

Transportation Under IDEA: How Far and How Wide?

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I. TRANSPORTATION AS A RELATED SERVICE

A. Related Services Defined

Related services means transportation and such developmental, corrective, and other supportive services *as are required to assist a child with a disability to benefit from special education*, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training. 34 C.F.R. § 300.34(a) (*emphasis added*).

B. The Related Service of Transportation Defined

Transportation includes—

- (i) Travel to and from school and between schools;
- (ii) Travel in and around school buildings; and
- (iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

34 C.F.R. §300.34(c)(16).

C. When is transportation required for a child to benefit from special education?

1. In *Letter to Hamilton*, 25 IDELR 520 (OSEP 1996), OSEP indicates that in order for a child to qualify for transportation as a related service there must be a nexus to the child's disability. OSEP explains the consideration process as follows:

You inquire further, however, as to what considerations inform a decision as to when transportation is necessary for a child to benefit from special education. Part B does not address this issue specifically; leaving to public entities the determination of relevant and appropriate factors. However, in order to be consistent with Part B, the determination of the particular related services required to assist a child with a disability to benefit from special education must be based upon the relationship between the child's disabilities and need for the particular related service.

... If a child's disabilities create unique needs that make it especially problematic to get the child to school in the same manner that a nondisabled child would get to school in the same circumstances, then transportation may be an appropriate related service. However, if the disabled student is capable of using the same transportation services as nondisabled students, then it would be consistent with Part B for the student's IEP team to find that transportation is not required as a related service. The school district is then required to treat the student with a disability the same as it treats its general student population in regard to transportation...

2. *McNair v. Oak Hills Local Sch. Dist.*, 441 IDELR 381 (6th Cir. 1987). In this case, the Sixth Circuit outlined four elements that must be satisfied to qualify for transportation as a related service:
 - (1) that the child is [disabled];
 - (2) that transportation is a related service;
 - (3) that the related service is designed to meet the unique needs of the child caused by the [disability]; and
 - (4) the school district must be responsible under the [IDEA] and its regulations for providing the related services under the particular circumstances of the case at hand.

The court held that Kelly, a hearing impaired child, did not qualify for transportation as a related service because there was no nexus to her disability. The court explained:

The parties have stipulated that Kelly's [disability] does not require any special transportation needs, therefore, she could utilize the same transportation service as a [nondisabled] child. The need for transportation, although a related service, is no more unique to Kelly because she is deaf than it would be if she were not deaf. Since the statute specifically requires a relationship between the related service and the unique needs of the child, the third requirement under the [IDEA] has not been satisfied, and the Act does not require Oak Hills to provide Kelly with transportation to St. Rita's.

3. *Donald B. v. Board of Sch. Commissioners of Mobile County, Ala.*, 26 IDELR 414 (11th Cir. 1997). This case involved a six-year-old student with a speech impairment. Donald's IEP called for him to receive speech therapy at a different location from the private school he attended. The location of the speech therapy was a public school campus 3 blocks away. The court rejected the argument that the related service of transportation is only required when necessary to address the unique needs caused by the particular disability. Instead, the court focused on the language of the statute, and concluded that "the IDEA requires transportation if that service is necessary for a disabled child 'to benefit from special education,' [] even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport." (Internal citation omitted.) The court articulated the factors for determining whether transportation as a related service was necessary, as follows:

In our view, the factors relevant in determining whether a child in this situation needs transportation as a related service include at least: (1) his or her age; (2) the distance he or she must travel; (3) the nature of the area through which the child must pass; (4) his or her access to private assistance in making the trip; and (5) the availability of other forms of public assistance in route, such as crossing guards or public transit.

In applying these factors, the court determined that Donald did not require transportation as a related service.

4. Related service of transportation may include transportation to and from an evaluation. 71 Fed. Reg. 46633 (August 14, 2006). The U.S. Department of Education explains its reasoning as follows:

If transportation to an evaluation outside the school environment is necessary, the public agency would have to provide it, as a part of its obligation to ensure that all eligible children are located, identified, and evaluated.

D. Standards for Preschool Students

1. In *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009), OSERS addresses the question, “When is an LEA obligated to provide transportation for a preschool child with a disability between private day care and the child's preschool?” as follows:

If the IEP Team determines that transportation is required to assist the preschool child to benefit from special education, and includes transportation as a related service on the child's IEP, the LEA would be responsible for providing the transportation to and from the setting where the special education and related services are provided.

2. In the *Notice of Interpretation*, Appendix A, Question 33 (1999 regulations), the U.S. Department of Education stated:

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.)

3. All children with disabilities ages 3 through 21, including pre-school students in states where transportation is not ordinarily provided for pre-school students, may also be eligible for transportation to and from school to home or to and from daycare facilities to school based on case by case consideration by the IEP team. See the discussion above at I.(C).

E. Manner of Transportation

1. 71 Fed. Reg. 46576 (August 14, 2006). The U.S. Department of Education, in its discussion of the regulations, emphasizes that the extent of the transportation to be provided to a child with a disability depends on the needs of the child:

A few commenters stated that the definition of transportation should require transportation to be provided between school and other locations in which IEP services are provided. Other commenters requested that the definition explicitly define transportation as door-to-door services, including provisions for an aide to escort the child to and from the bus each day.

