

BEFORE THE THREE-MEMBER

ADMINISTRATIVE HEARING PANEL

EMPOWERED PURSUANT TO SECTION 162.961 RSMo

Petitioner,

v.

Special School District of St. Louis County,

Respondent.

FINDINGS OF FACT,

CONCLUSIONS OF LAW, AND DECISION

This matter is an administrative hearing before a three-member panel pursuant to Section 162.961 RSMo. The panel consisted of Mr. Robert L. Hawkins, III, Chairperson, Dr. Margaret Gray and Ms. Phyllis Wolfram. Petitioner appeared by his parents and his counsel Lawrence J. Altman. James G. Thomeczek represented the Respondent, Special School District.

The hearing was convened on August 20, 1997. One of the panel members, Ms. Phyllis Wolfram, was not present, but the parties consented to proceeding without her presence and further consented to her participation in the decision on the merits. Ms. Wolfram was provided a complete copy of the transcript and copies of all exhibits presented by the parties at the hearing.

It is worthy to note that a great deal of the evidence was presented by stipulation.

The panel granted the request of the parties to submit post-hearing briefs. Following submission, certain efforts were made by the parties to settle the issues in the proceeding. After reporting that such efforts were a failure, the parties engaged in additional efforts toward settlement, though they ultimately were unsuccessful. The time-line was extended in response to requests regarding those efforts as well as other matters.

Based upon the evidence adduced and arguments presented by the parties, the panel makes the Findings of Fact, Conclusions of Law, and Decision.

FINDINGS OF FACT

Petitioner, __, is a __ year old, male student who resides in the Rockwood School District. __ parents are __ and __.

2. Rockwood School District lies within St. Louis County, Missouri. The Respondent ("SSD") provides special education services to students with disabilities who reside within the Rockwood School District.

3. __ has been identified by SSD as a student with a disability. __ is entitled to receive services through SSD's Early Childhood Special Education Program.

4. __ parents submitted a Referral Form to SSD prior to his acceptance in the Early Childhood Special Education Program which indicated that __ was attending the Fenton Play and Learn Center Preschool. __ teachers at Fenton Play and Learn Center submitted written information about __ to SSD prior to his acceptance in the Early Childhood Special Education Program (Joint Exhibit 6).

__ and SSD developed an IEP for __ on March 20, 1997. The IEP indicated __ had been attending day care in Jefferson County since he was six weeks old and was attending this program five days each week, and that __ parents were concerned about changing his day care setting. (Joint Exhibit 16).

Respondent, by its witness, Ms. Deborah Smith, indicated SSD would need to provide __ transportation to and from school five days per week. The Fenton Play and Learn Center Preschool lies within the Northwest R-I School District which is not within SSD boundaries. SSD refused to transport __ to and from the Fenton Play and Learn Center Preschool.

__ parents requested and received a Resolution Conference. Dr. Mary Rulo determined at the Resolution Conference that SSD was not obligated to transport __ to and from the Fenton Play and Learn Center Preschool.

__ parents made a timely request for a Due Process Hearing.

On August 20, 1997, a Due Process Hearing was held during which __ parents, __, appeared with their attorney, Lawrence J. Altman. Ms. Christine Montgomery appeared for SSD along with SSD's attorney, James G. Thomeczek.

At the Hearing, SSD did not contend that insurance or cost was a reason for not providing transportation for __ to and from his day care which was situated outside of SSD's boundaries.

The written policy of SSD is silent on whether SSD limits its transportation within the district boundaries (Joint Exhibit 22).

The parties have discussed transportation being provided by Respondent, with cost to be born by Petitioner's parents.

Petitioner's parents are willing to bear the reasonable cost of such transportation.

The location of the day care facility in question is one mile, more or less, outside the boundary of Respondent's district.

