

Avoiding Legal Potholes

STUDENT TRANSPORTATION

Selected Cases 2003-2017

Laura Booth
Attorney, Booth Law Group

Linda Gardner
Director, Special Services
Hopkins Public Schools

Does a school district have to provide transportation to and from home for an open enrolled student with an IEP that includes special transportation? A parent chose to open enroll her child who had an IEP to another school district under the Minnesota open enrollment statute. The IEP included special education transportation to and from school. The school district offered transport the student from the District's boundary to the school. The parent argued that as part of the obligation to provide a free appropriate public education (FAPE) her student required door to door transportation.

The Minnesota Department of Education in a similar case held that a school district must make an individual determination of whether an open enrolled student required door to door transportation.

Relying on MDE's earlier decision, the Administrative Law Judge in this case held that the IEP that called for special transportation "to and from school" required the

open enrolling district to provide door to door transportation. *Ind. Sch. Dist. 279*, OAH 82-1300-34084, (SEA MN 2017).

The case is currently on appeal to the federal district court.

Does a district have to provide transportation to day care center outside of the school's "cluster site" transportation boundaries? A Student with epileptic seizures required a nurse to accompany her in a taxi to and from school each day in case she had a seizure and needed a shot of Valium. The Student sued the school district to require it to provide the special education transportation to a day care outside of the school's boundaries. The District argued that it is following its policy to require all pick-up and drop-off addresses be within their borders of the cluster-sites.

The Eighth Circuit followed its precedent of *Timothy H. v. Cedar Rapids Cmty. Sch. Dist.*, that "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." Therefore, this school district did not violate the IDEA as the request for a different drop-off site was due to the parent's personal reasons and not because of the student's disability. *Fick ex rel. Fick v. Sioux Falls School Dist.*, 337 F.3d 968 (8th Cir., 2003).

Does a school have to provide door-to-door transportation? A student who is dependent on a wheelchair for mobility is legally blind, has a seizure disorder, and suffers cognitive impairments sued the school district when it refused to provide door-to-door transportation which included pushing the wheelchair up a 50-foot driveway and then up a 12-foot ramp (which was not ADA compliant). His guardians each worked at schools and were not always available after school to push the student up the ramp. On two occasions when the guardians were not available, the student was left outside in inclement weather. The District offered curb-to-curb or supervision at his school or another school until the guardians were available.

The District argued the guardians could pay someone to consistently be there, but the Court determined it is not the parents' responsibility but the District's. The Court found leaving the student at the foot of the ramp " did not complete the transaction

of transportation to and from school.” The District court affirmed the hearing officer’s decision requiring the school to provide door-to-door transportation. *Anchorage School District v. N.S., ex rel. R.P.*, 2007 WL 8058163 (D. Alaska, 2007).

So what can/should we do?

Linda says: It is very important that the IEP team fully describe the student’s needs while in the care of a bus driver. We can never assume that the descriptions elsewhere in the IEP will be sufficient to describe transportation needs since they can be quite different. Teachers may not be well trained in this area and it is up to all of us to be sure we ask enough questions to be sure we can follow the plan.

Clearly, it was a big mistake to leave the student outside in inclement weather. The larger error though is in not using the IEP to address what we will do if a parent/guardian is not there when we arrive.

What might the team have tried?

Can the guardian predict when they might not be home? Could we alter the drop off schedule so that the student could be assured of arriving after the guardian?

Wording for the IEP: Due to [Student’s] physical and cognitive needs, s/he will be provided special transportation arrangements. [Student] is unable to self-propel from the bus to the door of his/her home and from the bus into the school building. An adult assistant will be responsible to assist the student on/off the bus, bring the student to the bus from the school and will assist the student from the bus on arrival at home. The bus and the paraprofessional will wait for the parent/guardian to arrive at the bus to bring the student into the home.

Does a school have to provide a transportation aide to convey a student to and from the student’s apartment to the school bus? Because the parents were unable to transfer the Student who used a wheelchair from the apartment to the school bus outside, the Student was unable to attend school for almost two years. The District Court determined that without the District providing an aide who could take the student from the apartment to the school bus, the IEP is not reasonably calculated to enable the child to receive educational benefit, because he cannot access any of the other services in the IEP if he is not at school. This is not covered by *Fick* or

Timothy H. as those students were attending school and it was simply the parental preference or convenience that was at issue.

Here, the Student was not attending school for two years and therefore not receiving any services under the IEP. Additionally, it was not unreasonable for the school district to provide an aide to transport the student from the apartment to the school bus. *District of Columbia v. Ramirez*, 377 F.Supp.2d 63 (D.D.C. 2005).

So what can/should we do?

Linda says: We would never want a student to be out of school for two years. The team should meet as soon as they see the trend of the student not attending. If the parents do not agree to meet or cancel meetings or don't show up – the team still must meet to address the concerns and attempt to reach some conclusion that leads to the student receiving an education. The school team then provides the parent with a "Prior Written Notice" offering an alternative to the attendance problem.

An important take-away here is that Transportation must be in contact with the building principal, the Director of Special Services or someone in the district when you become aware of an issue with a student not getting on the bus. In Hopkins, the transportation office will contact me, or someone in my office to ask whether the route should be cancelled. This often leads us to ask more questions.

