

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

PROCEEDINGS BEFORE THE DUE PROCESS HEARING OFFICER

IN THE MATTER OF

Petitioners

v.

,

Respondent

DPH #0607-01

DUE PROCESS HEARING DECISION

**Muriel McClelland
Due Process Hearing Officer**

October 9, 2006

Counsel for Parents /Student:

Dennis Drucker, Esq.
Protection and Advocacy System
1720 Louisiana Blvd., NE, Suite 204
Albuquerque, New Mexico 87110

Counsel for School District:

Jacquelyn Archuleta-Staehlin, Esq.
Shana S. Baker, Esq.
Cuddy, Kennedy, Albetta & Ives, LLP
P. O. Box 4160
Santa Fe, New Mexico 87502-4160

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DUE PROCESS HEARING

DECISION

This matter coming before the Due Process Hearing Officer (DPHO) at a hearing commencing on September 15, 2006 and continuing on September 20, 2006; Petitioners (Parents/ Student) represented by Dennis Drucker, Attorney at Law; Respondent (District) represented by Jacquelyn Archuleta-Staehlin and Shana S. Baker, Attorneys at Law, and the Hearing Officer (DPHO), having heard the testimony of Petitioners' witnesses, having reviewed the exhibits and memoranda of law submitted by the parties, and having heard the arguments of counsel following Respondent's Motion to Dismiss upon Petitioners resting their case, dismisses Petitioners' complaint as a matter of law and enters the following Findings of Fact and Conclusions of Law in support of the dismissal with prejudice.

STATEMENT OF PROCEDURE

Parents filed a request for due process with the New Mexico Public Education Department (NMPED) on July 10, 2006, alleging denial of FAPE under IDEA because of District's failure to transport Student door-to-door. *[DPHO Exhibit 1]* The Due Process Hearing Officer (DPHO) was appointed on July 11, 2006. *[DPHO Exhibit 2]*

A pre-hearing scheduling conference was held telephonically on July 20, 2006. District did not challenge the sufficiency of the Complaint. District's request for an extension of time limits was granted to allow further settlement negotiations and the filing of a Motion

challenging Parents' standing to bring this action. *[DPHO Exhibit 5]* On July 27, 2006 the parties informed the DPHO that they had waived the resolution conference.

District filed its Motion to Dismiss (and Memorandum in Support) on July 28, 2006. *[DPHO Exhibit 6]* Petitioners' Memorandum in Opposition was filed on August 4, 2006. *[DPHO Exhibit 7]* Parties submitted Statements of Issues on August 7, 2006. *[DPHO Exhibits 8, 9]* At a telephonic hearing held on August 7, 2006 the DPHO, having reviewed the memoranda of counsel and counsel declining further argument, denied District's Motion to Dismiss. *[DPHO Exhibit 10]* At the second pre-hearing conference the dates for the due process hearing were changed to September 15 and September 20-21, 2006. *[DPHO Exhibit 11]*

District's Motion for Reconsideration was filed on August 11, 2006 and Parents' Memorandum in Opposition was filed on August 28, 2006. *[DPHO Exhibits 12, 13]* On September 6, 2006 after hearing arguments of counsel, and District having provided no new grounds for dismissal, the Motion for Reconsideration was denied.

The due process hearing commenced with the testimony of one witness on September 15, 2006 and continued on September 20, 2006 when Petitioners remaining witnesses testified. The DPHO dismissed the complaint as a matter of law pursuant to *Fed.R.Civ.P. 32(c)*. Although the preliminary issues of standing and DPHO lack of jurisdiction are mooted by the dismissal of the complaint, counsel have requested DPHO findings and discussion of those issues in this Decision, as well as DPHO findings with respect to the dismissal of Petitioners' complaint.

ISSUES PRESENTED

Parents/Student submit the following issues for determination by the DPHO:

1. Whether Student has been denied FAPE because of District's refusal to provide door-to-door transportation with an aide as a related service?
2. Whether Petitioners are entitled to receive compensatory education for missed school days resulting from District's failure to provide necessary transportation?

District submits the following issues for determination by the DPHO:

1. Whether Parents have standing to request and pursue a due process hearing on behalf of their adult son in the absence of a legal guardianship?
2. Whether Parents are required to accept a reasonable alternative proposed by District?
3. Whether Student is entitled to receive compensatory education and, if so, should damages have been mitigated by Parents and Student?
4. Whether Student's IEP was appropriate (that is, reasonably calculated to confer educational benefit), and was FAPE provided to Student?

