and Order

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ordered, prospectively, to provide transportation and to reimburse the Parent for past transportation costs.

See November 5, 2001 Prehearing Order, Exhibit C9.

There being no objection to the process by which these matters have been resolved, the undersigned hereby enters the following:

FINDINGS OF FACT

1. The Findings of Fact contained in the November 3, 2001 Prehearing Order and the evidence relied upon in rendering them, are incorporated herein by reference.
2. The Student is [REDACTED] years old and lives with her family within the boundaries of the ZSD. The Parents were greatly dissatisfied with the Student's education provided by ZSD. Rather than file for due process against ZSD, they sought and gained admittance to a vocational/life skills program within the YSD. The family lives approximately 25 miles from the Student's school within YSD. After providing transportation for over a year, the Parents filed for due process seeking transportation. The amount of time spent transporting the Student interferes with the mother's ability to work.

Basis of Attendance in YSD

3. The facts establishing the Student's attendance in YSD are summarized here:
 - a. The Parent applied for a non-resident student transfer to YSD, on behalf of the Student, by enrolling the Student on YSD's non-resident enrollment day. After completing enrollment application, the YSD staff inquired whether the Student needed special services. The Parent replied in the affirmative. YSD then denied the Student a non-resident transfer. The Parent filed a complaint with the U.S. Department of Education's Office of Civil Rights (OCR), asserting discrimination.
 - b. On June 29, 2000, YSD and OCR entered into an Agreement to Resolve ("OCR Agreement"), as a direct result of the investigation by OCR into the Parent's complaint.
4. The OCR Agreement provides, in relevant part,
 - II. General Provisions
 - C. Nothing in this agreement shall preclude the district from adopting or enforcing policies regarding student enrollment pursuant to the school choice program, provided such policies

Findings of Fact, Conclusions of Law and Order

are consistent with Section 504 [of the Rehabilitation Act] and Title II.

5. The OCR Agreement also provides that YSD will review and revise, as necessary, its policies and procedures for "admitting students with disabilities who reside outside of the district, under its school choice program, ensuring that its school choice policies are consistent with Section 504 and Title II" and that it will provide training to all district staff involved in making admission decisions for students seeking entry into the district pursuant to school choice program.

6. As it pertains directly to the Student, the OCR Agreement provides that:

[YSD] will mail registration forms and materials to the student's parents. Upon receipt of the completed registration forms, the district will accept the student for admission for the [REDACTED] school year, consistent with school choice policy. Upon admission, the district will determine whether further evaluation of the student is indicated, pursuant to 34 CFR 104.35(a) and (b). This agreement does not preclude the district's ability to contract with the Zillah School District for expenses associated with the student's educational program.

7. YSD's 'Choice' policy and its inter-district non-resident student transfer policy are one and the same. YSD's current, OCR approved, 'Choice' policy, 3141, provides:

Non-resident District Boundary Exceptions

The board recognizes that personal and family educational circumstances may exist that may make it more appropriate for a non-resident student to attend a school in the Yakima School District rather than a school in their district of residence. A non-resident student is one who resides in another public school district. The board directs the superintendent to develop procedures to consider non-resident requests to attend district schools. The procedures must recognize that the board's first responsibility is to the residents of the Yakima School District. The subsequent admittance of non-resident students shall take into consideration the district's capacity to serve and any financial hardship to the district, while at the same time not diminishing educational opportunities or services to the district resident students.

See Exhibit Y200, page 201.

8. YSD's implementing procedure, 3141P, distills the policy. YSD may consider: (1) that a parent understands that YSD will not provide transportation; (2) the history of a student's placement in special educational programs; and, (3) whether attendance would result in YSD's experiencing any financial hardship.

9. As a consequence of the policy and procedure, YSD refuses to provide transportation to any and all non-resident transfer students. As part of its admission of the Student under the OCR Agreement, YSD informed the Parent that it would not provide transportation pursuant to its policy. The Parent agreed to the terms but voiced her objection.

10. On August 29, 2000 at the beginning of the new school year, Superintendent Soria wrote to the Parent, confirming that YSD would not be providing transportation because as a 'Choice' student, the Parents were responsible for providing transportation, and because the Student's IEPs in ZSD and YSD did not specify transportation as a related service. He enclosed a copy of YSD's nonresident transfer policy.

11. On November 14, 2000, YSD's Superintendent Soria wrote to the Parent, copying Mr. Laffey. His letter stated that he understood the Parent had continued to seek transportation. He responded, in unequivocal language, that YSD's longstanding policy of never, without exception, providing transportation to a special education student attending as a non-resident transfer student was legal, responsible, and would not change. It went on to say, YSD could not reconsider its decision as to one special education child without reconsidering it as to the other 30 nonresident special education students and the 341 nonresident regular education students: To do otherwise would place a heavy financial burden on YSD.

12. YSD provides transportation to its resident students. It provides some resident special education students with transportation as a related service.

