

Transportation Under IDEA: How Far and How Wide?

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Learning Objectives

1. **Review definitions and legal standards regarding transportation as a related service under IDEA (special education law).**
2. **Address specific issues:**
 - a. How do we make difficult decisions about transportation as a related service?
 - b. Our District does not provide transportation for **ANY** students. What are our obligations under IDEA?
 - c. Our District does not provide transportation for **ANY** preschoolers. What are our obligations under IDEA?
 - d. Parents or the District have placed students out of District. What are the transportation issues and the District's obligations including per diem and mileage reimbursement?
 - e. Some students with off-campus jobs do not need special education transportation but they need transportation to access their jobs. What is the law?
 - f. Some students will not or cannot behave on the bus. What can and should we do?

The Slippery Slope

Transportation for students with disabilities is a tricky subject because each decision must be made on a case-by-case basis by the IEP team and we seem to have a rule being swallowed by exceptions.

For example, Jeff is 4 years old and eligible for pre-school special education services based on a moderate intellectual disability. Our district does not provide transportation for any pre-schoolers ages 3 through 5 except for those who need transportation as a related service in order to benefit from special education.

If we had general education buses for pre-schoolers, Jeff has no mental or physical impairments which would interfere with successfully riding the bus.

Jeff's mother is a single parent and she does not drive. She is ill and cannot work. She relies on public resources for financial support which are barely adequate to meet the family's basic needs. She cannot afford to hire a taxi to take Jeff to pre-school and walking is not feasible. Unless the District provides transportation for Jeff, he will be unable to attend the pre-school special education classes which he needs. (cont'd.)

The Slippery Slope cont'd.

- If Jeff were not eligible for special education, we would not be having this discussion. If Jeff's mother could not bring him to school or pay for him to get to school, he'd simply stay home and he would have no recourse against the District. But Jeff needs pre-school special education and he needs access to special education.
- But Jeff's need for transportation is not based on any mental or physical factors related to Jeff; his need arises out of family circumstances beyond his control and beyond the control of his mother.
- Is the school district legally obligated to provide some form of transportation written into his IEP as a related service so that Jeff can access his pre-school special education classes? Yes.

Review Special Education Law and Special Transportation

- Yes, yes, we know that transportation is a related service including developmental, corrective, and other supportive services as required to assist a child with a disability to benefit from special education. 34 C.F.R. 300.34(a).

More Law Review

- Yes, yes we know that transportation can mean travel to and from school and between schools; travel in and around school buildings; and specialized equipment such as adapted buses, lifts, and ramps if required to provide special transportation for a child with a disability. 34 C.F.R. 300.34(c)(16). These are rather easy decisions.

Yes, yes we know that if transportation is necessary for the Student to benefit from special education, it must be written into the IEP as a related service.



Our Goal

We want our decisions about transportation to be objective and guided by law so that our decisions are fair and equitable to each student and parent and so that resources are used wisely and equitably.

The Dilemma

- Phrases such as “transportation is necessary as a related service if needed to assist a student with a disability to benefit from special education and related services” are broad and not particularly helpful.
- The phrase “must be based upon the relationship or nexus between the Student’s disability and need for transportation” is not all that helpful either. *Letter to Hamilton*, 25 IDELR 520 (OSEP 1996).

Let’s formulate our own checklists.

1. Using the Section 504 definition of a disability, does the Student have a mental or physical impairment which affects major life activities such as the ability to get to school on the regular education bus?
2. Examples of mental impairments: bipolar and cannot be trusted to make prudent decisions without close supervision; behavior disorder associated with Autism and cannot control impulses leading to misconduct and risky behavior on bus; ED and tends to elope from bus stop and during bus loading and unloading; intellectual impairment and will not stay in seat during bus ride.
3. Examples of physical impairments: cerebral palsy and cannot walk up bus steps; quadriplegia; fragile medical condition requiring nursing care 24/7; clinically obese and needs assistance exiting threshold of apartment in order to access transportation.

Factors in Favor of Writing Transportation into the IEP as a Related Service:

- A nexus exists between the student's particular disability, the need for special transportation, and the opportunity to benefit from special education.
- The student's disability creates unique needs that make it problematic to get the student to school using the same equipment as a non-disabled student.
- The student is not capable of using the same mode of transportation as nondisabled students.

Letter to Hamilton, 25 IDELR 520 (OSEP 1996).

That made it seem easy till we read this:

Transportation should be considered even when the student has no ambulatory or behavioral or physical or intellectual impairment(s) that directly result in a unique need for some form of specialized transportation. *Donald B. v. Board of Sch. Comm. of Mobile, Ala.*, 26 IDELR 414 (11th Cir. 1997).