A child's IEP Team is responsible for determining whether transportation between school and other locations is necessary in order for the child to receive FAPE. Likewise, if a child's IEP Team determines that supports or modifications are needed in order for the child to be transported so that the child can receive FAPE, the child must receive the necessary transportation and supports at no cost to the parents. We believe the definition of transportation is sufficiently broad to address the commenters' concerns. Therefore, we decline to make the requested changes to the definition.

2. In *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009), OSERS entertains a broad range of possibilities based on the needs of the child, as follows:

1. Expanding the Ridership of Small Bus Routes and Integrating Children with Disabilities into General Education Bus Routes. School districts often provide door-to-door service for children with disabilities in a "small bus" vehicle that is separate from the school transportation used for other students. While this might be an appropriate strategy for supporting some children with disabilities, districts should explore options for integrating children with disabilities with nondisabled students, especially when the children with disabilities are in the same location and have the same schedule as children without disabilities. This option may require the utilization of a lift-equipped vehicle for the regular routes or the addition of a monitor or aide.
2. Using Aides on Buses. Many children with disabilities are able to ride the regular school bus with support provided by an aide who may be an instructional assistant or volunteer, based on State and local policy. Some LEAs also use other students to provide this service through a buddy system, based on State and local policy.
3. Bus Stop Monitors. For students who may need assistance with "going" to the bus stop or "waiting" at the bus stop independently, adding a bus stop monitor can be considered. Based on State and local policy, bus stop monitor positions may be filled by parents or community volunteers. Bus stop monitors will facilitate safe travel for all students.

4. Positive Behavioral Support. Recognizing that the school day begins at the bus stop is an important first step to ensuring that all students have a safe and positive experience. Many schools implement “positive behavioral support programs” that include the integration of behavioral strategies on the bus.
3. In *Letter to Hamilton*, 25 IDELR 520 (OSEP 1996), OSEP addresses the question: “If transportation to and from school is found to be a required related service, can a school fulfill its obligation to provide the service by requiring that parents, without their agreement, provide the actual transportation and get reimbursed mileage?” OSEP’s response:

If the student's IEP team specifies that transportation is a related service for the student, the public agency may not fulfill its obligation to provide this required related service at no cost to the parents by requiring the parent to transport the student and be reimbursed for mileage. While it is not unreasonable for the school district to request that the parent provide the transportation on condition of reimbursement from the public agency, it would be inconsistent with Part B for a public agency to condition the provision of transportation as a required related service to the student on the parent's willingness to provide the service in lieu of the public agency.

4. In *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009), OSERS stated: “If a child with a disability is receiving special education and related services and transportation is included in the child's IEP, the LEA must provide assistance needed by the parents to be reimbursed in a timely manner for the costs incurred in providing transportation.”
5. *District of Columbia v. Ramirez*, 43 IDELR 245 (D.D.C. 2005). The court upheld the parent’s request for a transportation to transport the student to and from his apartment and the bus. According to the hearing officer, the parents could not get the student outside to the bus. As a result, the student was unable to attend school for two years. The court explained its holding as follows:

Here, C.G-R.'s educational needs are not being met by the services plaintiff provides. [] The hearing officer found that C.G-R. had not attended school since 2003, and that his non-attendance was due to his inability to travel from the door of his family's apartment to the school bus. [] The hearing officer also concluded that it was not unreasonable for plaintiff and DCPS to bear responsibility for transporting C.G-R. from his apartment to the bus. []. Plaintiff has identified no evidence to refute the conclusion that granting

defendants' request for a dedicated transportation aide to assist C.G-R. is essential to allowing him to receive an FAPE. Even if facially neutral policies are exempt from review when deviations from them are requested for convenience alone, the present case is not one where this exception applies. *Cf. Fick*, 337 F.3d at 970 (no deviation from facially neutral policy for “parents' convenience or preference”). Defendants are requesting a transportation aide for C.G-R. not because of convenience or preference, but because the absence of such an aide has left C.G-R. unable to receive the education and related services guaranteed by the IDEA and prescribed in his IEP. (Cites to the transcript omitted.)

6. *Hurry v. Jones*, 555 IDELR 543 (1st Cir. 1984). The First Circuit awarded reimbursement for the period of time the parents transported George to school after the school district discontinued its transportation services. The court described the circumstances as follows:

George Hurry (George) suffers from cerebral palsy and a degree of [intellectual disability], and is confined to a wheelchair by spastic quadriplegia. He has attended various special education programs in the Providence area. Until January 1976, the City of Providence provided him with door-to-door bus transportation to and from school. By January of 1976, however, George had reached a weight of 160 pounds, and the bus drivers deemed it unsafe to continue to carry him up and down the steep concrete steps that led from his front door to the street. Mr. and Mrs. Hurry began to transport George to and from school in their van.

Starting in June 1976, Mr. Hurry held a position that required him to work until 5:15 p.m. each day. Because Mrs. Hurry could not lift George from the van and carry him up the steps without her husband's aid, he had to wait in the van for several hours each day until Mr. Hurry left work. He frequently missed school when the weather was too hot or too cold to permit him to wait in the van. George began to complain of pain in his legs from the long periods he spent in the van. In December of 1977, Mr. and Mrs. Hurry stopped transporting him to school; George did not attend school again until the fall of 1979.