13. Prior to, and after, enrollment, the Parent had numerous conversations about transportation with Mr. Laffey, the director of special education for YSD. The Parent focused her concern around the distance between home and school, as it was obvious that without some form of motorized transportation the Student could not attend Yakima Specialties. The Parent did not provide YSD with documentation about the need for transportation as it related to the Student's disability though the record is not clear that YSD asked for any such documentation.

14. YSD requested an opinion from OSPI regarding whether YSD was required to provide transportation. OSPI responded with Regulatory Guidance letter 96-004, which endorses a March 8, 1996 OCR letter to Dr. Gill, director of special education at OSPI. In relevant part, it states:

Findings of Fact, Conclusions of Law and Order

Q: Which district - the choice district or the resident district - is responsible for the provision of transportation services?

A. If a student with disabilities is entitled to transportation as a necessary related service, the district which is responsible for the provision of FAPE - here, the choice district - is responsible for the provision of transportation services.

15. Included with the OCR letter is Letter to Lutjeharms, 16 EHLR 554 (Dec. 1989). This letter is a response to an inquiry about Nebraska choice law. It has been adopted by OSPI because Nebraska and Washington have similar 'Choice' laws, in that each state transfers FAPE responsibility to the 'Choice' school. It states in relevant part:

Under the allocation of responsibility in Nebraska's current choice legislation, it appears that the choice district is the school district responsible for providing FAPE to all children with handicaps participating in the choice program. Under these circumstances, the choice district must provide, or ensure the provision of, necessary transportation to children with handicaps, where such transportation is a related service that is "required to assist a handicapped child to benefit from special education." 34 CFR Sec. 300.13(a) and (b)(13).

However, if transportation is not required as a related service, such transportation need not be provided to the child with handicaps, if non-handicapped children do not receive this service.

Thus, under Nebraska's choice legislation, EHA-B and Section 504 require that parents, who request due process hearing to challenge the appropriateness of their child's special education program, name the choice district in such a hearing, since the choice district is the school district responsible for providing FAPE to that child.

16. Based on OSPI's response, YSD determined that it did not have an obligation to provide transportation based on the Student's ZSD IEP.

17. As a condition of attendance in YSD, the Parent was required to obtain a release from ZSD for the 2000-2001 school year and again for the 2001-2002 school year. The Parent complied with both requests and submitted the releases to YSD.

The Student's Disability

18. The Student has [REDACTED]. The Parent offered written material describing various possible symptoms and/or conditions that may exist, or

develop, in a person with [REDACTED]. The ALJ granted the Parent's request to admit the portions of articles and/or books, however, little, if any, weight is given to them because the information is general in nature, is based on very small studies, and is not specifically or meaningfully connected to the Student. Therefore, the ALJ relies on the more meaningful Student evaluations, educational records and testimony from witnesses regarding the Student's condition as it relates to the need for transportation as a related service.

19. [REDACTED] is an uncommon disorder causing, among other things, [REDACTED] and uneven cognitive delays. The Student's I.Q. is in the mid 50's range. Her strengths include her expressive language and swimming. Her areas of weakness include adaptive behavior, learning disabilities, and poor judgment. A child with VCFS may have additional problems as she ages, especially in the teenage years, which could exacerbate her poor judgment.

Attendance at [REDACTED] and Yakima Specialties

20. [REDACTED] School [REDACTED] is a school of 1700 students. Qualified students at Davis attend vocational training at [REDACTED]. A student may earn school credits and work on IEP goals and objectives, as well as earn money, for work at [REDACTED]. YSD provides transportation for all program enrolled students between [REDACTED] and [REDACTED], in the form of a city bus pass.

21. For the first month of the Student's attendance in the [REDACTED] program, YSD implemented the Student's ZSD IEP. The ZSD IEP provides that the Student was able to ride the regular school bus and did not require transportation as a related service.

22. Approximately a month later, the Student's IEP team met and developed a new IEP. The Parent was invited and participated. During the IEP meeting, and in subsequent IEP meetings, the Parent requested the Student be provided transportation between home and [REDACTED] and/or [REDACTED]s. The team understood the request to be based on the 25 mile distance. It denied the request because the Student was a non-resident transfer student. The Parent signed the Student's October 2000 IEP stating her disagreement with the denial of transportation. The Student's 2000-2001 IEP also provides that transportation is not provided as a related service.

23. The IEP team did not consider the Student's individual need for transportation beyond looking at her ZSD IEP in order to confirm its decision to not provide transportation. This finding is based upon Ms. Thomas testimony to the same effect, the matter of factness of testimony from YSD witnesses and Superintendent Soria's letter to the Parents, that YSD does not provide transportation to non-resident students. It is also based on the fact

that YSD did not provide the Parent with written notice of its refusal to include transportation as a related service and of the Parent's right to seek due process. The absence of the notice, as required by WAC 392-172-302, amplifies YSD's belief that it had unilateral decision making authority on the issue of transportation, outside of the IEP process, for a non-resident transfer student.