CONCLUSIONS OF LAW

1. The Individuals with Disabilities Education Act ("IDEA") entitles parents of a child with a disability to an impartial Due Process Hearing upon request. In Missouri, a hearing authorized by Section 162.961 RSMo is intended to be the impartial Due Process hearing mandated by IDEA.
2. The single issue before the three-member hearing panel was whether SSD is required by law to provide transportation to and from a day care located outside its boundaries to a disabled student who is having services provided by SSD at a school located within its boundaries.
3. This single issue was presented to the hearing panel on stipulated facts (Joint Exhibit 25) and testimony of Mrs. _ on behalf of Petitioner and the testimony of two witnesses for Respondent, Ms. Deborah Smith and Mr. Richard E. Strauser.
4. There was no dispute that _ had been attending a day care facility which was outside SSD boundaries. Further, _ parents made this clear to SSD on the Application for Services (Joint Exhibit 6). _ IEP noted this as well (Joint Exhibit 16).
5. Section 162.710 RSMo states:

Transportation how provided

The district responsible for furnishing special education services shall provide necessary transportation for all handicapped children residing within the district, including transportation to and from contracted day classes, notwithstanding the provisions of Sections 162.621 and 167.231, RSMo.

6. There can be no question that SSD is responsible for furnishing with necessary transportation. _ is handicapped and lives within the boundaries of SSD.

7. Respondent asserts that it has a policy which prohibits it from transporting to or from his day care which is located in a district to which SSD does not provide services and is outside of its jurisdiction. Joint Exhibit 22 purports to be the policy of SSD on the issue of transportation of its students. Nothing within that written policy gives any indication that there is any limitation which would prevent SSD from providing _ the transportation services requested by his parents. Therefore, the Panel concludes that SSD has no policy on the issue before it.

8. Furthermore, the witnesses for Respondent testified that insurance was not a factor in making its decision, rather Respondent was relying on a policy which does not exist in its own written materials which deal with the issue of transportation.

9. SSD cannot claim that it was unaware of _ attendance at a day care facility outside of its boundaries. _ application to obtain services (Joint Exhibit 6) clearly states that his day care is at a location outside of SSD and the IEP of _ recognizes this fact as well (Joint Exhibit 16). The IEP contains nothing which would indicate SSD would not provide the transportation services requested by _ parents. In the "Other Adoptions" portion of _ IEP, it is stated that _ parents felt that a change from _ day care was a concern and may not be in his best interest. This parental concern is set forth twice within _ IEP, yet nothing is written indicating transportation services would be denied him due to the location of his day care. Ms. Smith testified there was one location in SSD which could provide _ with the day care services his parents felt were in his best interest, but she further stated it would not surprise her if there were no openings presently existing in this facility.

10. A school district is obligated to provide appropriate services to a child with a disability which includes such services as are necessary to permit the child to benefit from the Board of Education v. Rowley, 458 U.S. 176, 188-189, 102 S.Ct. 3034, 3043. SSD admits that for _ those services include transportation. In Missouri, the services which are required are defined as follows by Section 162.670 RSMo:

162.670. Statement of policy

In order to fully implement section 1(a) of Article IX, Constitution of Missouri,

1945, providing for the education maintenance of free public schools.....it is hereby declared the policy of the State of Missouri to provide or to require public schools to provide all handicapped

and severely handicapped children.....special educational services sufficient to meet the needs and maximize the capabilities of handicapped and severely children.

11. The parents expressed concern within the IEP that remaining at his present day care was a need for _ SSD could not offer an alternative which would meet _ needs and maximize his capabilities. The one program which was offered as an equivalent within the boundaries of SSD was not available for _. Moreover, nothing within the IEP states the transportation requested by _ parents would be denied him.

12. The factual pattern herein is very similar to that set forth in the California case of Santa Monica-Malibu Unified Sch. Dist., 26 IDELR 192 (SEA CA 1997) in which the District was ordered to provide transportation to a location outside the District. As in Santa, supra, the IEP for _ lists transportation would be limited to a certain location. The limitation SSD is attesting to impose is a unilateral attempt to change the IEP which is clearly prohibited by law.

13. The distance of the day care center, in this instance, beyond Respondent's district boundary is deminimis!!!!!!!

CONCLUSION OF LAW

It is the decision of this panel that SSD is obligated to transport _ as requested, with the reasonable cost of such transportation to be born by _ parents. SSD does not have a written policy prohibiting such transportation and nothing within the Missouri statutes precludes such services from being provided. Moreover, the IEP requires transportation for without any restrictions on _ location. If SSD is concerned about such an obligation, it can enact a new policy which clearly defines its transportation policy as having geographical restrictions and including such restrictions in a student's IEP.

