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Must schools transport special education students to schools of their choice?

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We are beginning to see more frequent situations in which public school students may get to choose the school they plan to attend. It is generally true that students who have a choice of what school to attend will not have transportation available to any school they may choose, with transportation limited to a select school or schools. The question arises, however, as to whether special education students have broader transportation rights in this situation than do regular education children. This article addresses that issue.

Background

For those school units that do not run a public school at a particular grade level, or have a contract for school services, the parents of children at that grade level will usually have a choice as to which school the child will attend. We also see superintendents occasionally agree to “best interest” transfers of children to another school unit, and in this situation transportation is usually left up to parents. And now we are beginning to see the Commissioner of Education order transfers of students to other school units, even when the two superintendents could not agree on the transfer. In any of these situations, it is usually true that the local school unit where the family resides does not have a duty to transport to any school the family chooses. The local unit might opt to transport, but there is not a legal duty to do so.

The question we are beginning to hear is whether there is a different standard that applies if the child in question is a student with a disability and has an IEP or a 504 plan. This question arises both when the IEP itself makes no reference to special transportation, and when it does.

Governing principles

There is no question that if a school unit provides regular education students with transportation to schools of choice, or particular schools of choice, the school unit must also provide students with disabilities with transportation to those same schools. Any other approach would likely amount to disability-based discrimination. And certainly when an IEP or 504 team concludes that a child should attend a different school than he or she would otherwise attend, the home school unit will have to provide transportation to that other school unit.

But in the situation we are considering here, the parent is choosing to send the child to another school, not the IEP team. Or perhaps the parent is allowed to choose from a wide variety of school options, but has chosen one to which the home school unit is not offering transportation. When the parent is choosing a school without a transportation option, and the IEP team has not ordered placement at that school, does the home school unit have a duty to transport the child to that chosen school?

Although Maine courts have not specifically addressed these questions, courts and hearing officers in other jurisdictions offer some useful insight. These authorities generally conclude that a school may operate

under a nondiscriminatory transportation policy that applies to all students equally, and need not alter that policy to transport a special education student out-of-district, unless of course the student requires transportation as a related service in order to be provided with FAPE, or the transportation is required as a Section 504 accommodation.

Decisions from other jurisdictions

Two cases from the Eighth Circuit Court of Appeals involved students with disabilities who, out of personal preference and not through the IEP or 504 team process, elected to attend school in a district other than the school the child would normally attend. The court in both cases held that the student's local school unit was not required by law to provide transportation to the new school.

In the first case, the court ruled that the school did not discriminate against a high school student when it refused to provide her with specialized transportation to the school of her choice under an intra-district transfer program.¹ Under the transfer program, parents could send their child to a school other than the neighborhood school as long as the parents agreed to assume responsibility for transportation to and from the school. A disabled student requested a special bus route using a special lift bus so that the student could attend a school outside her neighborhood boundaries. The student was already admittedly receiving FAPE at the neighborhood school and sought to switch schools based only on her parents' preferences. The court held that the school was not required to provide transportation to the new school because the child was not being denied FAPE and because the transportation policy was facially neutral, meaning it did not discriminate against students with disabilities because all parents in the school system had to pay for transportation costs in order to participate in the program.

In the second case, the parent of a special education student challenged the school's refusal to transport the student to a day care center outside school district boundaries.² The court in this case again found that the disabled child's educational needs were being met by the school within the neighborhood boundaries, and the request for transportation to an outside school was for reasons of parental preference. The court reiterated that a school's obligation under the IDEA and Section 504 is to provide disabled students with FAPE. Therefore, as long as that obligation has been met, "a school district may apply a facially neutral transportation policy to a disabled child without violating the law when the request for a deviation from the policy is not based on the child's educational needs but on the parents' convenience or preference."

Both opinions stressed that if the parent could show a specific disability-related need for special transportation, the school may be required to accommodate that need. However, in the first case, the court also added that even if the parent had requested an accommodation, providing transportation to a more distant school for reasons of parental preference would have been an undue burden on the school district given the expected annual cost of approximately \$24,000.

