

**BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS**

STUDENT

**bnf PARENT,
Petitioner,**

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v.

DOCKET NO. 105-SE-1211

**CELINA INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Procedural History

Petitioner's request for a due process hearing was filed on December 12, 2011. The initial due process hearing was set for February 1, 2012. Respondent filed a Plea to the Jurisdiction and Motion to Dismiss (Respondent's Motion to Dismiss) on December 23, 2011 as its response to Petitioner's request for a due process hearing. Petitioner submitted petitioner's Response to Respondent's Motion to Dismiss on January 11, 2012. Both parties also filed Reply pleadings. Respondent's Motion to Dismiss remained pending through the course of this litigation.

Agreement to Resolve Issues via Summary Judgment

A prehearing phone conference was conducted on January 13, 2012. The issues and relief requested were discussed and clarified. Respondent proposed this case could be resolved through dispositive pleadings with a set of stipulated facts. Petitioner initially opposed this suggestion and asserted petitioner was entitled to a due process hearing. The hearing was continued and reset by agreement for February 20, 2012 to resolve scheduling conflicts for Student's legal counsel and student's father with the initial February 1st hearing date.

The hearing was continued and reset again by agreement to March 7, 2012 when the school district's counsel became ill and could not proceed on February 20th. In subsequent email communications with counsel the parties agreed to forego the due process hearing and resolve the issues in this case through cross motions for summary judgment. Both parties submitted Cross Motions for Summary Judgment and Responses in a timely manner. The issues raised by Respondent's Motion to Dismiss will be resolved by ruling on the cross motions for summary judgment. A decision on the motions is due March 21, 2012.

Petitioner's Issues

Petitioner's issues are as follows:

1. Whether the school district is required under the IDEA to provide Student with transportation as a related service between student's home and student's disciplinary placement at the *** Juvenile Justice Alternative Educational Placement (JJAEP);
2. Whether the school district failed to provide Student with a free, appropriate public education within the meaning of IDEA by refusing to provide student with transportation to and from the JJAEP in order to access student's education (i.e., the opportunity to work on student's Individual Educational Plan goals and objectives as well as to access to the general curriculum) ; and,
3. Whether the school district violated Texas Education Code § 37.011 (k) (6) by refusing to provide Student with transportation to and from the JJAEP under the terms of the Memorandum of Understanding required by the statute.

Respondent's Issues

Respondent's issues are as follows:

4. Whether the hearing officer has jurisdiction to determine whether the school district has met its legal obligations under its Memorandum of Understanding with the JJAEP; and,
5. Whether Student is entitled to transportation to and from the JJAEP when the need for transportation is based on parental inconvenience or whether Student can demonstrate the requisite educational need for transportation in order to receive a free, appropriate public education within the meaning of IDEA.

Requested Relief

Petitioner's items of requested relief are:

1. The school district provide Student with daily transportation to and from student's home and the JJAEP for the duration of student's placement at the JJAEP;
2. Reimbursement to Student's father for all expenses and costs incurred in transporting Student to and from student's home and the JJAEP; and,
3. Any other relief to which Petitioner may be justly entitled.

Respondent requests all of Petitioner's claims be dismissed.

Summary Judgment Standards

The Texas Rules of Civil Procedure govern the proceedings of the due process hearing except to the extent they are modified or otherwise limited by the provisions of the relevant federal and state special education regulations. *19 Tex. Admin. Code § 89.1185 (d)*. Therefore, in considering the relative merits of the submission of the parties' cross motions for summary judgment I look to the Texas Rules of Civil Procedure for guidance in application of appropriate summary judgment standards.

A party seeking to recover upon a claim may at any time after the adverse party has appeared or answered move for summary judgment with or without supporting affidavits. A party against whom a claim is asserted may, at any time, move for summary judgment with or without supporting affidavits. *Tex. R. Civ. P. 166a (a) (b)*. Summary judgment may be granted if the record on file in the case, including any summary judgment evidence, establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion, answer, or other response. Summary judgment may be based on uncontroverted testimonial evidence of an interested witness if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies and could have been readily controverted. *Tex. R. Civ. P. 166a (c)*.

Where parties submit cross-motions for summary judgment I must consider the merits of each motion and, for each, draw all reasonable inferences in favor of the non-movant. Where, as here, the material facts are not in dispute, the parties' cross motions provide an opportunity to resolve the legal issues without the need for a due process hearing. *See, Bd. of Educ. of Dist. 130 Pub. Schools v. Illinois State Bd. of Educ., 1997 U.S. Dist. LEXIS 12921 (D.C. Ill. 1997)*.