The IEP. In this case, the team should consider an IEP goal that leads to the student's independence in transferring from home to bus. In this way, the need to have an aid simply to bring the student from apartment door to bus can be a temporary solution.

- [Student] will increase independence for self-ambulation from a level of being dependent on an adult for movement from one place to another 100% of the time to being able to move from one area to another up to a distance of 100 feet when there are no obstacles.
- Student will be able to direct an adult along the hallway, verbally indicating turns and movement around obstacles with 100% accuracy in 5 trials over 5 days.
- Student will be able to physically assist the adult in moving along a 50 foot hallway with no obstacles for at least ½ of the way in 5 trials over 5 days.
- Student will be able to physically assist the adult in navigating around small obstacles and for 100 feet, for at least 1/5 of the distance in 5 trials over 5 days.

Does a public school district ever have to provide transportation to students attending a private school? A four year-old girl required speech-language therapy at the elementary school just four houses away. The District tried to argue that the student's disability did not require special education transportation.

The State Education Agency determined that it is not only if the child's disability directly causes a unique need for transportation, but rather, if the student with a disability requires transportation "to benefit from special education." Therefore, if a student with an IEP receives special education services from the public school at a different site other than her private school, the public school is responsible for the services; failure to provide the transportation services could result in a denial of a FAPE. Whether the student requires transportation depends on several factors: 1) the child's age, 2) the distance, 3) the nature of the area, 4) the access to private assistance, and 5) the availability of public assistance. *Weymouth Pub. Schs.*, 56 IDELR 117 (SEA MA 2011).

In another case, the school provided an aide to walk with a student the two blocks between a private school and the public school. This was determined as reasonable and therefore transportation was not required. *In re: Student with a Disability*, 114 LRP 18300 (SEA WI 12/10/13).

So what can/should we do?

Linda says: The IEP team should ask whether the child is able to walk the distance before assuming s/he can. It is often best to ask how far the student is allowed to walk on their own if they are going to a playground or some other non-school location. As the student develops independence, the IEP can be changed to reduce transportation requirements.

The IEP.

Some possible wording would be: Due to student's age [4] and independence, transportation will be provided from the student's driveway to the curb of the school. The team, including the parent, believes that the student will be able to independently make this walk by the time s/he is [6] years old. *Pick the age when typical peers with the same cognitive and physical skills are capable of this walk.

What are the school district’s obligations to a student with a disability when the student is removed from the regular school bus for the remainder of the year?

The Student with a disability on an IEP brought a MDE Complaint after receiving the following three documented bus suspensions in one school year:

- a. October 1, 2013: a five day suspension from the bus for behavior including “using profanity and [an] obscene gesture out [the] bus window at [School]; [he/she] threatened the life of a [Student]...”
- b. November 26, 2013: a five day suspension from the bus for behavior including “not sit[ting] in [his/her] assigned seat for [the] substitute driver; caused disruptions on the bus with a student and refused to obey the bus driver.”
- c. February 4, 2014: a suspension from the bus for the remainder of the 2013-14 school year for behavior including “throwing objects on the bus after being warned the day before not to throw things and distract the driver.”

The school district met with the parent in January 2014 to review and revise the Student’s IEP based on behavioral concerns but did not address the issues on the school bus.

The school district was found in violation of 34 C.F.R. §300.324(a)(2)(i) and 34 C.F.R. §300.324(b)(1) because it did not address the Student’s transportation needs in a timely fashion. Because the Parent was able to transport the student during the times of the suspension, the District was required to reimburse the Parent for her mileage. Additionally, the district was required to provide training to special education staff on its obligation to review and revise the Student’s IEP and to include issues on the school bus. MDE Complaint Decision #15-010C, December 22, 2014.

So what can/should we do?

Linda says: A suspension from the bus is a suspension from school if transportation is required for the student to receive education. A student experiencing 5 consecutive and/or up to 10 non-consecutive days of suspension must receive a

Manifestation Determination meeting, where the IEP team considers whether the behavior leading to the suspension was related to the disability. The true function and benefit of a Manifestation Determination meeting is that it causes the team to consider whether the services being provided are meeting the student's needs fully. Multiple bus suspensions clearly indicate that something must be done.

The important thing to consider here is that the district should have met about the frequency and causes of the bus suspensions regardless of the parents' ability to provide transportation.

This is a time when transportation should be in very close contact with the Director of Special Education to advise and follow-up with the school team.

What is a school district's responsibility when a student is allegedly sexually assaulted by a school bus driver? Student with a disability and on an IEP received special education transportation with an aide on the school bus during the school year. The Student did not qualify for extended school year services, but the Parents chose to enroll her in the general education summer school. The District amended her IEP so that the Student would use general education transportation when attending general education activities. During one ride home from summer school, the Student was allegedly sexually assaulted by the school district's bus driver. Upon being given notice of the alleged incident the bus driver was placed on paid leave, MDE was contacted with a Maltreatment of Minors report filed, and upon a MDE finding that maltreatment did occur, the driver was terminated.