FINDINGS OF FACT¹

General Findings

1. Student is a nineteen-year-old, eligible for special education at District's high school though age twenty-one based upon his diagnosis of autism. *TR 98, 109*.
2. Student resides with Petitioners (his biological parents) and his 16-year old

¹To the extent that the foregoing findings of fact contain conclusions of law or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahan Independent School Bd.*, 835 F. Supp. 340 (1993).

sister. The family ranch is located in a rural area within District's school boundaries. *TR 132.*

3. Both parents work at home on the ranch and do not have outside employment. *TR 118, 148.*

4. Student is not presently attending school. *TR 143, 149, 152, 154.*

Standing/Lack of Jurisdiction

5. Parents have applied for but do not have legal guardianship of Student as of the date of this hearing. *TR 115.*

6. District acknowledges that a transfer of rights to Student is inappropriate because Student will likely be deemed incompetent, incapable of making educational decisions for himself. *TR 6.*

7. Parents have always acted on behalf of Student, both before he attained age of majority and after March 17, 2005 when Student was emancipated by age, including at five IEP meetings held in August, September, October and December, 2005 and in February, 2006. Parents claim they were never informed during this period of time that unless they became Student's legal guardians they would no longer be able to advocate for him. *Exhibits 13, 14, 15, 16; TR 114, 234-235.*

8. When District raised the question of standing Parents applied for legal guardianship through the Office of Guardianship, the state agency responsible for obtaining legal guardianship for IDEA parties. Parents were informed that a guardianship could not be obtained for a variety of bureaucratic reasons and that Student was number nineteen on a waiting list. *TR 115-116.*

Transportation

9. Children living in Student's neighborhood are bussed to school from bus stops, one located 3.5 miles from Student's home (Highway 53) and another located 18 miles from the home (Zuni Canyon Road). The LEA provides transportation at bus stops for all students residing in this area with the possible exception of one medically fragile child. *TR 89, 231-233, 261.*

10. Transportation has been an issue ever since Student first transferred to District's schools in 2002; Parents have demanded door-to-door transportation for Student since he entered the LEA in 2002, as a component of FAPE. *TR 196, 241-242, 274-283.*

11. The transportation issue was not resolved at the December 4, 2003 IEP meeting. Transportation was not listed as a "related service," the Team deferring further discussion until March 30, 2004. *Exhibit 10.*

12. At the March 30, 2004 IEP meeting, although seven transportation options were noted and rejected by either Parents or District, the Team consensus was: "Transportation assistant would be on the bus from the starting point of bus route to the end of bus route. Transportation with assistant for the bus from bus stop to school. District does not feel that [Student's] disability warrants door-to-door transportation. District realizes that [Student] would benefit from the interaction of riding a bus with his nondisabled peers. Continuation of feeder route will occur until further determination. State of New Mexico standards for bus transportation and parent responsibility were addressed." *Exhibit 11, p. 12.*

13. At the December 13, 2004 IEP meeting, transportation was listed as "none." *Exhibit 12.*

14. An Addendum IEP meeting was held on March 3, 2005 to discuss transition

services. The IEP form noted: “Office of Guardianship will be contacted and information on guardianship will be shared with parent.” There is no evidence that this occurred. *Exhibit I*.

15. Again, no resolution was reached at the August 18, 2005 Transition IEP meeting with respect to transportation issues. *Exhibits 13, 14, 15*.

16. At the annual review IEP meeting on December 13, 2005, noting the several options that were proposed and rejected, the consensus of the IEP Team was that Student requires transportation as a “related service,” further indicating in the “*accommodations and supports required*” section, “[Student] could ride a special ed bus with assistance.” *Exhibit 16, p. 13.*²

17. At the February 14, 2006 IEP meeting (the last meeting prior to the request for due process), while observing Student has a history of behavioral outbursts, transportation was omitted from the IEP forms as a “related service.” *Exhibit 17, p. 12*.

18. At all times material to the due process request, Parents rejected the bus stop options offered by District and chose instead the feeder-route option, transporting Student the full distance to and from school and their residence, a distance of eighty miles each day. *Exhibits 11, 12, 13, 14, 15, 16, 17*.

19. District paid Parents the feeder-route state compensation rate of 32 cents per mile, which Parents consistently claimed was not enough to cover their time and expenses. *Exhibit 11, pp 3, 6, 11*.