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Factual Background

Student is a *** year old *** school student eligible for special education as a student with Other Health Impairment (OHI) on the basis of asthma and ***. (Respondent's Motion for Summary Judgment Exhibit B-1)(referred to hereafter as "R. Ex. ___"). Student lives with student's *** within the jurisdictional boundaries of the school district. (Petitioner's Motion for Summary Judgment, Affidavit ***)(referred to hereafter as "Affidavit ***").

Student was in the *** grade at *** School for the 2011-2012 school year. (R. Ex. B-1). The *** school is *** from Student's home. Student did not require transportation to the *** school. (Affidavit ***). On ***, 2011 Student was expelled by the school district for ***. The term of expulsion is 180 days and ends ***, 2012. (Respondent's Motion for Summary Judgment - Exhibit A – Affidavit of ***)(referred to hereafter as "Affidavit of ***").

Student was placed in the *** Juvenile Probation (JJAEP) for the term of the expulsion under a Memorandum of Understanding (MOU) between the JJAEP, the Respondent, and other *** school districts. (Affidavit ***)(Petitioner's Exhibit 1, referred to hereafter as "P. Ex. ___")(P. Ex. 2) (Affidavit of ***) (Affidavit of ***). Under the Student Code of Conduct no district credit can be earned for work missed during the period of expulsion unless Student is enrolled in the JJAEP. (R. Ex. A-2, p. 27).

The JJAEP is located at ***, Texas. The JJAEP is between *** miles from Student's home (depending on whether the distance is measured by Google or MapQuest). It is also some *** miles outside the jurisdictional boundaries of the school district. (Affidavit of ***)(Affidavit of ***)(P. Ex. 5) (R. Ex. F).

The school district notified Student's father by letter dated October 28, 2012 that he would be responsible for getting Student to and from the JJAEP each day. (Affidavit ***)(P. Ex. 2). The school district maintains a policy that transportation to a disciplinary alternative education program is the responsibility of the student or parents unless transportation is otherwise provided as a related service in the student's IEP. (Affidavit ***)(Affidavit ***).

Transportation under the MOU is the responsibility of the sending school district. The MOU requires the sending district to provide transportation information to the parent at or during the expulsion process. Students are required to be at the JJAEP no later than 8:30 am and must be picked up no later than 4 pm. (P. Ex. 1)

A manifestation determination Admission, Review & Dismissal Committee (ARD) meeting was conducted on ***, 2012. The ARD concluded the behaviors that formed the basis of the disciplinary decision were not a manifestation of Student's disability. The disciplinary placement at the JJAEP was confirmed and agreed upon by all members of the ARD, including Student's father. The ARD also agreed that Student would continue to receive the same schedule of services student received under the IEP in place prior to student's placement at the JJAEP. Transportation was not a related service under the IEP. (R. Ex. B-2).

Student's father raised the issue of whether the school district could provide transportation to and from the JJAEP. The administrator in charge of the ARD explained the school district's policy and referred Student's father to an Assistant Superintendent to further discuss the transportation issue. (Affidavit ***)(P. Ex. 3) (Affidavit ***). The Assistant Superintendent subsequently confirmed transportation to the JJAEP would not be provided in accord with school district policy. (Affidavit ***).

Student does not *** and cannot transport ***self to and from the JJAEP. There is no public transportation between Student's home and the JJAEP. Student's father is a single parent and the sole provider for a family of ***. Student's father must leave work early or arrive late in order to transport Student to and from the JJAEP. Transporting Student to and from the JJAEP adds between *** miles and *** minutes each way to his commute to

work. Student's father worries he is at risk of losing his job because of the demands on his time imposed by transporting Student to and from the JJAEP. (Affidavit of ***)(P. Ex. 5) (R. Ex. F.).

Student began attending the JJAEP on November 11, 2011. (P. Ex. 5). Using the state mileage rate of .51/mile the cost per day of transporting Student to the JJAEP is between \$*** to \$***/day. (P. Ex. 5) (R. Ex. 5). However, Student has been absent numerous times due to student's father's difficulties in providing transportation. (Affidavit of ***). The school district filed truancy charges as a result of these absences. (P. Ex. 6). Each day of non-attendance at the JJAEP extends the date for Student's return to the regular *** school campus. (R. Ex. A-1).

Petitioner's Argument

Petitioner argues that the school district's refusal to provide petitioner with transportation to and from the JJAEP interferes with petitioner's access to special education and thus violates the IDEA. Petitioner contends the school district has a legal duty under IDEA to ensure Student continues to receive educational services throughout student's placement at the JJAEP so student may continue to participate in the general education curriculum and make progress in meeting the goals of student's IEP. Without transportation Student cannot be physically present at the JJAEP in order to receive an education.