7. In *Letter to Smith*, 211 IDELR 191 (OSEP 1980), OSEP responded to an inquiry regarding establishing bus stops for children with disabilities as follows:

In terms of establishing bus stop locations, P.L. 94-142 does not mandate that the child be picked up at his/her home, nor does it prohibit the county board from establishing bus stop locations for

[disabled] children. However, the decision of whether to transport an individual [disabled] child from his/her home or a bus stop location to the special education program would have to be made on the basis of the [disabled] child's particular needs consistent with the services identified in the IEP developed in concert with parents and appropriate professional personnel.

F. Measures to Ensure Safety

1. *P.T. v. Jefferson County Bd. of Educ.*, 106 LRP 40276 (N.D. Ala. 2005), *aff'd*, 46 IDELR 3 (11th Cir. 2006). This case involved a child with autism who would remove her lap belt, walk to the front of the bus, and tantrum while on the bus. The aide who was on the bus had to devote all of her attention to P.T., even though there were other children on the bus. On one occasion, P.T. attacked the aide. In response, the District decided to utilize a safety harness with P.T. while on the bus. In upholding the use of the restraint while on the bus, the court explained:

Unlike using restraints in a classroom, a bus is a vehicle designed for transportation, not education. Because a vehicle moves in traffic, tantrums, behavioral outbursts, throwing objects and attacking others is much more dangerous behavior on a bus than in a classroom. The evidence before the court is that the harness was not in the nature of a straightjacket, as described by the plaintiff, but more in the nature of a harness used in a child seat. It allows P.T. movement of her arms and legs, but prevents her from getting out of her seat or removing her shoes to throw.

2. *Skelly v. Brookfield LaGrange Park Sch. Dist. 95*, 26 IDELR 288 (N.D. Ill. 1997). The court ordered the school district to provide a properly trained aide to care for a 4-year-old student during a 20-30 minute bus ride including to perform tracheostomy tube suctioning. The court described the nature of the needed care as follows:

The type of suctioning of Eddie's tracheostomy tube that Eddie needs during the bus rides to and from Blair is considered surface suctioning. This procedure is performed by inserting into the tracheostomy tube a soft-plastic catheter, a two-inch to three and one-half-inch tube, that is attached to the catheter connector (Pl. Ex. 5) which is attached to a suctioning unit mounted onto Eddie's wheelchair. When the thumb-sized vent hole of the catheter connector is covered, a suction is created in the soft-plastic catheter and mucus secretions that have collected on the inside wall of Eddie's tracheostomy tube are suctioned. Deep suctioning of Eddie's tracheostomy tube, unlike the suctioning performed with

the soft-plastic catheter, is very rare and is performed only when Eddie is sick, in which case he would not be sent to school.

The court rejected the school district's arguments that such services were excluded medical services. In ruling that the service was not an excluded medical service because it could be performed by someone other than a physician, the court relied on the bright-line test established by the U.S. Supreme court in *Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 104 S.Ct 3371 (1984). In so ruling, the court noted: "The ability of any person to learn to suction a tracheostomy tube does not require medical licensure. It only requires some training which, as Dr. Raettig testified, would best be provided to the trainee by Eddie's family members."

3. In *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009), OSERS responded to the question, "When does the IDEA require climate-controlled transportation for children with disabilities?" OSERS's response was as follows:

Climate-controlled transportation is not explicitly required under the IDEA. However, if an IEP team determines that a child needs climate-controlled transportation to receive special education services, related services, or both, and the child's IEP specifies that such transportation is necessary, the LEA must provide this special transportation at no cost to the parents. Similarly, climate-controlled transportation is not required under Section 504 of the Rehabilitation Act of 1973, as amended (Section 504) unless a child with a disability has an identified need for this transportation. See 34 CFR Part 104. However, the transportation of nondisabled children in climate-controlled buses, while children with disabilities are transported in separate buses that are not climate-controlled, might raise issues of disability discrimination under Section 504.

4. *Zak L. v. Cambridge*, 30 IDELR 863 (D. Mass. 1999). The District initially agreed to reimburse the parent mileage at the state rate to transport Zak to and from his therapeutic day school. Later, Zak's placement was changed to a school located 45 minutes from Zak's residence. Zak's psychiatrist recommended that Zak be provided with "separate and direct cab transportation" to and from his new school. The District offered the option of van transportation with other students, or cab transportation to be arranged by the parents and reimbursed by the school. The parents chose the cab option. After initially transporting Zak without incident, the Yellow Cab Company terminated its transportation agreement with the parents due to an inability to ensure a regular driver. The parents requested that the district secure an agreement with another

cab company. Instead, the district again offered the van transportation with other students or mileage reimbursement, along with a transportation evaluation. The parents requested a due process hearing. The Hearing Officer ordered continued “separate and direct” transportation pending a comprehensive transportation evaluation and IEP team agreement regarding a different plan. The district court found the parents to be a prevailing party and awarded attorney’s fees.

