

XXXX XXXX,	*	BEFORE WILLIAM SOMERVILLE,
STUDENT	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE
PRINCE GEORGE’S COUNTY	*	OF ADMINISTRATIVE HEARINGS
PUBLIC SCHOOLS	*	OAH No.: MSDE-PGEO-OT-16-30405
* * * * *		

DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
ORDER

STATEMENT OF THE CASE

On October 4, 2016, XXXX XXXX (Parent), on behalf of her child, XXXX XXXX (Student), filed a Due Process Complaint with the Office of Administrative Hearings (OAH) requesting a hearing to review the implementation of the Student’s Individual Education Program (IEP) by Prince George’s County Public Schools (PGCPS) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1415(f)(1)(A) (2010).¹

I held a telephone prehearing conference on December 6, 2016. The Parent and the Student were represented by Marlon S. Charles, Esq. Gail B. Viens, Esq., represented the PCGPS. By agreement of the parties, the hearing was scheduled for January 5, 2017. I held the hearing on the agreed upon date. Parties were represented as set forth above.

The hearing date requested by the parties fell more than 45 days after the triggering events described in the federal regulations, which is the date my decision would have been due.

¹ U.S.C.A. is an abbreviation for United States Code Annotated.

34 C.F.R. § 300.510(b) and (c); 34 C.F.R. § 300.515(a) and (c) (2016).² The Parties requested an extension of time until Saturday, February 4, 2017, for me to issue a decision. 34 C.F.R. 300.515 (2016); Md. Code Ann., Educ. § 8-413(h) (Supp. 2016).

Federal regulations require that the due process hearing be heard, and a decision issued, within forty-five days of certain triggering events described in the federal regulations. The OAH received the due process complaint on October 4, 2016. The resolution session began on October 19, 2016. On November 4, 2016, PGCPs notified OAH that the resolution session had concluded that day and the matter remained unresolved. Therefore, the triggering event in this case was on November 4, 2016. 34 C.F.R. §§ 300.510(b) - (c); 34 C.F.R. §§ 300.515(a), (c). On November 17, 2016, the parties were contacted to coordinate the scheduling of a prehearing conference, and on December 1, 2016, the parties agreed to have the prehearing conference conducted on December 6, 2016. During the prehearing conference, the parties advised me that January 5, 2017, was the earliest date on which they could be available for a hearing. I reviewed the parties' respective calendars and determined that January 5, 2017 was, in fact, the earliest date that both parties were available for a hearing. Both parties requested that I grant an extension of the forty-five day timeline, requesting that the matter be scheduled for a hearing on January 5, 2017 and that my decision be issued on or before thirty days thereafter. I granted that request. The hearing was conducted on January 5, 2017, and the parties reconfirmed, on the record, that they were requesting that my decision be issued on or before thirty days after the hearing date. That date would be Saturday, February 4, 2017. Internal OAH policy suggests that I issue the decision on an earlier workday, which would then be on or before Friday, February 3, 2017.

² C.F.R. is an abbreviation for Code of Federal Regulations.

During the course of the hearing, the PGCPS made a motion to dismiss at the end of the Student's presentation. I denied that motion. COMAR 28.02.01.12.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2016); Md. Code Ann., Educ. § 8-413(e)(1) (Supp. 2016); and Code of Maryland Regulations (COMAR) 13A.05.01.15C.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act; Maryland State Department of Education (MSDE) procedural regulations; and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); COMAR 13A.05.01.15C; COMAR 28.02.01.

ISSUES

Did the PGCPS deny the Student a free and appropriate public education (FAPE) by inappropriately implementing a related service – that being bus transportation? And if so, what requested remedy is appropriate?

SUMMARY OF THE EVIDENCE

Exhibits

The Parent offered no exhibits.