Petitioner contends the distance is too far for Student to walk or bike on a regular basis especially in view of student's *** and asthma. Petitioner also contends there is no adequate public transportation available. Petitioner argues the school district's blanket policy of refusing transportation for all students placed at the JJAEP is not lawful under the IDEA because the statute requires the need for transportation be determined on a case by case basis. *Letter to Smith, 23 IDELR 344 (OSEP 1995)*. Petitioner claims the school district failed to make an individualized assessment of Student's needs for transportation or consider whether student's IEP should be amended given student's placement at the JJAEP.

Petitioner also argues the school district's policy of refusing to provide transportation to and from the JJAEP violates the MOU between the school district and the JJAEP as established by the Texas Education Code. Specifically, Petitioner points to the statutory requirement that the school district must have a plan to provide transportation services for students placed in a juvenile justice alternative education program. *Tex. Educ. Code § 37.011 (k) (6)*.

Petitioner contends transportation to the JJAEP is the school district's explicit responsibility under the school district's MOU. The school district's policy of refusing to provide transportation to the JJAEP contravenes the provisions in the MOU. Petitioner argues the hearing officer has jurisdiction over this claim under the hearing officer's broad authority to resolve issues related to a student's education under IDEA. Petitioner argues the school district violates IDEA when it fails to provide services required under state law when state law requires transportation for students placed in JJAEP programs.

Respondent's Argument

Respondent first argues the hearing officer lacks jurisdiction to decide any claims arising under the Texas Education Code. Respondent contends there is a difference between whether the school district has a responsibility to provide Student with FAPE from whether the school district must provide transportation under the Texas Education Code or the MOU. Respondent also argues that because transportation was not a related service established by Student's current IEP it is not required in order for Student to receive FAPE at the JJAEP. The school district argues the need for transportation is merely one of inconvenience for the parent and not because it is an essential component of Student's IEP and as such is not required under the IDEA. The school district also contends that any inconvenience is a natural consequence of Student's misconduct and that its policy is "facially neutral" applied equally to all school district students assigned to the JJAEP.

The school district further contends providing Student with transportation to the JJAEP would be an unreasonable burden upon the school district because it would have to add another bus route, hire a new driver, obtain a new bus or other vehicle, or contract with an outside agency. In addition, Respondent argues Petitioner failed to show that Student does not have access to any other assistance in getting to and from the JJAEP. Respondent suggests Student's *** has the means and ability to provide the transportation. Respondent argues there is no real burden or expense on the family since the JJAEP is ***. Finally, Respondent contends Petitioner's claims are not ripe because Student's father did not submit a request for transportation as a related service in order for Student to receive FAPE to an ARD.

Hearing Officer Lacks Jurisdiction to Determine Texas Education Code Claim

As a threshold matter I must determine whether a special education hearing officer in Texas has jurisdiction to decide whether the school district's refusal to provide Student with transportation to and from the JJAEP violates Texas Education Code § 37.011(k)(6) under the terms of the Memorandum of Understanding (MOU) between the school district and the JJAEP. The jurisdiction of a special education hearing officer is strictly limited to issues involving matters related to the identification, evaluation, educational placement or the provision of FAPE under the IDEA. *34 C.F.R. § 300.507 (a); 19 Tex. Admin. Code §§ 89.1151 (a) (b); 89.1170 (a)*. While certain state laws may be relevant in determining those issues, any claims arising under state or federal law other than the IDEA are outside the scope of the hearing officer's jurisdiction. Therefore, Petitioner's claims that Respondent violated the Texas Education Code or its MOU with the JJAEP are outside the hearing officer's jurisdiction and will be dismissed. *Id.*

Transportation is a Related Services under IDEA

Transportation may be provided to students with disabilities as a "related service." *34 C.F.R. § 300.34 (a)*. A related service means transportation and developmental, corrective, and other supportive services that are required to assist a child with a disability to benefit from special education. *Id.* Transportation includes travel to and from school and between schools. *34 C.F.R. § 300.34 (c) (16) (i)*. There is nothing more fundamental in order to benefit from special education than being physically present at the site where the educational services are provided. At a minimum a student with a disability cannot benefit from special education unless the student is present in the classroom and attends classes. *See, Irving Ind. Sch. Dist. v. Tatro, 468 U.S. 883, 891 (1984) (child must attend school to benefit from special education)*.