24. The Student attended [REDACTED] until March 2001. During the period she attended [REDACTED] she rode the city bus between [REDACTED] and [REDACTED] with a group of students. Because she was unable to keep track of it, another student carried the Student's bus pass for her. Other students pulled the cord to signal the bus driver to stop at the correct location as the Student had not yet learned how to do so by the time she stopped attending [REDACTED].

25. During the time she spent at [REDACTED], the Student had problems. She would go off by herself and end up with boys who took advantage of her. She also was harassed and bullied by students in the lunch room and hallways. The IEP team, including the Parents, decided that fewer transitions and small groups were better for the Student. Effective March 1, 2001, they decided that the Student should attend [REDACTED] all day rather than attend [REDACTED]. That plan continues to be implemented at the time of the hearing.

Transportation Situation

26. There is no public transportation between Zillah and Yakima. The Student's Parents or sister drive the Student to [REDACTED]. Currently, her sister drops her off in the morning. At the end of the day, the Student waits in the lunchroom and then walks from [REDACTED] to her sister's workplace, about a half mile away. The Student can choose between two routes: One is a busy industrial/commercial area with truck traffic and no sidewalks. The other route begins on a busy arterial and changes to a second busy arterial. Both arterials have wide shoulders but no sidewalks. Since the onset of winter and discontinuation of daylight savings time, the Student asked her teacher, and was given permission, to be able to leave early so that she can walk to her sister's workplace in the daylight. To date, the Student has not had any problems with the half mile walk. Ms. Thomas and the Parent have concerns about the safety of the walk.

27. The Student is not likely to get lost walking to her sister's workplace, although her sense of location and direction are poor. On one occasion, she was unable to direct someone to even the general location of her sister's workplace. It is likely the Student would exercise poor judgment if approached and offered a ride by someone she did not know. The Student also has no meaningful concept of time and has poor time management skills.

28. In the past, on occasion, the Student has taken the [REDACTED] bus, a non-profit service, to [REDACTED]. [REDACTED] transportation is safe but it cannot always accommodate the Student, as its primary purpose is to transport people to medical appointments. It does not provide a direct route to [REDACTED]. Her morning travel time is about two hours and forty minutes and her afternoon travel time takes up to four hours and thirty minutes. It is agreed that this is an unreasonable amount of time for commuting.

29. At the times the Parent requested YSD provide transportation, it was based on the hardship on the family to provide the two hours per day of travel time. She did not identify the Student's specific problems because she assumed that YSD understood the Student's limitations. In her view, the Parent changed school districts in order to provide the Student a FAPE and she needs transportation in order to access it.

30. The Student's day at [REDACTED] is scheduled to begin at 8:15 a.m. However, she is not penalized for arriving late or leaving early.

31. During the 2000-2001 school year, the Student participated on the basketball team. This year she participates on the swim team, winning the individual medley race for her class. The Student's teacher has provided and/or arranged transportation.

32. The Student's teacher at YSD, Kathy Thomas, is an experienced special education teacher, whom the Parent credits with the Student's success in the YSD program. Prior to her current position with [REDACTED], she was employed by YSD, for about seven years, as a behavior specialist and social skills trainer. Prior to that she worked, for about seven years, as a group life counselor and day treatment teacher/counselor for adolescents at the Children's Home Society.

33. Ms. Thomas is capable of assessing a student's functional skills in managing modes of transportation. She is required, as part of her job, to determine the need for transportation as a related service, which she refers to as 'door to door' transportation, for resident students. She considers behaviorally disabled, physically handicapped, and low functioning students to sometimes require door to door transportation. She did not consider and evaluate information about the Student and admits the IEP team did not discuss the Student's need for transportation as a related service. This appears due to three things: Her assumption that the Student did not fit into the types of disabilities she typically equates with 'door to door' eligibility; she has not questioned YSD's longstanding policy of no transportation for nonresident students; and, her misapprehension that intradistrict transfers and interdistrict transfers are the same.

34. At the time of the hearing, Ms. Thomas had not considered that poor judgment, such as the Student's, would require door to door transportation. Upon reflection, she

opined that if she were a resident of YSD, the Student would not qualify for 'door to door' transportation.

Pre-YSD Transportation History

35. During the time she attended school in ZSD, the IEP team determined that the Student could ride the regular school bus. In making that decision, the team considered the Student's physical ability to ride the bus, her safety and maturity. The IEP team decided the Student did not need transportation as a related service, over the Parent's objection. The Student's ZSD IEPs provided for regular school bus transportation.

36. During the time she attended ZSD, the Student routinely rode the regular education bus. She had no significant problems though her bus riding was not without incident. On one occasion, the Student lost her balance and fell when the bus stopped unexpectedly. On another occasion the Student became aggressive. The Parent requested that the Student sit behind the driver to ensure supervision. On another occasion, ZSD provided a 1:1 aide for two weeks to ensure that the Student got on the bus, as she was not wanting to go home. During another short period, the Parent and ZSD had a communication failure about an early release time, which resulted in the Student's confusion regarding her bus schedule. At one point during the Student's attendance at ZSD, the Parent requested that the Student be provided a small school bus with an aide but ZSD denied her request.