G. Regular versus Special Bus: Does LRE Apply?

1. 71 Fed. Reg. 46576 (August 14, 2006). In its discussion of the federal regulations, U.S. Department of Education indicates that LRE principles apply:

We do not believe it is necessary to make the change requested by the commenters. It is assumed that most children with disabilities will receive the same transportation provided to nondisabled children, consistent with the LRE requirements in §§ 300.114 through 300.120, unless the IEP Team determines otherwise. While we understand the commenter’s concern, adapted buses may or may not be part of the regular transportation system in a particular school system. In any case, if the IEP Team determines that a child with a disability requires transportation as a related service in order to receive FAPE, or requires supports to participate in integrated transportation with nondisabled children, the child must receive the necessary transportation or supports at no cost to the parents.

2. In *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009), OSERS stated: “The IDEA does not require LEAs to transport children with disabilities in separate vehicles, isolated from their peers. In fact, many children with disabilities can receive the same transportation provided to non-disabled children, consistent with the least restrictive environment requirements in 34 CFR §§ 300.114 through 300.120.”
3. *Gwinnett County School District v. J.B.*, 45 IDELR 60 (N.D. Ga. 2005). The parent sought to have her daughter, a nine-year-old with cerebral palsy, transported on the regular education bus rather than the special education bus, which is what the school district offered. The parent contended that the regular education bus provided her daughter with socialization opportunities that could not be replicated on the special education bus. The record showed that the student could not “walk without a walker and a personal assistant, and even with this support, she [could not] walk long distances. [She was] confined either to a wheelchair or her ‘work chair’ for the majority of the day.” The district asserted that it had

legitimate safety reasons for using the special education bus for this student. A district witness testified: “The reality of the physics of getting [the student] safely on the bus means that she cannot travel up the steps by herself, she's going to have some mechanism. And our definition is a lift and our lifts are on the mini buses.” The court concluded that the district had the right to transport the student on the special education bus due to its safety concerns. “While the School District required that J.B. use special education transportation, it did this out of a pragmatic concern for her safety in accessing the bus. Student safety is a legitimate concern, and requiring J.B. to use special transportation does not deny her access to the ‘basic floor of opportunity’ envisioned in *Rowley*.”

4. *Ms. S. v. Scarborough Sch. Comm.*, 42 IDELR 117 (D. Me. 2004), *recommendation adopted at* 112 LRP 50061 (D. Me. 2005). The conflict in this case concerned the afternoon drop off of the student while riding the regular bus. The child care arrangements were such that a care giver was not always present at the bus stop when the student was dropped off. When there was no one to meet the student, Ms. S. requested that the student remain on the bus, and that the bus driver call Ms. S. to determine an alternate place for her to meet the bus to pick up her child. Following the student’s surgery, the bus driver of the regular bus began dropping the student off in front of his house, rather than at the designated bus stop. Ms. S. requested that the IEP specify that the bus driver would wait to verify if there was adult supervision, and then make one or more calls if no one was home. Due to the potential delays to the other students on the bus, as well as delays to the other afternoon bus runs, the district offered door-to-door transportation with adult hand-off on a special education bus. The district refused to provide the same door-to-door transportation on the regular bus. The parent challenged this decision. The hearing officer found in the school district’s favor and the parent appealed. Both the magistrate judge and the district court expressed doubt regarding whether the least restrictive environment mandate applies to transportation. The district court’s concern largely centered on whether the transportation claim fell within the scope of the IDEA since it appeared the request was for personal reasons. The magistrate judge reasoned:

It is not at all clear that the “least restrictive environment” requirement of the IDEA applies to transportation. It requires that, “to the maximum extent appropriate,” disabled children be “educated with” children who are not disabled and that they be “removed ... from the regular educational environment ... only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A) (emphasis omitted). There is no sense in which a

school bus may be considered to be a “regular class,” nor is education the purpose of daily trips on the school bus.

H. Transportation as part of Special Education

1. Special education includes travel training if necessary to meet the unique needs of a child with a disability. 34 C.F.R. § 300.39(a)(2)(ii). Travel training means:

[P]roviding instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to—

- (i) Develop an awareness of the environment in which they live; and
- (ii) Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community). 34 C.F.R. § 300.39(b)(4).

2. Travel training is not limited to a particular category of disability. The U.S. Department of Education, in its discussion of the regulations, stated:

It is unnecessary to state that travel training includes instructing children with disabilities other than blindness, as requested by the commenters, because the definition of travel training already states that travel training is appropriate for any child with a disability who requires this instruction. 71 Fed. Reg. 46578 (August 14, 2006).

3. In *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009), OSERS stated:

Both transportation and travel training are important services IEP Teams should continue to consider when they plan for a child's postsecondary transition needs. ... These services can be a fundamental component of the provision of a free appropriate public education (FAPE) that will assist children in preparing for employment and independent living in their communities. Therefore, IEP Teams should consider the need for both transportation and travel training when planning for a child's postsecondary transition needs.

4. Are goals and objectives required? OSEP addresses this issue in *Letter to Smith*, 23 IDELR 344 (OSEP 1995), as follows:

Whether goals and objectives are required in a student's IEP for transportation provided as a related service depends on the purpose of the transportation. If transportation is being provided solely to enable the student to travel to and from school, in and around school, and between schools, no goals or objectives are needed. If, however, instruction will be provided to enable the student to increase his or her independence or improve his or her behavior or socialization during travel, then goals and objectives must be included in the student's IEP to address the individual student's need to increase independence or improve behavior or socialization.