Wherefore, it is the Order of this panel that SSD provide _ transportation which will permit him to attend the Fenton Play and Learn Center Preschool, with the reasonable cost of such transportation to be born by his parents.

SO ORDERED this 24th day of November, 1997.

Robert L. Hawkins, III, Chairperson

Dr. Margaret Gray, concurring.

Ms. Phyllis Wolfram, dissenting (dissent attached)

Petitioner,

vs.

The SPECIAL SCHOOL DISTRICT

of ST. LOUIS COUNTY,

Respondent

MINORITY OPINION

The three member hearing panel consisted of Mr. Robert Hawkins, III, chairperson, Dr. Margaret Gray and Ms. Phyllis Wolfram. Mr. Lawrence J. Altman represented the Petitioner and Mr. James G. Thomeczek represented the Respondent.

The hearing was held on August 20, 1997. Ms. Phyllis Wolfram was not present. However, the parties consented to proceed in her absence and further consented to her participation in the decision on the merits that she be provided with a complete copy of the transcript and copies of all exhibits presented by the parties at the hearing.

The panel convened a phone conference on September 5, 1997 to determine their findings. Prior to this conference Mr. Hawkins indicated that he and Dr. Gray had spoken and felt they had reached a decision in this matter. However, it was not discussed so as not to prejudice the third panel member prior to her review of the transcript and evidence. During the phone conference on September 5, 1997, a request was made by Dr. Gray and Ms. Wolfram to review the briefs submitted by both parties. Mr. Hawkins indicated he would forward these. At the conclusion of the phone conference a unanimous decision was not reached. The panel agreed, if requested by the parties, to extend the timelines for the purpose of further mediation attempts. On October 3, 1997 the panel members were notified that attempts to mediate the issue were unsuccessful and that the panel's decision would be rendered by October 20, 1997/

FINDINGS OF FACT

1. _ is a _ year-old male student who resides in Rockwood School District. (Stipulation 1)
2. _ parents are _ . (Stipulation 2)
3. Rockwood School District lies within St. Louis County. (Stipulation 3)

4. The Special School District of St. Louis County (SSD) provides special education services to students with disabilities who reside in the Rockwood School District. (Stipulation 4)
5. _ has been identified by the SSD as a student with a disability. (Stipulation 5)
6. _ is entitled to receive services through the SSD's Early Childhood Special Education Program. (Stipulation 6)
7. The SSD, together with _, developed an IEP for _ on March 20, 1997. (Stipulation 7)
8. "Areas of Concern" noted in the IEP

Articulation-production and use of age appropriate speech sounds and phonological processes. Fine Motor-grasping, hand use, eye hand coordination and manual dexterity skills. Behavior-attention span, task focus, and compliance. Gross motor concerns include balance and coordination. (Stipulation 8)

9. The IEP noted that _ was attending a daycare center in Jefferson County five (5) days per week. (Stipulation 9)
10. _ has been in the daycare center since he was six (6) weeks old. (Stipulation 10)
11. At the IEP meeting, _ expressed a concern about changing _ daycare setting, because other daycare choices available in the area have an "open space" environment, and the parents believed that _ short attention span and distractibility would not be best served in that type of setting. (Stipulation 11)
12. _ "Learning Profile," as set out in his IEP

_ attention span and task focus are reported to be limited. At times, he is reluctant to follow directions, or remain with the group at his preschool/daycare setting. He sometimes clears shelves of toys, or has tantrums when he does not get his way. _ seems to benefit from a structured setting in which behavioral expectations are clear and consistently reinforced. (Stipulation 12)

13. With respect to transportation, the IEP noted that the "Child can be picked up in A.M. from home." The IEP also noted that _ would need to be restrained in a harness while being transported. (Stipulation 13)