37. During the Student's time at ZSD, she participated on the cross-country team and rode the team bus to events. She required supervision while running to ensure that she did not detour from the route. On one occasion, ZSD left the Student alone in a school office and she accepted a ride from a stranger.

38. The Student attended school in [REDACTED] for one year. Her resident district arranged for the Student to attend school in an adjacent district program based on an interdistrict cooperative agreement and program. Her IEP provided for door to door transportation as a related service.

Cost of Transportation

39. YSD would incur one of the following costs should it be required to provide transportation to the Student: \$49,000 per year for a district employed driver; \$29,500 for 180 days of private carrier service; and, \$6,000 (at \$.315 per mile) for reimbursement to Parents for driving costs.

40. While the Parent would not refuse reimbursement for her mileage, as everyone agrees \$6,000 is a lot of money, her concern is also one of time. She objects to the

amount of time per day spent in the transport of the Student because it prevents her from working her own job as a realtor.

41. Annually, YSD receives approximately \$8,000 in state funds and \$800 in federal funds for the Student.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 U.S.C. Section 1401 et seq. (Individuals with Disabilities Education Act (IDEA)), Chapter 28A.155 RCW, Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 CFR 300 et seq., and Chapter 392-172 WAC.

YSD's Motion for Joinder of ZSD

2. YSD asserts that there are two distinct statutory schemes for transfers between districts and that it is not bound to comply with WAC 392-137-235 (responsibility for non-resident transfer student's special education) because the Student is attending YSD as a 'Choice' student, pursuant to WAC 392-137-310, and not as an inter-district transfer student pursuant to WAC 392-172-220. YSD asserts that ZSD should be added as a necessary party because it may be required by statute (RCW 28A.225.310), and by this ALJ, to arrange transportation services with YSD to the Student.

3. Contrary to the District's position, RCW28A.225.310 does not create an alternative inter-district transfer process. It simply provides that a non-resident and resident district may work cooperatively to meet a student's needs, as in developing an interdistrict contract/agreement. That option is available to YSD but is not required (as confirmed by the OCR Agreement). In addition, the evidence established that YSD's 'Choice' and non-resident student transfers are one and the same process, and that such was the basis of the Student's admission: The OCR Settlement Agreement did not create a new structure, it clearly states that YSD will admit the Student pursuant to its revised non-resident student transfer policy and procedures.

4. As stated previously, WAC 392-137-235 transfers responsibility to YSD for delivery of a FAPE to the Student. It provides:

Notwithstanding the definitions of resident and nonresident district pursuant to this chapter, in the event a student who is eligible for special education pursuant to chapter 392-171 [now 392-172] WAC transfers pursuant to this chapter from a resident school district to a nonresident district, the nonresident district shall be deemed the resident district for the purposes of

chapter 392-172 [now 392-172] WAC and shall be required to perform all legal duties as otherwise required by the resident district, including the transportation of the transferring handicapped student if so required as a related service.

WAC 392-137-235.

5. The ALJ concludes that YSD's motion to join ZSD is without merit. WAC 392-172-235, which transfers the obligation to provide special education and related services to the accepting nonresident district, applies in this circumstance. Therefore, YSD is responsible for FAPE to the Student. YSD's motion to join ZSD is denied.

Burden of Proof

6. YSD asserts that the Parent has the burden of proof in this matter because she is the appellant. In support of this position, YSD cites *Malehorn v. Hill City Sch. Dist.*, 27 IDELR 144 (D.C.S.D. (1997)), *Donald B. v. Board of Sch. Commissioners Mobile County, Alabama*, 117 F.3d 1371, 1375 (11th Cir. 1997), and *Hiller v. Bd. of Ed. and Brunswick Central Sch. Dist.*, 743 F.Supp 958, 967 (N.D.N.Y. 1990). These cases are appeals from administrative hearings. As stated in *Hiller*, the burden at the administrative level belongs to the school district. In an appeal of an administrative decision, the burden shifts to the appellant. (See *Hiller*, p. 967.) This is consistent with the Ninth Circuit's opinion in *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, (9th Cir. 1994), which held that the school district bears the burden of proving compliance with the procedural requirements of the IDEA.

7. A parent may have a responsibility to provide information to a school district when seeking a particular outcome or to present evidence in a due process hearing to support requested remedies, such as the case in *Donald B. id.*, but that responsibility does not shift the burden of proof to the Parent. The ALJ concludes that the burden of proof lies with YSD at the administrative hearing level.

IDEA Compliance: Substantive and Procedural

8. 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 *Hendrick Hudson District Board of Education vs. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

First, had 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.