I. Transportation to and from Nonacademic and Extracurricular Activities

1. 34 C.F.R. § 300.107. With respect to nonacademic services, IDEA regulations require that the State ensure the following:
 - (a) Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.
 - (b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.
2. In *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009), OSERS responds to the question, "When does a child with a disability have a right to transportation to and from school-related activities that occur outside of normal school hours, such as community service activities that are required by the school?" OSERS's answer:

When a child with a disability has a right to transportation to and from school-related activities that occur outside of normal school hours depends on whether the IEP Team has included transportation as a related service in the child's IEP to enable the child to benefit from special education and related services. If the IEP Team has made that determination, then it should include transportation for required after-school activities, such as community service activities that are required by the school, as

well as for activities necessary to afford the child an equal opportunity to participate in extracurricular activities.

3. Students with disabilities in work programs off-campus may be entitled to transportation from school to the job site and from the job site to home. See I.(C) for guidance and 34 C.F.R. 300.107.

II. DISTANCE

A. FAPE Challenges Based on Distance

Brett K. Jr. v. Momence Community Unit Sch. Dist. No. 1, 47 IDELR 257 (N.D. Ill. 2007). The court explains the dispute in this case as follows: “The dispute is over transportation, a dispute that started at the very beginning of the process. The District does not own or operate its own buses. It contracts out the service. I infer that Brett's transportation situation was not unique in comparison to the transportation needs of all other students. Indeed the District is geographically large and many students spend an hour or more on the bus.” The due process complaint challenged a bus route which could require up to two hours of travel in each direction. There were numerous factors that contributed to the length of the bus ride including traffic, weather and railroad crossing delays. The parent argued that the length of the bus ride had a subsequent negative impact on the child during the school day, thus depriving the child of a FAPE. The court rejected the argument due to the absence of credible evidence. The court explained its reasoning as follows:

What Plaintiffs sought to show was that the bus was worse than the car (which might have been difficult to do considering the child's cognitive impairments). Alternatively, Plaintiffs sought to show that an extra half-hour or hour on the bus was bad enough to interfere with his education. The flaw in the parents' case is that they had no good comparative evidence to offer other than the subjective impressions of one parent. The record contains reliable evidence (the Blue Cap journal) that Brett did not, in fact, act out after arriving at school on a significant number of days. And there is undisputed evidence that he acted out in the afternoon rather than the morning on as many, or nearly as many, days.

B. Challenges to Location of Services Based on Distance

1. 34 C.F.R. § 300.116(b)(3). In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that ... the child's placement ... is as close as possible to the child's home.
2. 34 C.F.R. § 300.116(c). In determining the educational placement of a child with a disability, including a preschool child with a disability, each

public agency must ensure that ... unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.

3. *Murray v. Montrose County Sch. Dist. RE-IJ*, 51 F.3d 921 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 278 (1995). This case involved a twelve year old student with cerebral palsy. He suffered from multiple disabilities including cognitive, physical, and speech impairments. He lived approximately five blocks from his neighborhood school. His neighborhood school had a special education program for mildly to moderately disabled students. However, the district believed it could no longer implement his IEP at his neighborhood school, and instead, recommended that he attend an elementary school campus 10 miles away where they had a special education program for severely and profoundly disabled students. The Court refused to apply an LRE analysis; instead, concluding that the regulations contain a mere preference rather than presumption in favor of the neighborhood school.
4. *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 24 IDELR 673 (5th Cir. 1996). Consistent with the Tenth Circuit in *Murray*, the Fifth Circuit upheld the school district's centralized programming for deaf students. "[T]he proximity preference or factor is not a presumption that a disabled student attend his or her neighborhood school." With regard to the distance, the court concluded: "And in this case, distance is not controlling---from Katie's home to the Four Bluff school is approximately 9 miles, from her home to Calk Elementary it is 17 miles."

C. Challenges to Change of Placement based on Distance

1. *Tammy S. ex rel. Jordan S. v. Reedsburg Sch. Dist.*, 41 IDELR 133 (W.D. Wis. 2003). This case involved a severely multiply disabled student whose disabilities included deafness. The district's proposed placement involved a commute of 50-65 minutes each way, three days per week to Portage High School; and 2 hours and 10 minutes each way, two days per week to Wisconsin School for the Deaf. Despite arguments that Jordan's medical condition made this commute inappropriate, the court upheld the placement. The court favorably noted the extensive safety precautions that the school district was planning to take:

Lucinda Yanke, a nurse employed by defendant, is responsible for the medical component of a safety plan relating to Jordan's commute to school. Defendant plans to take the same precautions for Jordan that it has taken since he started commuting to school more than 10 years ago. Yanke has prepared a color-coded map for Jordan's driver showing the location of the nearest hospitals along the route to the Wisconsin School for the Deaf in Delevan.

Delevan is 18 minutes from Madison via Med Flight, as compared to a 16 minute flight from Reedsburg. Jordan commutes to school in a car with a driver trained by Yanke on proper response to seizures, using training reviewed by plaintiff. The driver is equipped with a cell phone and a copy of Jordan's current medical protocol. Beginning in 1989, using the same protocol, Jordan has commuted safely to school for the past 13 years. Jordan first commuted from Loganville to the Madison program in 1989 at age three. From 1992 through 1997, Jordan traveled one hour and 15 minutes each way from Loganville to Madison. From 1997 until April 2001, Jordan traveled 65 minutes each way between Loganville and Portage. Throughout the past ten years, no medical professional has advised defendant that it is not safe for Jordan to commute to any of these schools. However, none of these commutes lasts as long as the proposed commute to the Wisconsin School for the Deaf.