In 2008, a Pennsylvania hearing officer decided that a school was not required to provide transportation when a parent chose to transfer a child out of the neighborhood school to a different school solely on the parent's belief that the new school was "better in general."³ The hearing officer acknowledged that "any student – one eligible for special education and related services or not – needs to get to school in order to partake of the program offered" but concluded that the parent was responsible for transportation because the request was unrelated to any special needs of the student and had nothing to do with any deficiency or failure to provide FAPE in the first program. The hearing officer also stated that the district's burden would be "tremendous and likely unsustainable" if it had to accommodate all such requests from students in the district. Still, as in the Eighth Circuit cases above, the hearing officer emphasized that if a parent could prove a connection between the request for transportation and the student's disability needs, then the parent may have had a case for the transportation.

Similarly, a Pennsylvania court reiterated the point that children with disabilities are only entitled to individualized transportation services when they are necessary to some fundamental part of their special

education needs.⁴ The court first explained that a school must provide related services such as transportation when necessary to meet some integral part of the student's educational needs, even if it imposes a substantial burden on the school system. Interestingly, the court also indicated that the expected benefit of a program to a child should be weighed against the projected cost or burden imposed upon the school. In the end, the court concluded that federal law does not require the school to modify its transportation policy to accommodate the needs, work schedules or domestic arrangements of parents or guardians.

Several other hearing officer decisions show a similar trend: Public schools must provide transportation to an out-of-district school when to do otherwise would deny the child FAPE, and may be required to do so as part of a Section 504 accommodation, but otherwise need not alter a nondiscriminatory transportation policy to accommodate non-educational parent preference.⁵

What this means for Maine school units

The above decisions are useful when considering transportation issues in Maine school units, although different factual scenarios can lead to different results, and the above decisions are not binding in Maine. Nonetheless, these decisions indicate that a school's disability-neutral transportation policy will likely be upheld, as long as it does not depart from any generally accepted standards for transporting students with disabilities, or deprive a student of FAPE. In other words, as long as the school demonstrates that it provided the student with the option of FAPE, a parent who then chooses to place the student at a school other than the one where that FAPE is available based on preference or convenience will likely be responsible for transportation. And in the case of school units without a school or contract for school services, where the family generally can select a school for the child to attend, it should generally be permissible if the school unit is offering transportation to some school that has a FAPE available to the child. The local unit should not then have to offer transportation to other schools as well.

It is important to remember that although a child with a disability is not automatically entitled to a change in the school's normal transportation policy, the IEP team might conclude that in any particular case the child requires transportation to access a particular program necessary for the student to receive a FAPE. In that situation, transportation should be included in the IEP and must then be delivered. As with other "related services," the issue of transportation should be considered on a case-by-case basis during the IEP process. Once an educational program is selected, any transportation arrangements agreed upon should be described in the IEP with specificity.⁶ In cases where the IEP team determines that transportation is a related service because it is required to assist that student to benefit from special education, schools must provide transportation to the student at no cost to the family. However, as the above decisions indicate, courts and hearing officers are reluctant to require a school unit to modify its transportation policy based on a parent's request for reasons of convenience or personal preference. ■

Endnotes

1. *Timothy H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968 (8th Cir. 1999). Although this case involved a claim under Section 504, the court later affirmed that the same reasoning applies to cases arising under the IDEA.

2. *Fick v. Sioux Falls Sch. Dist.*, 337 F.3d 968 (8th Cir. 2003).

3. *Philadelphia City Sch. Dist.*, 108 LRP 60697 (SEA PA 2008).

4. *North Allegheny Sch. Dist. v. Gregory P.*, 687 A.2d 37, 40 (Pa. Commw. Ct. 1996).
5. See *Mountain Bd. of Coop. Educational Services*, 45 IDELR 83 (SEA CO 2005) (hearing officer decided that a disabled preschool student was entitled to transportation to and from her program even though the school's policy was not to provide transportation to preschool students, because the child would not receive FAPE without transportation from the school); *In re: Student with a Disability*, 40 IDELR 172 (SEA Mich. 2003) (finding that the school was not required to provide transportation where an IEP did not include any mention of transportation, the student was not eligible for transportation under the school's regular education policy, and the evidence did not support a need for special transportation in order to provide FAPE).
6. Whenever transportation is included in an IEP, it should be made clear whether transportation is also required to afford the student the opportunity to participate in school-related activities outside of normal school hours, such as extracurricular activities.