103 S. Ct. at 3051.

YSD's Procedural Compliance with the IDEA

9. The purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services [d]esigned to meet their unique needs and to prepare them for employment and independent living." 20 U.S.C. 1400(d). A free appropriate public education (FAPE) means special education and related services which are provided at public expense, under local school district or other public agency supervision and direction, without charge to parents, and provided in conformance with IEP requirements. See WAC 392-172-035(1).

10. Related services are defined as "transportation and such developmental, corrective, preventative and other supportive services as are required to assist a special education student to benefit from special education." WAC 392-172-055(1). Transportation includes travel to and from school. WAC 392-172-055 (2)(k)(i). A student's IEP must include a statement of the special education and related services and supplementary aids and services to be provided to the student, or on behalf of the student. WAC 392-172-160. See also 34 C.F.R. Sec. 300.347(a)(3). The Supreme Court endorsed the district's duty to comply with these related services requirements in *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371 (1984).

11. In this case, the ALJ previously determined that the Student retains her right to a FAPE when transferring from ZSD to YSD under 'Choice' legislation. YSD may not *per se* refuse to provide services required to provide the Student a FAPE, nor does the Parent *per se* waive her right to transportation by accepting the interdistrict transfer.¹ YSD was entitled to rely on the Student's last ZSD IEP, which did not provide transportation as a related service, during the initial transition period and prior to its development of a new IEP. See OSPI Regulatory Guidance Letter, 96-004, and *Letter to Lutjeharms*, 16 EHLR 554. Thereafter, it was required to determine, within the IEP process, the Student's special education and related services needs. See *Letter to Smith*, 23 EHLR 344 (1995); *Letter to Dubois*, EHLR 1978-87, EHA Rulings and Policy Letters 211: 267 (1981); and *Alamo Heights Indep. Sch. Dist. v. State Bd. of Ed.*, 790 F.2d 1153, 1160 (5th Cir. 1986).

¹ See the November 3, 2001 Order; WAC 392-137-235; and, *Malehorn v. Hill City Sch. Dist.*, 27 IDELR 144 (D.C.S.D. (1997).

12. YSD asserts that because the Parent's request focused on the distance and not the special education needs of the Student it was not required to address the request as an IEP issue. The ALJ disagrees. The evidence clearly established that the Parent requested transportation for the Student within the context of an IEP meeting, directly to the Student's special education teacher, and to the director of special education. The October 2000 IEP contains a statement of the Parents' disagreement with the IEP over the lack of transportation. Moreover, YSD did pursue the question of whether it had to provide transportation as a related service by seeking advice from OSPI and reviewing the last ZSD IEP. In addition, YSD staff had experience with the Student at Davis that, combined with these other factors, warranted an IEP team discussion about whether the Student needed transportation as a related service. The ALJ concludes that YSD was on notice that transportation as a related service was at issue, and it had an obligation to consider the issue within the IEP process.

13. The evidence established that in spite of the Student's YSD IEP, stating that transportation is not needed, the IEP team did not discuss transportation in the context of related services. YSD decided the issue of transportation outside of the IEP process on the basis of its transfer policy and reliance on the Student's last IEP at ZSD. The ALJ concludes that YSD failed to comply with the procedural requirements of WAC 392-172-055, -153, and -160, 34 CFR 300.347, and its obligations to the Student under the IDEA when it failed to consider the Student's the need for related services in the IEP process.

14. In addition, had YSD appropriately addressed the Parent's request for transportation and found that the Student did not qualify, it had an obligation to provide the Parent with prior written notice of that decision in accordance with WAC 392-172-302.

15. **WAC 392-172-306 Contents of prior written notice.** (1) The notice required by WAC 392-172-302 shall include:

- (a) A statement that the parents of a special education student have protection under the procedural safeguards of this chapter. If a copy of the procedural safeguards are not included with the prior written notice, the district or other public agency shall include a statement that describes the means by which a copy of a description of the procedural safeguards can be obtained;
- (b) A description of the action proposed or refused by the school district or other public agency, an explanation of why the district or other public agency proposes or refuses to take action, and a description of any other options the district or other public agency considered and the reasons why those options were rejected;

- (c) A description of each evaluation procedure, test, record, or report the district or other public agency used as a basis for the proposal or refusal;
- (d) A description of any other factors which are relevant to the school district and other public agency's proposal or refusal

16. Here, YSD did not provide written notice, pursuant to WAC 392-172-302 and -306. The letters from Superintendent Soria's were not notices based on the above standard. By failing to provide such notice YSD committed procedural error.

17. In summary, based on the foregoing, the ALJ concludes that YSD committed procedural error by failing to consider the Student's need for transportation as a related service at the first IEP meeting and/or thereafter. It also erred when it failed to provide the Parents with notice of its refusal, the special education basis of its denial, and the Parents' rights to due process to contest YSD's decision.

18. In order to determine the effect of the procedural error in this matter, it is first necessary to identify whether the Student is entitled to transportation as a related service.

Substantive Compliance with the IDEA:
Is Transportation Required as a Related Service?