Access To Educational Services

Transportation can be a related service even for a student without an ambulatory disability when the service is necessary in order for the student to benefit from student's special education. *Donald B. v. Bd. of Sch. Comm'rs of Mobile Cnty., 117 F. 3d 1371, 1374 (11th Cir.1997)*. Transportation need not be directly related to the student's disability but instead the relevant relationship is between the need for transportation and the student's access to special education. *Eagle Cnty. Sch. Dist.RE-50J, 46 IDELR 176 (SEA CO. 2006)(preschool student needed transportation from public preschool speech therapy program to day care 10 miles away where both parents worked and were unable to pick student up in middle of work day and other assistance was not available)*.

The uncontroverted facts establish that Student had no need for transportation as a related service until student was placed at the JJAEP. However, once student was assigned to the JJAEP the changed circumstances called for the ARD to consider student's need for transportation as a related service in order to access the educational services at the JJAEP and continue making progress on student's IEP goals.

Disciplinary Placement Under IDEA Requires Continued Provision of FAPE

The IDEA requires the school district to provide educational services when a student with a disability is removed from student's current placement and placed in an alternative setting for disciplinary reasons to enable the student to continue to participate in the general education curriculum and progress towards meeting the student's IEP goals. *20 U.S.C. § 1415 (k) (1) (D) (i)*). As a student with a disability the school district must provide Student with a free, appropriate public education even while suspended or expelled from school. *34 C.F.R. §§ 300.101 (a); 300.530 (d) (1) (i) (2)*.

Where, as here, the removal from the *** school to the disciplinary placement at the JJAEP is a change in placement, the ARD must determine the appropriate services the student needs – doing so could and should have included the need for transportation. *34 C.F.R. §§ 300.530 (d) (5); 300.536*. The uncontroverted evidence shows that the transportation issue was raised at the manifestation ARD but not fully discussed. Instead, Student's father was referred to an administrator who declined to offer transportation based solely on the school district's policy. In that regard the manifestation ARD failed to fulfill its responsibility to determine whether Student needed transportation in order to access the educational services at the disciplinary placement. The ARD did not consider the change in circumstances from the shorter distance between home and the *** school as opposed to the significantly farther distance of *** miles to the JJAEP or the potential impact on student's father's employment.

Facially Neutral Policy

A facially neutral policy that denies transportation when it has the effect of preventing the student from accessing school and the educational services student needs to receive an educational benefit violates IDEA. *Mountain Bd. of Cooperative Educat'l Services, 45 IDELR 83 (SEA. N.J. 2005) (district required to provide transportation to preschooler to access educational services despite facially neutral policy where both parents worked and requiring parents to provide transportation might compromise employment. But see, Fick v. Sioux Falls 49-5, 337 F. 3d 968, 970 (8th Cir. 2003)(facially neutral transportation policy did not violate IDEA when request based on parental convenience or preference; transportation to private day care located outside neighborhood school boundaries denied for student with epilepsy); Middleton Twnshp. Bd. of Educ., 53 IDELR 203 (SEA N.J. 2009)(policy limiting transportation to home and school and not to daycare upheld).*

Burden on School District

The burden to provide transportation is appropriately placed on the school district when transportation is needed to enable the student to receive educational services at a disciplinary location that is a far greater distance than the distance between the student's home and regular campus assignment. *Walnut Valley Unified Sch. Dist., 22 IDELR 1169 (SEA CA. 1995)(district required to provide transportation to mental health day treatment program 16 miles from student's home where treatment program was component of student's IEP). See also, Rochelle Twp. H.S. Dist. 212, 39 IDELR 58 (SEA IL. 2003) (transportation to vocational school required for high school student in order for student to take cosmetology course that was component of student's transition plan and thus student's IEP).*

Conclusion

In this case, Student has no choice in whether student attends the JJAEP – the school district (exercising its lawful authority) made the unilateral placement. However, in doing so, the school district is also responsible for continuing to provide Student with educational services during student's period of expulsion and placement at the JJAEP. I note the distinction between a distance of *** miles to the JJAEP and significantly smaller distances or where the student chose to attend a private school in those cases where the denial of transportation was upheld. *See for e.g., Donald B. v. Bd. of Sch. Comm'rs of Mobile Cnty., 117 F. 3d at 1375) (student did not meet his*

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burden of proving he lacked other means to travel from private school to public school where speech services were provided); Lincoln Elem. Sch. Dist. 156, 47 IDELR 57 (SEA IL. 2006) (student not entitled to transportation where student lived within 1.5 miles from school); Contra, Bd. of Educ. Dist. 130 Pub. Sch. V. Illinois State Bd. of Educ., 1997 U.S. Dist. LEXIS 12921 (D.C. IL. 1997)(transportation from private school to public school for student with ADHD was necessary where distance was almost 2 miles and route was along a busy street and required student to cross numerous intersections, driveways and navigate other obstacles.)