2. *Stallings v. Gilbert Unified Sch. Dist. No. 41*, 112 LRP 54837 (Ariz. App. 2009). The parent challenged the district's proposed change of placement to a special day school that served only disabled students. The parent's objections to the change of placement included the one-hour bus ride each way. The parent's concerns regarding the commute included its impact on Alex's "precarious health" and possible need for medical attention during transportation, as well as "the safety of freeway travel in general." Alex's doctor testified "he was concerned with Alex being properly positioned during travel, spasms that may occur during the trip, whether the trip would interfere with the timing of Alex's feedings, skin breakdown caused by sitting in one position for a prolonged period of time, and Alex's head falling out of the head harness on his wheelchair." Nevertheless, the court upheld the hearing officer's finding that the benefits of the more restrictive placement outweighed the risks of the commute.

III. PARENTAL REQUESTS TO TRANSPORT OUTSIDE SCHOOL DISTRICT BOUNDARIES OR CAMPUS ATTENDANCE ZONES

- A. *Alamo Heights v. State Board of Educ.*, 790 F.2d 1153 (5th Cir. 1986). This Fifth Circuit case recognizes that in some circumstances a district might have to transport a child outside district boundaries, such as when the child's only available child care is outside district boundaries. In reaching its decision in favor of the parent, the court engaged in an analysis involving a balancing of the unique needs of the child with the burden to the district, as follows:

This analysis suggests that the "transportation" required as a "related service" under the Act is not arbitrarily limited by the geographic boundaries of the school district so long as it is required for the special circumstances of the [disabled] child and is reasonable when all of the

facts are considered. The district court implicitly found Mrs. G.'s request for one-mile out-of-district transportation for Steven reasonable. The School District has not argued that the transportation would in any way create a burden, much less an unfair burden, on the School District or on other children being transported. There is neither evidence nor argument that going a mile out of the district boundaries would create any substantial additional expense, disrupt efficient planning of school bus routes, entail additional time to transport other children, or in any other way inconvenience other children on the bus route. Instead, the School District has merely insisted that, although “generic” transportation is defined as a related service required to enable a [disabled] child to benefit from special education, out-of-district transportation, because it is out-of-district, is not. We cannot agree. Unless the transportation request is shown to be unreasonable, the Act requires that such transportation be provided as a related service.

- B. *North Allegheny School District v. Gregory P.*, 25 IDELR 297 (Pa. Commw.Ct. 1996), appeal denied 702 A.2d 1062 (1997). In this case, the IEP team determined that Gregory qualified for transportation as a related service and included transportation in his IEP, and the district agreed to transport Gregory to and from his mother’s house which was located within district boundaries. The parent requested transportation outside district boundaries on the alternating weeks when as a result of a custody order, Gregory’s father had physical custody of Gregory. The district refused and the parent requested a due process hearing. The hearing officer ruled in favor of the district; the state appeals panel reversed. The district court reversed the appeals panel in favor of the district. The district court denied additional transportation outside district boundaries because it was not necessary for some integral part of the student’s educational needs. In distinguishing *Allegheny* from *Alamo Heights v. State Board of Educ.*, 790 F.2d 1153 (5th Cir. 1986), the *Allegheny* court points out, “[t]here, because the educational benefit was substantial and the burden on the district not unreasonable, the requested supplemental transportation was held to be required.” The court sympathized with the parents but reasoned as follows:

Here, however, the additional transportation requested serves not to address any of Gregory's special educational needs, but only to accommodate the particular domestic arrangements which Gregory's parents have made. It is unfortunate that parents who live apart, whether by choice or necessity, face greater difficulties in meeting their responsibilities to their children. The particular transportation problems imposed by a shared custody arrangement between parents living substantial distances apart falls equally on those whose children have no special educational needs. Mitigating such hardships, however, is not the purpose of the IDEA or the Public School Code. These acts require 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.