19. **WAC 392-172-055 Related Services.** (1) As used in this chapter, the term "related services" means transportation and such developmental, corrective, preventative and other supportive services *as are required to assist a special education student to benefit from special education.* (Emphasis added.)

20. There is no authority that directly applies to the circumstances in this matter, namely interdistrict transfers. YSD asserts that the duty to provide special education interdistrict transportation is analogous to the standard by which to determine a district's obligation to provide intra-district transportation. For example, YSD cites *Kratisha H. v. Cedar Rapids Community Sch. Dist.*, 30 IDELR 535, 1999 U.S. App. Lexis 17024, (an unpublished decision by the 8th Circuit, 1999), in which the court held that when a responsible district offers FAPE at the local school it is not required to provide transportation should the student elect to attend a non-neighborhood school within the district. YSD argues that if the Student received a FAPE at ZSD (the 'neighborhood school'), the Parent's choice of a school in YSD (the 'non-neighborhood school') does not require YSD's provision of transportation.

21. The interdistrict and intradistrict transfer are not analogous. As stated previously, the obligation to provide a FAPE rests with the responsible district not the individual school

building. Stated another way, it is immaterial whether Zillah School District provided a FAPE to the Student prior to her arrival in YSD. Because of the structure of Washington's 'Choice' law, specifically WAC 392-172-235, once YSD accepted the Student as a nonresident transfer, it became responsible for providing a FAPE to the Student regardless of whether ZSD provided the Student a FAPE. YSD may use the Student's ZSD educational records, IEPs, and may consult with ZSD staff, to inform its decisions but YSD does not qualify as a remote location of ZSD.

22. The cornerstone cases on the subject of related services are the United States Supreme Court cases *Irving Indep. Sch. Dist., v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371 (1984) and *Cedar Rapids Community Sch. Dist., v. Garret F.*, 526 U.S. 66, 119 S.Ct. 992 (1999). Although *Tatro* and *Garret F.* are dissimilar to the case at hand because the related services in dispute are health services, the Supreme Court identified the first question that must be addressed in all related services disputes: whether the service is "required to assist a handicapped child to benefit from special education." This criteria is taken directly from the definition of related services at 20 U.S.C. 1401(22) (previously 20 U.S.C. 1401(a)(17)) and 34 CFR 300.24 (previously 34 C.F.R. 300.16), and WAC 392-172-055(1).

23. In order to understand what "required" means, the ALJ finds helpful the Department of Education's Notice of Interpretation, Appendix A to Part 300, 34 C.F.R. 300. The Notice of Interpretation contain a series of common questions related to the IDEA with guidance in the form of answers. Question 33 pertains to the issue. It states, in relevant part:

33. Must a public agency include transportation in a child's IEP as a related service?

As with other related services, a public agency must provide transportation as a related service if it is required to assist the disabled child to benefit from special education. (This includes transporting a preschool-aged child to the site at which the public agency provides special education and related services to the child, if that site is different from the site at which the child receives other preschool or day care services.)²

. . . In making this determination, the IEP team must consider how the child's disability affects the child's need for transportation, including determining whether the child's disability prevents the child from using the same transportation provided to nondisabled children, or from getting to school in the same manner as nondisabled children.

²The preschool example is analogous to YSD's provision of transportation between [REDACTED] and [REDACTED] for the special education students attending the vocational skills program

Even if a child's IEP team determines that the child does not require transportation as a related service, Section 504 of the Rehabilitation Act of 1973, as amended, requires that the child receive the same transportation provided to nondisabled children. If a public agency transports nondisabled children, it must transport disabled children under the same terms and conditions. However, if a child's IEP team determines that the child does not need transportation as a related service, and the public agency transports only those children whose IEPs specifying transportation as a related services, and does not transport nondisabled children, the public agency would not be required to provide transportation to a disabled child.

It should be assumed that most children with disabilities receive the same transportation services as nondisabled children. For some children with disabilities, integrated transportation may be achieved by providing needed accommodations such as lifts and other equipment adaptations on regular school transportation vehicles.

24. In order to determine the Student's need for transportation it must be compared to the district's transportation policy for all students. Whether examining ZSD or YSD policy, the policy for resident students is the same. Each district provides regular transportation to all its resident students. Therefore, we examine whether the Student's ability to ride the regular bus is impaired in some way that requires specialized transportation services. See *Letter to Dubois, id.* The need for specialized transportation is not limited to ambulatory impairments. *Donald B. v Board of School Commissioners of Mobile County, Alabama*, 117 F.3d 1371 (6th Cir. 1997).

25. The Student's last experience with riding a school bus was during her attendance at ZSD. We know that the Student had some problems and that the Parent was dissatisfied with the arrangement. However, the Student was able to routinely ride the bus with a few incidents and occasional assistance. The Parent did not suggest the Student had problems waiting at the bus stop, recognizing the correct bus, or getting on and off at the appropriate time. The Student did experience other problems at school related to her poor judgment but they were not identified as significant problems on the bus.