I admitted the following exhibits offered by PGCPS:

PGCPS Ex. 1 – Notice, 10-25-2016

PGCPS Ex. 2 -- Revocation notice, 11-1-2016

Testimony

The Parent testified and presented the following witness:

- XXXX XXXX, Ph.D., admitted as an expert in “related services – transportation” and in “compensatory education plans”
- The Student

The PGCPs presented the following witnesses:

- XXXX XXXX, admitted as an expert in “special education”
- XXXX XXXX, admitted as an expert in “special education”
- The Parent

FINDINGS OF FACT

Based upon demeanor evidence, testimony, and other evidence presented, I find the following facts by a preponderance of the evidence:

1. At all times relevant, the Student (born in XXXX 2000) was the daughter of the Parent, and was enrolled in the PGCPs. She was in eleventh grade beginning in the 2016-2017 school year.
2. Until November 1, 2016, the Student was a special education student in the PGCPs. She had an IEP and the IEP included bus transportation as a “related service.”³ The transportation schedule was set forth in a separate transportation agreement.
3. The Student had weaknesses in social/emotional skills, problem solving skills, opposition to authority, task management, and she was unavailable for learning at times because of social issues.
4. The Student’s neighborhood school is [School 1].
5. Beginning sometime in late August 2016, the Student was placed in a Transition program with twenty-two other students at [School 2]. The Transition program supports students with emotional difficulties and provides academic support. It provides, among other things, early dismissal to address social emotional needs. Students in the program are given more time to transition between their scheduled classes and events, including boarding the school bus. The program provides access to a “reflection room” and to work accommodations. That learning

³ No IEP was offered into evidence.

environment provides academic and direct support from a social worker, a case manager, a “crisis interventionist,” and various teachers. The program also offers academic support through small, co-taught classes, a resources class, “scaffolding assignments” and “wrap around supports.”

6. As part of the Transition program, from late August 2016 until October 13, 2016, the Student’s afternoon school bus would leave twenty-five or thirty minutes before the end of her last class. She would leave at around 2:00 p.m. when the classes ended at 2:30 p.m. Because the school used an “A-day, B-day” schedule, the Student’s last class was either a government civics class or a home-economics-like “Food & Nutrition” class.

7. The government civics class was a regular education class which was co-taught.

8. The resource class to which the Student was given access was a ninety minute class in which twenty minutes were devoted to social/organizational skills and the remaining seventy minutes were devoted to review, re-teaching, and pre-teaching academic material from the Student’s other classes.

9. The Student believed that making up for missed class instruction from the government civics class in the resource class was “more work” and cut into resource assistance that she could have used for another class, such as geometry. In the resource class, she did not seek any assistance for the Food & Nutrition class.

10. On October 4, 2016, the Student’s Parent, through counsel, filed a request for hearing alleging that with regard to bus transportation, “PGCPS failure to appropriately implement a related service . . . constitutes a bold denial of FAPE.”

11. After October 13, 2016, the Student’s bus schedule was modified; the school held the Student’s bus for thirty minutes to allow her to remain in her last classes. After that date, the Student did not always stay in class until the end of the period.

12. On October 19, 2016, the parties held a resolution meeting.

13. By October 19, 2016, the Student had been absent for eighteen days of the quarter.

14. The Student's first-quarter report card, or progress report, showed that she received Ds in the two end-of-the-day classes. She also received a similar grade in her first-period geometry class. These grades were substantially similar to the grades that she had previously received at [School 1].

15. On October 25, 2016, the parties held an IEP meeting. At that time, the Student threatened to drop out of school if she could not transfer back to [School 1].

16. The Student benefitted educationally at the Transition program because with its academic and social-emotional supports, she learned how to "handle certain situations," remain in class for more time, improve organizational skills, reduce distractions, and reduce disciplinary actions, among other things.

17. On November 1, 2016, by written note, the Parent revoked consent for special education services for the Student and the Student began to attend [School 1].

DISCUSSION

Burdens

The Student bears the burdens of production and persuasion by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49 (2005).

Special Education Law Overview

The identification, evaluation, and placement of students in special education are governed by the IDEA, state statutes, and state and federal regulations. 20 U.S.C. §§ 1400-1482 (2010 & Supp. 2016); 34 C.F.R. Part 300 (2016); Md. Code Ann., Educ. §§ 8-401 through 8-417 (2014 & Supp. 2016) and COMAR 13A.05.01. The IDEA requires "that all children with

disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living.” 20 U.S.C.A. § 1400(d)(1)(A) (Supp. 2016); 20 U.S.C.A. § 1412; *see also* Md. Code Ann., Educ. § 8-403 (2014).