- C. *Timothy H. and Brenda H. v. Cedar Rapids Community Sch. Dist.*, 178 F.3d 968 (8th Cir. 1999). This Eighth Circuit case involved a voluntary intra-district transfer. Kristina’s IEP called for transportation as a related service. Specifically, Kristina required a lift bus. Kristina’s IEP identified her neighborhood school as the campus location for implementing her IEP. Mr. and Mrs. H. did not dispute that Kristina’s neighborhood school offers her a FAPE. They acknowledged that they applied for an intra-district transfer simply because they preferred the special education program at another school, Kennedy High School. The district has a policy regarding intra-district transfers which states: “Parents shall be responsible for the transportation of students not attending their resident area school. ...” After Kristina was granted the transfer, the school district refused to transport Kristina to and from Kennedy High School. The parents requested a due process hearing. The district argued that it would cost \$24,000 to provide a lift bus and to establish a special bus route for Kristina. The Administrative Law Judge found in favor of the school district; the district court reversed. The Eighth Circuit reversed the district court and upheld the policy requiring parents to transport their children when participating in an intra-district transfer program because Kristina’s parents did not establish a need beyond parental preference. “In short, establishment of a special bus route for a single student who admittedly receives a free appropriate public education at her neighborhood school, but who wants to go to another school for reasons of parental preference, is an undue burden on the school district.” This case was argued on the basis of Section 504; however, the parents acknowledged to the court during oral argument that their arguments under Section 504 and the IDEA were duplicative.
- D. *Fick v. Sioux Falls Sch. Dist.* 49-5, 337 F.3d 968 (8th Cir. 2003). Sarah’s IEP called for transportation as a related service. Specifically, the district provided a nurse-accompanied taxi ride to and from school. Under the school district’s policies applicable to all students, students may designate one address for pick-up and one address for drop-off as long as they are in the same cluster area. In this case, the parent requested that the district change the drop-off location to a daycare outside of the cluster area. The district refused, and the parent requested a due process hearing. The school district prevailed at each level of the proceedings under the IDEA. Relying heavily on *Timothy H.*, the Eighth Circuit upheld the school district’s denial of transportation to a daycare center outside the student’s cluster area because “the request for a deviation from the policy [was] not based on the child’s educational needs, but on the parents’ convenience or preference”.

IV. TRANSPORTATION AND DISCIPLINE

- A. 71 Fed. Reg. 46715 (August 14, 2006). The U.S. Department of Education, in its discussion of the regulations, stated:

Whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child's IEP. If the bus transportation were a part of the child's IEP, a bus suspension would be treated as a suspension under § 300.530 unless the public agency provides the bus service in some other way, because that transportation is necessary for the child to obtain access to the location where services will be delivered. If the bus transportation is not a part of the child's IEP, a bus suspension is not a suspension under § 300.530. In those cases, the child and the child's parent have the same obligations to get the child to and from school as a nondisabled child who has been suspended from the bus. However, public agencies should consider whether the behavior on the bus is similar to behavior in a classroom that is addressed in an IEP and whether the child's behavior on the bus should be addressed in the IEP or a behavioral intervention plan for the child.

- B. In *Questions and Answers on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009), OSERS responded to question, "If transportation is included in the IEP for a child with a disability who has documented behavioral concerns on the bus, but not at school, when may a school district suspend the child from the bus for behavioral issues and not provide some other form of transportation to and from school?"

1. Consistent with prior guidance, OSERS answered that a bus suspension must be treated as a day of suspension if transportation is part of the child's IEP:

If transportation is included in the child's IEP, a bus suspension must be treated as a suspension under 34 CFR § 300.530 and all of the discipline procedures applicable to children with disabilities would apply. ...

2. OSERS applied the FAPE free zone to bus suspensions:

An LEA is not required to provide alternative transportation to a child with a disability who has been suspended from transportation for 10 school days or less unless the LEA provides alternative transportation to children without disabilities who have been similarly suspended from bus service. 34 CFR § 300.530(d)(3).

3. OSERS affirmed that suspension from the bus can constitute a change of placement:

Additionally, the suspension of a student with a disability from transportation may constitute a change of placement if a district has been transporting the student, suspends the student from the transportation as a disciplinary measure, and provides no other form of transportation. If a student is suspended from transportation for more than 10 consecutive school days, or is repeatedly suspended, and such suspensions constitute a pattern under 34 CFR § 300.536(a)(2), a change of placement has occurred. In such situations, the LEA, parent, and relevant members of the IEP Team must determine whether the conduct was a manifestation of the child's disability, using the process described in 34 CFR § 300.530(e). If the conduct is a manifestation of the child's disability, the IEP Team must take the steps outlined in 34 CFR § 300.530(f)(1), and also must return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan. 34 CFR § 300.530(f).

4. Finally, OSERS affirmed that the special circumstances exceptions apply to bus suspensions:

Regardless of the procedures discussed above, school personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child has taken any of the actions specified in 34 CFR § 300.530(g) regarding weapons, illegal drugs, or the infliction of serious bodily injury.

- C. In *Letter to Sarzynski*, 59 IDELR 141 (OSEP 2012), OSEP further clarified OSERS's guidance above.

1. When the parent transports a student to school during a bus suspension, OSEP stated:

Generally, a school district is not relieved of its obligation to provide special education and related services at no cost to the parent and consistent with the discipline procedures just because the child's parent voluntarily chooses to provide transportation to his or her child during a period of suspension from that related service. As explained in response to Question H-1 of the Department's Questions and Answers on Transportation, when transportation is included in the child's IEP, a bus suspension must be treated as a removal under 34 CFR § 300.530 and all of the

IDEA's discipline procedures applicable to children with disabilities apply...

2. When determining whether a bus suspension constitutes a change of placement due to a pattern, OSEP clarified that “all disciplinary removals, including disciplinary suspensions from instruction, must be considered in determining whether the child's current removal from IEP-prescribed transportation services constitutes a change in placement due to a pattern and whether a manifestation determination is required.”
3. When determining whether a suspension from instruction constitutes a change of placement due to a pattern, OSEP clarified: in determining whether the current disciplinary removal from instruction constitutes a change of placement due to a pattern of disciplinary removals under 34 CFR § 300.536(a)(2), the school district would need to consider any previous suspensions from IEP-prescribed transportation services.”