26. It is relevant to assess the Student's need for specialized transportation as a student at YSD because a student's need may be a dynamic rather than a static situation. In this case, since her enrollment in YSD, the Student has not ridden a school bus. She has had similar problems in her peer relationships as she did in ZSD. We also know that she is not able to ride a city bus by herself. However, a city bus provides challenges not provided by the school bus and not demonstrated here as issues for the school bus. The ALJ concludes that the Student's situation as to the ability to ride a school bus is the same in YSD as ZSD, if such a service was available in YSD. In addition, we also know that the

Student's teacher, Ms. Thomas, a special education teacher qualified to assess a [REDACTED] program student's need for transportation, is of the opinion that the Student does not qualify for transportation as a related service.

27. Based on the foregoing, the ALJ concludes that it has not been demonstrated that the Student requires specialized school bus transportation different than her peers as a *resident* student in either ZSD or YSD, as districts which provide regular school bus transportation for regular education students.

28. The next area of analysis is to compare the Student to her non-resident peers attending school in YSD. In this case, YSD provides no transportation, and students and parents are left to their own devices to arrange transportation based on their election to attend school in YSD. The question here is: whether the Student requires specialized transportation services because she cannot use the same transportation used by her non-resident peers.

29. First, there is no doubt that the distance of 25 miles is too far to walk, and there is no public transportation. Neither the Student nor her nonresident peers are walking to school, or walking to bus stops and accessing public transportation. Therefore, questions about the Student's ability to walk without harm and the ability to ride a public transit system are not apropos because her nonresident peers would not be accessing these modes of transportation.³ The Parent has ably established that the only meaningful mode of transportation for nonresident students to school in YSD is reliance on their parents or other parent-arranged transportation. Such is the situation of the Student.

30. In applying the guidance articulated by the Department of Education, above, there is no evidence that the Student requires specialized transportation that the Parents are unable to provide. There is no doubt that two hours of driving a day is a significant contribution of time and money. However, it appears that this is the burden of every nonresident parent who chooses school in YSD. As has been previously stated, YSD, notwithstanding its stated policy, must provide transportation to a special education nonresident student if that student needs specialized transportation different than that type of transportation accessed by her peers. Analyzed from this perspective, the ALJ concludes that the Student does not need specialized transportation different than her

³ In *Malehorn v. Hill City School District*, 27 IDELR 144 (S.D.D.C. (1997), the court applied the *Donald B.* criteria, specifically concluding that no one factor was determinative. The court found that the child would be safe at the bus stop, and that as a consequence, transportation was not necessary for the child to benefit from special education.

nonresident peers and therefore YSD does not have an obligation to provide transportation as a related service.

31. The Parents assert that YSD should be required to provide transportation as a means of addressing the Student's life skills needs. The rule of thumb is that if transportation is provided for an educationally related purpose, such as increasing independence, then IEP goals and objectives should be provided. However, if the purpose of the transportation is travel between home and school, as is the case here, then no goals and objectives are needed. See *OSEP Policy Letter to Smith*, 23 EHLR 344 (1995). Here, transportation is a possible mechanism by which the Student could learn such goals but it is not the purpose of transportation. Therefore, YSD is not required to provide transportation unless the Student otherwise qualifies for transportation as a related service, which, the ALJ has concluded, it is not required to do.

Effect of Procedural Error

32. Having determined that the Student does not qualify for transportation as a related service, the ALJ turns to determine the effect of YSD's failure to comply with the IDEA procedural requirements.

33. Generally, procedural error will constitute a denial of FAPE only where it results in the loss of educational opportunity, or seriously infringes the parents' opportunity to participate in the IEP formulation process. See *W.G. v. Board of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479 (9th Cir. 1992); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994, (1st Cir. 1990), cert. den., ___ U.S. ___, 111 S.Ct. 1122 (1991); *Hall by Hall v. Vance County Bd. Of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985).

34. Here, YSD's errors did not result in a loss of educational opportunity to the Student. The errors did, however, affect the Parent's opportunity to participate in the IEP process on two levels: First, the District unilaterally decided the issue without involving the Parent in the discussion. Although the Parent had some responsibility to identify her concerns,⁴ it is hard to hold her accountable since YSD's response was unilateral in nature and based on its nonresident transfer policy. YSD's reliance on the Student's ZSD IEP did not appreciably change the characterization of the YSD decision as it was used to further solidify the immutability of the decision. YSD's failure to consider the Student's needs within the IEP process, with the opportunity for the Parent to participate, operates to deny

⁴ See *Malehorn v. Hill City Sch. Dist.*, 27 IDELR 144 (D.C.S.D. (1997) and, *Donald B. v. Board of Sch. Commissioners Mobile County, Alabama*, 117 F.3d 1371, 1375 (11th Cir. 1997) which required the parents to provide evidence of the need for transportation.

the right to an assessment and determination, on an individual basis, of the Student's need for transportation as a related service.