Title 20, Section 1401(9) of the United States Code defines FAPE:

(9) Free appropriate public education -- The term “free appropriate public education” means special education and related services that—

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

Similarly, 34 C.F.R. § 300.17 defines FAPE:

Free appropriate public education or FAPE means special education and related services that —

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

The requirement to provide FAPE is satisfied by providing personalized instruction with sufficient support services to permit a child to benefit educationally from that instruction. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Supreme Court defined FAPE as follows:

Implicit in the congressional purpose of providing access to a “free appropriate public education” is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped

child....We therefore conclude that the basic “floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to give educational benefit to the handicapped child.

Rowley, 458 U.S. at 200, 201.

A student is not entitled to “[t]he best education, public or non-public, that money can buy” or “all the services necessary” to maximize educational benefits. *Hessler v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983), citing *Rowley*, 458 U.S. 176. The *Rowley* Court further stated that with regard to the IEP, the issue is whether the IEP is “reasonably calculated to enable the child to” benefit educationally. *Id.* at 203-04. The issue is not whether the IEP will enable the student to maximize his or her potential.

The IDEA requires an IEP to provide a “basic floor of opportunity that access to special education and related services provides.” *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990) (citing *Rowley*, 458 U.S. at 201). It does not establish a “requirement to guarantee any particular outcome for the child.” *King v. Bd. of Educ.*, 999 F. Supp. 750, 767 (D. Md. 1998).

To the maximum extent possible, the IDEA seeks to have children placed in regular public school environments, but in any case, to have them placed in the “least restrictive environment” (LRE) that is consistent with their educational needs. 20 U.S.C.A. § 1412(a)(5).

Arguments of the Parties

The Student and Parent argue that the Student was not provided a FAPE because she was dismissed early from her last-period class in order to transition to the school bus. They suggest that fifty or sixty hours of tutoring would compensate for the inappropriate provision of education.

The PGCPS argues that the Student and Parent have not met their evidentiary burdens. The local school system argues that the Student has not shown 1) a failure to appropriately

implement the transportation related service, 2) the implementation of the related service resulted in a denial of FAPE, 3) any harm, and 4) the proposed compensatory education is an appropriate remedy.

Analysis

In the instant case, on the basis of this evidentiary record, counsel for the Student and Parent would have me determine that the Student's poor grades in two afternoon classes – civics and Food and Nutrition – in the first quarter of 2016, while the Student was placed in a special education transition program at [School 2], were caused by the planned, early-dismissal support which allowed the Student to leave school in the afternoon twenty to thirty minutes before the general education students. He suggests that this determination should allow me to conclude that the Student's grades were “negatively impacted” and that a FAPE was denied.

To provide a FAPE, a school system must provide sufficient “related services” to allow a student to obtain meaningful educational benefit from her IEP. 20 USCA §1414(d)(1)(A)(i)(IV); 34 CFR §300.34(a). Transportation is a “related service.” 34 CFR §300.34(a); *Oceanside Unified School District*, 58 IDELR 266 (2012) (issue was whether manner of providing bus transportation denied a FAPE). Disputes over transportation as a related service can be a proper basis for requesting a hearing under the IDEA. *Letter to Anonymous*, 20 IDELR 1155 (1993).

In the instant case, bus transportation was a related service included in the Student's IEP. (Finding of Fact 2.)

There are times when a related service, such as transportation, properly shortens the academic day of a student. *See Santa Rosa School District*, 18 IDELR 153 (1991) (IEPs and §504 plans can contemplate shortened school days or shortened instruction time as support to a student). Credible evidence in the instant case showed that the twenty-two students in the Transition program at [School 2], including the Student, benefited from an early transition period

to get to the afternoon buses without the other students around. Early dismissal was part of the Student's IEP. (Findings of Fact 5 & 6.) Credible evidence in the instant case showed that the Student benefited by the early dismissal, despite losing twenty-five or thirty minutes of class time in the afternoon. (Finding of Fact 5 and testimony of XXXX.) Credible evidence showed that despite her brief stay in her program, the Student benefited by her program at [School 2]. She learned how to "handle certain situations," remain in class for more time, improve organizational skills, reduce distractions, and reduce disciplinary actions, among other things. (Finding of Fact 16.) Her program provided early dismissal to address social emotional needs.