20. Although Parents fully participated in the IEP meeting of February, 2006 as members of the IEP Team, they continue to dispute the IEP Team transportation determination,

² Since Petitioners have not numbered pages in each of their exhibits, the DPHO has determined pagination sequentially.

resulting in their request for due process filed with the NMPED on July 10, 2006. *DPHO Exhibit 1, Exhibit 17.*

21. DA, Student's behavioral consultant (contracted to do case reviews through the Department of Health Office of Behavioral Science), received all his information re: transportation safety issues from Student's mother only, and then only since June, 2006. *Exhibit 7.*

22. DA testified that he would recommend that a Developmental Disabilities (DD) waiver occupational therapist perform an occupational evaluation to determine vehicle safety, but had not yet referred Student for the OT evaluation as of the date of the hearing. *TR 54.*

23. DA did case reviews with Department of Health staff members approximately once a month and did not have direct contact with Student. *TR 12-13.*

24. DA has no personal knowledge of Student's behaviors while being transferred to school, his workplace, or in family vehicles. *TR 13, 27-28.*

25. DA did not mention transportation safety issues in his Behavior Support Plan (BSA) dated June, 2006. He related concerns expressed by Student's mother in his annual assessment dated August 12, 2006. *Exhibits 5, 6, 7.*

26. Student is active, enjoys physical activities, and has no physical limitations. *Exhibit 12, pp. 5, 13; TR 290.*

27. School staff report Student has a history of behavioral outbursts requiring assistance from an aide; Student demonstrates hitting, touching, grabbing and other behaviors. *Exhibit 7, p.12; TR 229, 290-293, 346, 354.*

28. Student's one-on-one aide, SW, an extremely credible witness with respect to Student's behaviors, spends the entire the school day with Student (apart from his lunch break).

TR 168-169.

29. When Student was first enrolled in the LEA in 2002, over 400 hitting incidents in one day on average were recorded by school staff. According to SW, Student now rarely has emotional outbursts but they still occur. *TR 174, 188-189, 340-341 .*

30. According to SW and CS (Student's special education teacher and case manager), Student can move independently. Student did not have any problems with bus transportation going to and from the swimming pool (20 minutes each way) or on longer field trips to Albuquerque in the 2005-2006 school year. Based upon his daily experiences with Student, SW believes Student can ride to school on either the special ed or the regular school bus with an aide. *Exhibit C; TR 180, 184, 185, 192-193, 296,308-309, 311, 318.*

31. Student requires an aide if he rides a regular or special ed school bus. *TR 317.*

32. In the professional opinion of Dr. DL, the school psychologist (and District's interim special education director), a credible witness familiar with Student's unique needs, Student does not require door-to-door transportation to access his educational program. *TR 356-358, 360-361.*

33. Mother reported to school personnel incidents involving physical aggression when she was transporting Student. On one occasion in November, 2005, witnessed by CS, Student had exited the family vehicle in a parking lot while accompanying Parent on a trip to Santa Fe and was observed having an outburst in the middle of the street. *TR 178, 203, 294-295, 319-320.*

34. School personnel deal with Student's tantrumming with a Behavior Intervention Plan (BIP). Student's family has never consulted with school staff about implementing the BIP in the home setting. *Exhibit 3; TR 322.*

35. Parents have never asked DA for assistance in modifying Student's behavior while he is in a vehicle with a family member (mother especially) and have never obtained an opinion from a medical provider that Student requires door-to-door transportation. *TR 242, 245-247.*

36. Parents have no problem with Student's educational program, from which Student benefits. *TR 207-208.*

37. By mother's admission and from the reports of others present, the IEP Team discussed Student's unique needs and disability at numerous IEP meetings, as well as having considered New Mexico transportation standards. *Exhibit B; TR 128-136, 254-255, 297-298, 318-319, 331-332.*

38. District has stipulated that pickup and delivery at either of the two District bus stops (Zuni Canyon Road or Highway 53) and bus transportation at either of those points to and from school accompanied by an aide, are options that remain open for Student, as well as the option of feeder-route payment at the state required level should Parents choose to transport Student the entire distance to school. *TR 367.*

CONCLUSIONS OF LAW

1. The District is required to provide transportation to and from school for a child with a disability if the child's disability is such that the child cannot be transported to and from school by regular means. *20 U.S.C. §§ 1400, et seq., 34 CFR §§ 300.511--300.514 (2006), 6.31.2.13(I) NMAC (2005).*

2. The District is required to provide transportation to and from school for a child with a disability if the child's disability is such that the child cannot be transported to and from school by regular means, unless the child's parent can demonstrate that the child can be transported to and from school by regular means.

3. The District is required to provide transportation to and from school for a child with a disability if the child's disability is such that the child cannot be transported to and from school by regular means, unless the child's parent can demonstrate that the child can be transported to and from school by regular means.

student's IEP (and what the components of that related service are based upon the disability and the unique needs presented by a student, as well as the mode of transportation), is strictly an IEP decision based upon a state's transportation standards. *Exhibit B; TR 318*.