14. The SSD proposed that _ receive early childhood special education services in an early childhood special education class in an integrated building. The services to be provided to _ by the SSD included 600 minutes per week of early childhood special education; 30 minutes per week of physical therapy; 60 minutes per week of speech/language therapy; and 30 minutes per week of occupational therapy. Mrs. _ agreed with the proposed placement. (Stipulation 14)

15. Mrs. _ requested that the SSD transport _ from his early childhood special education class to the daycare facility that he had been attending at the conclusion of his school day. Mr. and Mrs. _ offered to pay for the transportation. (Stipulation 15)

16. The daycare facility lies outside of the Rockwood School District and outside of St. Louis County. The daycare facility lies within the Northwest R-I School District boundaries. (Stipulation 16)

17. The SSD refused to transport _ to a site outside of its boundaries. (Stipulation 17)

18. Mrs. _ requested a resolution conference on the transportation issue. (Stipulation 18)

19. Dr. Mary Rulo, now the Assistant Superintendent for the SSD, determined that the SSD was not obligated to transport _ to a site outside of the District. (Stipulation 19)

20. Mr. and Mrs. _ requested a due process hearing on the transportation issue. (Stipulation 20)

21. A hearing was held on Wednesday, August 20, 1997. The parents were represented by Lawrence J. Altman. The District was represented by James G. Thomeczek. (Stipulation 21)

22. Mrs. _ agreed with the goals and objectives, educational service and service delivery specified in the IEP. (Testimony _)

23. The IEP does not state that its implementation should take place at the Fenton Learn and Play or any other daycare facility. (Exhibit 16)

24. _ attends daycare because both parents work. (Testimony _)

25. _ will attend the Rockwood Preschool Program beginning this school year and will be provided a sufficient program. (Testimony _)

26. The Rockwood Preschool Program and the SSD Early Childhood Program both utilize the Project construct Curriculum. (Testimony Deborah Smith) _ would not have daycare available on

the days school is out if he attended Rockwood Preschool Program therefore their first choice is Fenton Learn and Play Program. (Testimony _)

27. Mrs. _ was notified prior to the IEP meeting that SSD does not transport students outside of the district boundaries. (Testimony _)

28. Mrs. _ explored alternative means of transporting _ and indicated that nothing is available except for private transportation of which she cannot pay. (Testimony _)

29. SSD Board Policy states that the superintendent shall set forth regulations that govern transportation (Exhibit 22)

30. Mr. Richard Strauser, Director of Transportation for the SSD and is responsible for the transportation of approximately 3,400 students including 350 to 400 early childhood students on a daily basis. (Testimony Mr. Strauser)

31. Mr. Richard Strauser, in his nine years of employment with SSD is unaware of any students being transported outside of the district boundaries unless specified in IEP. (Testimony Mr. Strauser)

32. Mr. and Mrs. _ are willing to pay for the cost of transportation if the cost is reasonable and affordable. (Testimony _)

33. The sole issue for determination is - Whether the SSD is required by state or federal law to provide transportation to a student with a disability, who is receiving early childhood special education services from the District in a program operated by the District, from that program, which is provided in a school that lies within the District, to at site outside of the District, namely the daycare facility that the child has been attending since he was six weeks old.

CONCLUSIONS OF LAW

The majority opinion in this case is held by Mr. Hawkins and Dr. Gray. The minority opinion is held by Ms. Wolfram. The majority opinion as expressed in the phone conference on September 5, 1997, has held that the SSD is obligated to transport outside the District's boundaries given that the parents have agreed to incur the cost of the transportation.

The majority's position is both understandable and well intentioned just as the parents request to keep _ in the same daycare facility that he has attended since six weeks of age and the fact that it is convenient to meet with work schedules of the parents is also understandable. However

well-intentioned this position, it does not answer the question as to whether the SSD is required to provide transportation outside of the District's boundaries. The burden of proof in this case rests with the Petitioner's who must demonstrate a legal requirement that the SSD provide the requested transportation. Review of the testimony and facts simply do not substantiate the SSD is required to transport _ to a daycare facility outside of the District's boundaries.