D. Transportation by any mode may be problematic for some students with intractable behavior problems. Let's assume that the Student began on the regular education bus and was not successful. The District performed a functional behavioral assessment and behavior intervention plan. The Student was re-assigned to a special education bus with 10 other students and a one to one assistant. The Student was not successful despite faithful implementation of the BIP. The Student was re-assigned to a bus with a driver, one assistant, and no other students. The Student was not successful. The occupational therapist was consulted and a customized vest was purchased for the Student to be worn on the bus as a restraint to protect against the Student getting out of his seat. The Student was not successful. What additional options must or may be exercised by the IEP team?

The parent may be asked to transport the Student to and from school with reimbursement by the District but the parent cannot be ordered to do so. If the parent refuses, the District may be forced to use the expedited due process procedures at 34 C.F.R. 300.532(c) including, if necessary, residential placement at the expense of the District.

V. TRANSPORTATION AND PROPORTIONATE SHARE SERVICES TO CHILDREN WHO HAVE BEEN VOLUNTARILY ENROLLED BY THEIR PARENTS IN PRIVATE SCHOOLS

A. Services Plans

School districts must spend a proportionate share of their IDEA B monies on services to parentally placed private school children. Students who receive proportionate share services receive these services under a services plan. The federal regulations define services plans as follows:

Services plan means a written statement that describes the special education and related services the LEA will provide to a parentally-placed

child with a disability enrolled in a private school who has been designated to receive services, including the location of the services and any transportation necessary, consistent with § 300.132, and is developed and implemented in accordance with §§ 300.137 through 300.139. 34 C.F.R. § 300.37.

B. Transportation under a Services Plan

1. The federal regulations define the extent of the duty to provide transportation under a services plan as follows:

Transportation—

(1) General.

- (i) If necessary for the child to benefit from or participate in the services provided under this part, a parentally-placed private school child with a disability must be provided transportation—

- (A) From the child's school or the child's home to a site other than the private school; and
- (B) From the service site to the private school, or to the child's home, depending on the timing of the services.

- (ii) LEAs are not required to provide transportation from the child's home to the private school.

- (2) Cost of transportation. The cost of the transportation described in paragraph (b)(1)(i) of this section may be included in calculating whether the LEA has met the requirement of § 300.133. 34 C.F.R. § 300.139(b).

2. 71 Fed. Reg. 46596-46597 (August 14, 2006). The U.S. Department of Education, in its discussion of the regulations, explained its reasoning for the transportation requirement for parentally placed private school children:

We do not agree that transportation services should be removed from § 300.139(b). If services are offered at a site separate from the child's private school, transportation may be necessary to get the child to and from that other site. Failure to provide transportation could effectively deny the child an opportunity to benefit from the services that the LEA has determined through consultation to offer its parentally-placed private school children with disabilities. In this situation, although transportation is not a related service, as defined in § 300.34, transportation is necessary to enable the child to participate and to make the offered services accessible to the child. LEAs should work in consultation with

representatives of private school children to ensure that services are provided at sites, including on the premises of the child's private school, so that LEAs do not incur significant transportation costs.

However, for some children with disabilities, special modifications in transportation may be necessary to address the child's unique needs. If the group developing the child's services plan determines that a parentally-placed private school child with a disability chosen to receive services requires transportation as a related service in order to receive special education services, this transportation service should be included as a related service in the services plan for the child.

In either case, the LEA may include the cost of the transportation in calculating whether it has met the requirement of § 300.133.

VI. Reimbursement of parents for transportation expenses

A. Parent offers to transport Student needing special transportation to school

For various reasons, parents may offer to bring Students with disabilities to and from school. If the Student is eligible for special transportation, the parent should be offered reimbursement for transportation because all special education services should be free. How should the parent be reimbursed? See copies of South Dakota statutes and regulations attached: Section 3-9-1; Art. 13-37-8.9; 13-30-3; 13-37-1.1.

B. Student living in residential facility at expense of District

Where an appropriate residential placement is outside the commuting distance from the parents' home, parents are likely entitled to reimbursement for expenses related to travel and visitation; phone calls; and in rare instances, lodging and living expenses during visitation. As rule, these expenses must be related to genuine educational concerns to be justified (such as maintaining the family bond or attending IEP team meetings or other meetings related to school services). *Aaron M. v. Yomtoob*, 40 IDELR 65 (N.D. Ill. 2003); *Agawam Pub. Sch.*, 42 IDELR 284 (SEA MA 2004); *Los Angeles Unified Sch. Dist.*, 52 IDELR 144 (SEA CA 2009).

Districts may reimburse parents for family visitations to the residential facility and in providing the student trips home. *New Prairie United Sch. Corp.*, 30 IDELR 346 (SEA IN 1999); *Los Angeles Unified Sch. Dist.*, Id.

If overnight accommodations are required because of the distance between the Student's home and the residential facility, the district may be required to pay for the reasonable

expenses of the parents travel including food and lodging. The reimbursement of such expenses may be determined by the District on a case by case basis. *Board of Educ. of Wrappingers Cent. Sch. Dist.*, 35 IDELR 112 (SEA NY 2001). Courts may limit the amount of actual reimbursement based on various factors. *Lakin v. Birmingham Pub. Sch.*, 39 IDELR 152 (6th Cir 2003).

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