13. The IEP Team has considered numerous transportation options in light of the criteria mandated in the New Mexico standards for transportation. *Exhibit B; Malehorn v. Hill City Sch. Dist., 27 IDELR 144 (S.D.1997)*

14. District has provided Student with access to education.

15. District's transportation options for Student are consistent with FAPE.

16. Parents have not met their burden of proof by a preponderance of evidence.

17. Parents' request for due process is dismissed with prejudice as a matter of law.

Fed.R.Civ.P. 32(c).

18. Parents/Student have exhausted administrative remedies.

DISCUSSION

Standing

Procedure for transferring rights upon reaching the age of majority is not specifically governed by IDEA, but left to the states; *34 CFR §300.520(b)* provides:

Special rule: A State must establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of child's eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program." [20 U.S.C. 1415(m)]

New Mexico has not established informal proceedings for appointing the parent of a child with a

disability to act on a student's behalf as contemplated by the Special Rule. In New Mexico, the procedure for transfer of rights once a child attains the age of majority is governed by 6.31.2.13(K)

(1)NMAC (2000):

....A guardianship proceeding under the Probate Code is the only way an adult in New Mexico can legally be determined to be incompetent and have the right to make his own her own decisions taken away. Public agencies and their IEP Teams are not empowered to make such determinations under New Mexico law. Accordingly, pursuant to 34 CFR Sec. 500.517,³ when a student with a disability reaches age 18 and does not have a court-appointed general guardian, limited guardian or other person who has been authorized by a court to make educational decisions on the student's behalf: (a) a public agency shall provide any notices required by 34 CFR Part 300 to the student and the parents; (b) all other rights accorded to parents under Part B of the IDEA, New Mexico law or SBE rules and standards transfer to the student; and (c) the public agency shall notify the individual and the parents of the transfer of rights.

District challenges Parents' standing to file a request for due process and challenges the DPHO's jurisdiction to conduct a due process hearing in the absence of a legal guardianship.

Estoppel

While this DPHO could find no cases directly on point (neither were any cases cited in support of District's position), there is some guidance in the IDEA itself, which mandates parental participation, and in the doctrine of quasi-estoppel.

The 4th Circuit Court of Appeals provided the elements of the doctrine in Ritter v. Ulman, 78 F. 222, 224 (4th Cir. 1897): "In order to constitute estoppel, or quasi estoppel, by acquiescence, the party, with full knowledge or notice of his rights, must freely do what amounts to a recognition of the transaction, or must act in a manner inconsistent with its repudiation, or must

³Now 34 CFR §300.520.

lie by for a considerable time, and knowingly permit the other party to deal with the subject-matter under the belief that the transaction has been recognized, or must abstain for a considerable time from impeaching it, so that the other party may reasonably suppose that it is recognized.”

More recently, several courts have relied upon the doctrine of quasi-estoppel to remedy perceived injustices. As the Court explained in County Sch. Bd. of Henrico County v. R.T., 46 IDELR 4 (E.D. Va. 2006),⁴ the doctrine of quasi-estoppel “was developed to prevent a party from retaining a benefit by asserting a position to the disadvantage of another and then asserting a right which is inconsistent with that previous position.” See also Hesling v. Avon Grove School District, 45 IDELR 190 (2006), which held that a school district’s failure to disclose certain information to a parent constituted a breach of the duty of good faith and fair dealing. See also Bates v. Long Island R.R. Co., 997 F.2d 1028 (2d Cir. 1993); Erie Telecommunications Inc. v. City of Erie, 659 F. Supp. 580 (W.D. Pa. 1987).

The emphasis throughout IDEA is on timely resolution of educational disputes, consistent with parental input and parental participation. 34 CFR §300.501. Parents are empowered to bring appeals to federal district courts as “aggrieved parties,” no matter what the age of the student. 34 CFR §300.516. To give credence to District’s position would be to place Student’s educational concerns in a legal limbo, denying him a legal remedy. Although District has argued for a dismissal without prejudice wherein Parents can refile once the legal guardianship is perfected, this does not solve the problem. “Justice delayed is justice denied.” William Ewart Gladstone(1809-1898).

⁴ Quoting Stimpson v. Plano Indep. School Dist., 743 S.W. 2d 944, 946 (Tex.App.-Dallas 1987)

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that the foregoing is a true and correct copy of the original as filed with the court on 9/20/2006: Cuddy, Kennedy, Albetta & Ives, LLP, P.O. Box 4160, Santa Fe, New Mexico 87502-4160; Dennis Drucker, Esq., Protection and Advocacy System, 1720 Louisiana Blvd., NE, Suite 204, Albuquerque, New Mexico 87110; and the undersigned, do hereby certify that the foregoing is a true and correct copy of the original as filed with the court on 9/20/2006. 300 P.O. Box 4160, Santa Fe, New Mexico 87501-2786.

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