Based on the facts presented into evidence, the testimony rendered at the hearing on August 20, 1997, and applicable law, I must respectfully disagree with the majority decision for the following reasons:

1. Mrs. _ was present for the development of the IEP and agreed that the goals and objectives, related services and delivery system were appropriate to provide special education services to _. Under the IDEA, transportation is required as a related service only when needed for a student to access their special education services. Because the IEP, which was agreed to by the parents, did not include the Fenton Play and Learn Center Preschool Program, then transportation to this facility is not required.

2. Mrs. _ was notified prior to the IEP meeting that SSD would not transport outside of the district's boundaries. She therefore explored other options available within the district acknowledging that child care and transportation is the parent's responsibility. However, she has chosen not to access these programs.

3. The majority opinion states the district is obligated to provide transportation, under the condition that the parents reimburse the SSD for reasonable costs. Under the FAPE provision of the IDEA, if transportation is required to be provided then it must be provided at no cost to the parents. The parents are not contending that the cost of transportation service they are requesting is the responsibility of the SSD as they have agreed to pay for reasonable costs to transport their son, _, outside of the district's boundaries. They have in fact explored alternatives by which to transport their son indicating that this is their responsibility. The fact that the parents and the majority opinion have recognized that the cost of transportation should be the responsibility of the parents is clearly an admission that the service is not required under the FAPE provision of the IDEA and therefore not the responsibility of the SSD.

4. Both the parents and majority opinion agree that it would be reasonable for the SSD to agree to this request of transporting _ one-half mile over the district's geographical boundaries. There are no requirements in the state and federal law that would prohibit this transportation. However, there is in fact, Board Policy that speaks to transporting students within the district

boundaries as well as a long-standing practice that prohibits transporting students across the district's boundaries unless otherwise specified in the IEP. It is the panel's responsibility to determine if the district has complied with the provisions set forth under the IDEA, then to determine if reasonable special education and related services have been provided. It is not for the panel to decide whether the IDEA is appropriate, or whether related state law which is in compliance with the IDEA is appropriate or whether Board Policy which complies with applicable state and federal law is appropriate but rather, whether the SSD has complied with those applicable laws and policies. No evidence in this case substantiates that the SSD is in violation of any such policy. The panel should not substitute their opinion for that of the District authorities in this matter. In the Rowley decision, the Supreme Court cautioned against this when it stated, "the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute sound educational policy for those of the school authorities which they review." *Board of Education v. Rowley*, 458 U.S. 176,206,102 S.Ct. 3034,3051 (1982). Though the three member hearing panel is not a court it would appear that this direction would apply.

5. Under Section 504 of the Rehabilitation Act of 1973, the parents would need to demonstrate that other students had been transported across district boundaries in order to substantiate their contention that the requested transportation was owed under this legislation. In this case, the evidence presented was testimony from the Director of Transportation for the SSD, Mr. Richard Strauser. Mr. Strauser testified that in his nine years he was unaware of any instance in which a student was transported outside of district boundaries except when called for in the IEP. It is clear that the IEP of _ does not call for transportation outside of the district's boundaries in order to access an appropriate special education program. The parents offered no evidence to dispute this.

6. Mrs. _ also testified that she had explored other daycare options within the Rockwood School District, within the SSD boundaries. She indicated that the Rockwood Daycare Center would meet _ needs. However, she wishes to keep _ at the daycare facility he was attending prior to the development of the IEP on March 20, 1997. This, of course, is the parent's option. However, this preference does not obligate the SSD to violate their current practice and transport _ outside of their district boundaries for purposes unrelated to his special education program.

In summary, the facts in this case together with applicable state and federal law supports the minority opinion which holds for the Special School District of St. Louis County, finding that there is no obligation to transport _ to a daycare facility across the district's boundaries.

The SSD has complied with state and federal law in the development of an appropriate IEP for _ , including appropriate goals and objectives, service delivery and related services which includes transportation to access those services. It is pertinent in this case to note that the transportation services being sought by the parents is not necessary to access the required special education services. Rather, it is the need arising from the family's wish to accommodate their work schedules and desire for _ to remain in a daycare located outside of the district's boundaries.

Phyllis Wolfram, Hearing Officer

October 17, 1997