35. Second, because of YSD's failure to provide prior written notice, pursuant to WAC 392-172-302 and -306, the Parent remained confused as to her legal options to pursue transportation. Because of YSD's denial based on nonresidency, the Parent believed that she was required to file a hearing request against ZSD.⁵ YSD's failure to provide written notice operated to deny the Parent and Student the right to notice of the right to seek due process review of YSD's decision. The ALJ concludes that YSD's errors resulted in a denial of a free appropriate public education because it seriously infringed on the Parent's right to participate in the IEP process. See *Target Range, id.*

36. If a violation of the IDEA is found either procedurally or substantively, the court shall grant such relief as [it] deems appropriate. 20 U.S.C. 33 Sec. 1415(i)(2)(B)(iii) and *Hacienda La Puente School v. Honig*, 976 F.2d 487 (9th Cir. (CA) 1992). An ALJ has authority to award compensatory education in appropriate circumstances. Compensatory education is in-kind special education or related services relief designed to place the child in the position she would have been in without the denial of a FAPE. See *Lester v. Gilhool*, 916 F.2d 865 (3rd Cir. 1986).

37. In determining what, if any, remedy addresses YSD's error, the ALJ considers the court's decision in *Malehorn v. Hill City Sch. Dist.*, 27 IDELR 144 (D.C.S.D. (1997)). As in this case, the *Malehorn* court found that the student was not eligible for transportation as a related service. However, the court awarded the parents reimbursement for transportation costs for the district's failure to address the issue in IEP meetings. Reimbursement was based on the transferring district's IEP which provided for transportation as a related service. Here, unlike *Malehorn*, the Student's ZSD IEP did not specify transportation as a related service. Therefore, reimbursement for transportation costs as compensatory education relief would not be appropriate.

38. There is disagreement among the circuit courts as to whether the IDEA allows awards of compensatory damages, i.e., monetary damages. See *W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995), *Porter v. Board of Trustees*, 123 F.Supp2d 1187, 1199, (C.D. Cal. 2000). In any event, even if allowed and found appropriate, the ALJ does not have authority to award monetary compensation as damages.

⁵ It may be that when the Parent initially filed this hearing request against Zillah School District she understood on some level that the Student would not qualify for transportation based on her individual needs, but that is not evidenced by the Parent's presentation of evidence in this matter.

39. The ALJ concludes that there is no appropriate remedy to address YSD's denial of a FAPE in this case. Therefore, none is ordered.

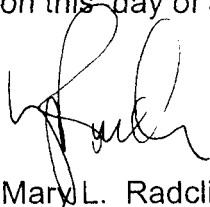
40. As stated previously, this decision does not affect, nor comment upon, the Parents' right to file a request for due process hearing against ZSD for the provision of a FAPE to the Student during the time she attended school in that district. The ALJ notes, however, as the Parent has said that she does not want ZSD to be involved in any of the Student's educational planning at YSD, that *if* she prevailed in such a hearing, and *if* ZSD became responsible for the YSD placement, including transportation,⁶ ZSD would be ultimately responsible and involved in the educational planning for the Student at YSD.

41. The administrative law judge has considered all arguments made by the parties. Arguments that are not specifically addressed have been duly considered but are found to have no merit or to not substantially affect a party's rights.

ORDER

1. Yakima School District's Motion to Join Zillah School District is denied.
2. Yakima School District failed to comply with the procedural requirements of the IDEA when it failed to consider, within the IEP process, the Student's need for transportation as a related service and when it did not provide the Parent with prior written notice of its refusal to provide transportation as a related service. These procedural errors denied the Student a free appropriate public education.
3. The Student is not entitled to transportation as a related service.
4. The Parent's request for reimbursement for past transportation costs is denied as inappropriate given the conclusion the Student is not eligible for transportation as a related service.

Dated at Seattle, Washington this day of January 22, 2002.



Mary L. Radcliffe
Administrative Law Judge
Office of Administrative Hearings

⁶These are legal issues not addressed here.

APPEAL RIGHTS

This is a final agency decision subject to a **petition for reconsideration** filed within ten days of service pursuant to RCW 34.05.470. Such a petition must be filed with the administrative law judge at his/her address at the Office of Administrative Hearings. The petition will be considered and disposed of by the administrative law judge. A copy of the petition must be served on each party to the proceeding and the Superintendent of Public Instruction. The filing of a petition for reconsideration is not required before seeking judicial review.

Pursuant to 20 U.S.C. Section 1415 (i) (Individuals with Disabilities Education Act) and Chapter 34.05.542 RCW, this matter may be further appealed to a court of law. The **Petition for Judicial Review** of this decision must be filed with the court and served on the Superintendent of Public Instruction, the Office of the Attorney General, all parties of record, and this office within thirty days after service of the final order. If a petition for reconsideration is filed, this thirty-day period will begin to run upon the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). Otherwise, the 30-day time limit for filing a petition for judicial review commences with the date of the mailing of this decision.

Certificate of Mailing

This certifies that a copy of the above Findings of Fact, Conclusions of Law and Order was served upon the parties or their representatives on 1/22/02, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

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