Students in the Transition program at [School 2] were given more time to transition between their scheduled classes and events, including boarding the school bus. The program provided access to a "reflection room" and to work accommodations. That learning environment provided academic and direct support from a social worker, a case manager, a "crisis interventionist," and various teachers. The program also offered academic supports through small, co-taught classes, a resources class in which missed classwork could be reviewed and retaught, "scaffolding assignments" (which means pacing assignments) and "wrap around supports." (Finding of Fact 5.) Even the expert witness for the Student believed that the Transition program was a good fit for the Student. (Testimony of XXXX.) With regard to the benefit of the early-dismissal support to transition to the school bus, once that support was stopped on October 13, 2016, the Student had trouble transitioning to the bus. (Testimony of XXXX.) I conclude that during the short portion of the school year when the Student was dismissed early, the Student received "access to specialized instruction and related services which are individually designed to give educational benefit" to the Student. *Rowley*, 458 U.S. at

200, 201. She had a reasonable opportunity to make significant educational progress; it has not been shown that she was denied a FAPE by early dismissal for transitioning to the school bus.

The Student's expert witness offered an opinion that the early-dismissal support negatively impacted the Student's grades. Negatively impacting marks, to some extent, is not the same as a denying FAPE. Grades are not the only indicator of whether a student is receiving an educational benefit from his or her IEP. *See Hall v. Vance Cty Bd. of Ed.*, 774 F. 2d 629, 635-36 (4th Cir. 1985) (grades and promotions are fallible measures of FAPE). Moreover, the witness offered that opinion in spite of the fact that 1) the Student's barely-passing grades in her last-period classes were equivalent to those grades she received before being placed in the transition program at [School 2]; her grades were no worse 2) her barely passing grade in geometry was in a first-period class; that grade is not attributed to early dismissal, and 3) from the beginning of the school year in August until the date in mid-October when the bus schedule was modified for the Student, there were only about thirty school days, at least fifteen of which⁴ the Student was absent; unpredictable absenteeism probably played a significant role in the poor grades. The witness suggested that I should recognize that the school system sacrificed class instruction for the early-dismissal support to the detriment of providing a FAPE. He also offered an opinion on what compensatory education might remedy the loss of class time. Unlike the experts for the school system, the opinions of the expert witness for the Student were not well articulated or well supported with facts. The Parent and Student have not met their burdens.

Having concluded that the Parent and Student have not met their burdens to show a denial of FAPE, I need not address the appropriateness of proposed compensatory education. *M.C. v. Central Regional Sch. Dist.*, 81 F. 3d 389, 395(1996) (remedies like reimbursement and compensatory education are available under the act if a school system denies a FAPE).

⁴ As of October 19, 2016, the Student had been absent eighteen days. (Finding of Fact 13.) Although the exact figures are not important, by subtracting the three school days between October 13 and October 19 as days on which the Student was possibly absent, that leaves at least fifteen days on or before October 13, 2016.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Parent and Student have not met their burdens to show that the Student was denied a FAPE for inappropriate implementation of a related service during the period when the Student was dismissed early in order to transition to the school bus. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

ORDER

I **ORDER** that the Parent and Student's complaint be, and is hereby, **DISMISSED**.

January 31, 2017
Date Decision Issued

William J.D. Somerville III
Administrative Law Judge

WS/emh

REVIEW RIGHTS

Any party aggrieved by this Final Decision may file an appeal with the Circuit Court for Baltimore City, if the Student resides in Baltimore City, or with the circuit court for the county where the Student resides, or to the Federal District Court of Maryland, within 120 days of the issuance of this decision. Md. Code Ann., Educ. § 8-413(j) (Supp. 2016). A petition may be filed with the appropriate court to waive filing fees and costs on the ground of indigence. Should a party file an appeal of the hearing decision, that party must notify the Assistant State Superintendent for Special Education, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201, in writing, of the filing of the court action. The written notification of the filing of the court action must include the Office of Administrative Hearings' case name and number, the date of the decision, and the county circuit or federal district court's case name and docket number. The Office of Administrative Hearings is not a party to any review process.