The school district contends there is no increased cost to Student's father since the JJAEP is ***. However, even if this is so, there is uncontroverted evidence that Student's father must be either late for work or leave work early in order to comply with the JJAEP school day -- it is this factor that imposes a potential risk to the father's employment. The possibility that Student's *** may have the means and ability, at times, to provide student with transportation does not relieve the school district of its fundamental responsibility under IDEA to ensure Student has access to the educational services located at the JJAEP.

Based upon the foregoing, the record on file in this case, the uncontroverted evidence, and application of the relevant law I conclude, as a matter of law, that Petitioner is entitled to transportation as a related service from the Respondent school district in order to receive a free, appropriate public education for the term of petitioner's expulsion and placement at the *** Juvenile Justice Alternative Program. I also conclude I have no jurisdiction over claims arising under the Texas Education Code or a Memorandum of Understanding between the school district and local JJAEP.

ORDERS

It is therefore **ORDERED** that Petitioner's Motion for Summary Judgment is **GRANTED IN PART and DENIED IN PART** and that Respondent Celina Independent School District's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART**.

It is further **ORDERED** that Petitioner's claims that Respondent violated the Texas Education Code or its MOU with the *** JJAEP are dismissed for want of jurisdiction.

It is further **ORDERED** that the parties shall convene an Admission, Review & Dismissal Committee (ARD) meeting within seven (7) school days of the date of this Order, or on a date and time mutually agreed upon by the parties, for the purpose of designing a transportation plan for Petitioner. It is further **ORDERED** the transportation plan shall be implemented beginning no later than three (3) school days from the date of the ARD through the end of Petitioner's expulsion term at the *** Juvenile Justice Alternative Education Program (JJAEP), unless the parties agree otherwise.

It is further **ORDERED** that Student and student's father shall cooperate with the school district in designing the transportation plan and that Student shall be ready and on time each school day in order to access the transportation services provided under the plan.

It is further **ORDERED** that at the ARD the parties shall also review attendance records from the JJAEP to calculate Petitioner's actual days of attendance at the JJAEP beginning on ***, 2011 up through the date of this Order.

It is further **ORDERED** that Respondent shall reimburse Petitioner's father in the amount of \$ 40.00 for each day of Petitioner's actual attendance at the JJAEP as compensatory relief, unless the parties agree otherwise. It is further **ORDERED** that Respondent shall reimburse Petitioner's father within fifteen (15) school days of the date of the ARD, unless the parties agree otherwise.

All other relief not specifically stated herein is **DENIED**.

SIGNED the 8th day of March, 2012

Ann Vevier Lockwood
Special Education Hearing Officer

**BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS**

STUDENT

**bnf PARENT,
Petitioner,**

v.

**CELINA INDEPENDENT
SCHOOL DISTRICT,
Respondent.**

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DOCKET NO. 105-SE-1211

SYNOPSIS

Issue:

Whether school district required to provide transportation as a related service to *** school student between student's home and JJAEP during term of student's expulsion in order to provide student with FAPE.

Held: FOR THE STUDENT

Student lived within *** miles of *** school but JJAEP located *** miles from home and outside the jurisdictional boundaries of the school district. Student's father required to arrive late for work or leave work early in order to provide transportation to student in compliance with JJAEP school day.

Manifestation ARD failed to consider or discuss these changed circumstances and instead school district applied blanket policy that required all students to provide own form of transportation to disciplinary placement unless transportation was already stated as related service under IEP. Student needed transportation to JJAEP (which was a change in placement) in order to access educational services and continue making progress towards IEP goals during the term of expulsion.

34 C.F.R. § 300.34 (a) (c) (16) (i); 300.101 (a); 300.530 (d) (1) (i) (2); 300.536

Issue:

Whether student's claims that school district's transportation policy violated Texas Education Code § 37.001 (k) (6) and Memorandum of Understanding with local JJAEP were outside the jurisdiction of the special education hearing officer in Texas.

Held: FOR THE SCHOOL DISTRICT

Jurisdiction of special education hearing officer in Texas strictly limited to issues arising under IDEA that involve matters related to the identification, evaluation, educational placement, or the provision of FAPE. While Texas Education Code and other state laws may be relevant in determining IDEA issues claims arising under state or federal law other than the IDEA are outside the scope of hearing officer's jurisdiction.

34 C.F.R. § 300.507(a); 19 Tex. Admin. Code §§ 89.1151 (a) (b); 89.1170 (a)