The District Court of Minnesota found that the removal of special education transportation from the student's IEP did not violate Section 504 unless there was a showing of disability discrimination. Additionally, the District was not deemed responsible or even vicariously liable for the alleged misconduct of its employee as there was no nexus between the alleged assault and any custom or policy of the school district; the school district did not maintain inadequate reporting or remedial action plans, and did not violate the Minnesota Maltreatment of Minors Act. *M.Y. ex rel. J.Y. v. Special School Dist. No. 1*, 519 F.Supp.2d 995 (D. Minn. 2007).

How informed should a bus driver be about a student with an IEP? A student with an IEP required transportation on a daily basis. In addition, the IEP stated he required a safety vest, access to an air-conditioned bus, a bus attendant during

transportation to and from school, and that he be seated alone. The school district's bus drivers were routinely informed of accommodations through route sheets. His route sheet only stated the student required a "harness," but did not state the specialized transportation equipment, the personnel and supports required by the student's IEP relating to the air conditioner, the specific seating arrangement, and a bus attendant.

The Maryland State Educational Agency required the school district to show proof that the required transportation staff are informed of all IEP requirements related to each students' identified needs in the area of transportation. *Prince George's County Public Schools*, 66 IDELR 203 (SEA MD 2015).

So what can/should we do?

Linda says: *This* is a continual problem for all of us. It must be understood that Transportation departments must have all necessary information to do their job. Teams should provide the section of the IEP that fully describes the conditions of transportation. Transportation forms should include space for description.

What is the school district's responsibility to students with disabilities as they are being transported to and from school? A student with autism and sleep apnea had an IEP that included special education transportation. The student rode a school bus along with nine other students diagnosed with autism that had both a driver and an aide. One afternoon, the student failed to get off the bus at his regular stop and proceeded to fall asleep on the bus. He was left alone on the bus so that when he awakened he had to find a way off the bus and wandered alone until he was found by a stranger who ultimately left him with the school's football coach. The District argued that "checking a school bus for sleeping children before 'locking it up for the night' is 'common sense,' rendering an alleged lack of training irrelevant to the case."

The actions of the staff to not notice when the student missed his stop and when they did not ensure every child had left the bus at the end of the route could potentially violate the 14th Amendment and the District may be found liable under the *Monell* standard for *respondeat superior*. *K.M. V. Chichester School Dist.*, 152 F.Supp.3d 412 (E.D. Penn. 2015).

What is the school district's responsibility to protect students? Recently, a Minnesota school district was sued when a six year old student with EBD and ADHD was having behavioral issues on the bus and not following directions. Upon stopping at the students stop in front of his house, his older brother was allowed to exit the bus, but the six year old was not. The six year old was driven to the next stop which was 0.14 miles from his home on a day that had a wind chill of approximately -2 degrees Fahrenheit. It was reported as the Maltreatment of a Minor to the Minnesota Department of Education. MDE determined the bus driver neglected the child but the student did not suffer any physical consequences.

This case failed to provide the three elements the Eighth Circuit requires for a 42 U.S.C. §1983 claim in alleging failure to train employees: (1) that the government entity's training practices were inadequate; (2) that the government entity was deliberately indifferent to the rights of others in adopting the training practices, such that their failure reflects a deliberate or conscious choice by the government entity; and (3) that the alleged deficiencies in the training practices caused the plaintiff's injury.

Under Minnesota state law, a school district may be held responsible for an employee's actions under *respondeat superior* theory if the actions occurred within the scope of the employment, foreseeable, related to and connected with actions otherwise within the scope of his employment. The §1983 and *Monell* claims were dismissed, but the court allowed the claim for vicarious liability to continue as a fact question for the jury. *D.B. v. Nickolas Hargett and Independent Sch. Dist. 31*, 114 LRP 16569, 13-cv-2781 (D. Minn. 2014).

Does a school district have to provide transportation to students living within a safe walking zone when the parent has a disability? Recently a Georgia court analyzed a school district's responsibility under the Americans with Disabilities Act (ADA) to provide transportation to students when their mother was blind and therefore disabled. The mother requested transportation for her three elementary aged children due to her inability to walk them to and from the school even though the family lived in a safe neighborhood four tenths of a mile from the school. When the school offered several options for the children to get to and from school including: walk with other students as a group to school, ride with another student's

parent who offered to drive the children each day, or walk with a school staff person for several days to become acquainted with the route before walking by themselves, the mother declined all options. The court found that the children were entitled to the public benefit of public education, not the mother and therefore the mother was never denied meaningful access to public education for her children. Additionally, the court found that the school district had indeed offered the mother reasonable accommodations to get her children to school, but she had refused all options but the one she requested. None of the children had special needs and the school had done a walking and driving inspection of the residential neighborhood they lived in and found no hazards. The mother rejected a number of compromises because she could only trust the children to a school district official,” after she had hugged that person and felt their soul. “*Todd v. Carstarphen*, 236 F. Supp. 3d 1311 (N.D. Ga. 2017).

The transportation the mother requested was estimated to cost the district \$200 per year, regardless the district was not required to provide door to door transport for non-disabled children because their mother had a disability.-