**Whoa? Whoa?
Whoa?
Hold that bus!**

Access v. Unique Need Analysis

Access example: Sue is ambulatory and has no unique need for transportation directly related to her disability of Autism. However, if the District does not provide transportation to Sue, she will be unable to participate in academic and non-academic school activities.

Unique need example: Sue is not ambulatory and must be transported to school in a customized chair in a prone position and she must be accompanied by a one to one nursing assistant.

Unique needs cases are easy to decide; access cases are more challenging.

Example of Access Analysis

- 6 year old, speech impaired, attending private school. Entitled to proportionate share services (ST) at the public school campus 3 blocks from the private school.
- 11th Circuit rejected argument that special transportation is only required to address unique needs caused by particular disability.
- Court held: IDEA requires transportation in order to permit the student to benefit from speech therapy. *Donald B. v. Bd. Ed. Ala.*, 26 IDELR 414 (11th Cir. 1997).

Factors in the Access Analysis

- Factors specified by the 11th Circuit:
 1. Age of student (too young to walk).
 2. Distance to travel (too far to walk in bad weather).
 3. Nature of area to be traversed (too risky with busy traffic).
 4. Access to other forms of transportation other than special ed transportation? (None.)
 5. Availability of other forms of public assistance such crossing guards, public transit? (None in this case.) *Id.* at *Daniel B.*

Must South Dakota follow 11th Circuit law?

No. South Dakota must follow U.S. Supreme Court precedent and decisions out of the 8th Circuit Federal Court of Appeals, but in making difficult decisions, all of the Federal Circuit Courts of Appeals shop around.

Another access case: *Malehorn v. Hill City Sch. Dist.*, 987 F.Supp. 772(D. South Dakota, 1997).

8 year old Student lived 13 miles from school.

Mom drove student 8 miles to a bus stop; bus picked up Student and siblings for remainder of 5-mile trip to school.

Mom requested door to door. Why? Student does not have good judgment at bus stop; bus stop has no shelter; busy traffic at bus stop; student left at bus stop once during snow storm and parent late in arriving; student allegedly injured at bus stop.

Federal District Court determined:

1. IEP team should conduct case-by-case analysis (they did).
2. Nothing unique about student's disability qualified her for special transportation, let alone door to door.
3. Because the Student was not eligible for special transportation, IEP team not obligated to consider door to door.
4. Student could appreciate risks at bus stop. Could be trusted not to run into traffic; student did not show that living 13.5 miles from school should be determinative factor.

Another South Dakota case: *Fick v. Sioux Falls Sch. Dist.*, 337 F. 3d 179 (8th Cir. 2003)

Student has seizures; needs injection quickly after seizure; this is a unique need. Student eligible for special transportation as related service (taxi ride to and from home with nurse provided by District) but Mom wants Student transported to day care center after school by taxi with nurse instead of home. This is an access issue.

District policy was to plan routes and provide transportation economically: school will pick up and drop off within a "cluster boundary" but both pick-up and drop-off must be within "cluster boundary" unless transportation is necessary for child to benefit from IEP. Dropping off at day care would be outside "cluster boundary."

No exceptions are made for non-disabled students; none are dropped off outside cluster boundary. Court held parent's request was made for personal reasons only and parent did not prove that drop-off at day care (access issue) was necessary for the Student to benefit from her IEP.

What about Pre-School Students even if our District does not provide transportation for Pre-School Students?

1. Must be considered by IEP on case-by-case basis.
2. If IEP team determines that special transportation is required to assist student in benefiting from special education, then District is obligated to provide special transportation.
3. This includes transporting a pre-school age student to the site where the District provides the special education if the site is different from the site where the student receives preschool or daycare services.

Query: even if the student is ambulatory, cognitively intact, and the pre-school is 4 blocks from the daycare? Yes, this is an access issue. (*Notice of Interpretation, Appendix A, Question 33; DOE regulations 1999*)

So for Pre-School Students, summarize please.

1. Some decisions are easy: District does not provide transportation for any pre-school students but special education pre-school Student is not ambulatory or Student has special medical needs during transportation. Student eligible for special transportation.
2. Some decisions are difficult: parent unemployed, does not have a car, distance from home to school is too far for the student and parent to walk. No public transportation available. If District does not provide transportation, pre-schooler will not have access to special education. Student probably eligible for special transportation and does not involve parent preference or convenience. (Note this is an access analysis.)

Heads up: we are changing lanes.

We just discussed how to make tough decisions about whether to provide transportation in the IEP for students in special education.

Now we are going to discuss choosing the manner of transportation assuming the Student needs special transportation.

Manner of Transportation

1. Door to door
2. Small bus or van w/ LRE consideration
3. Bus stop monitors
4. Aides on regular education or special education buses
5. Positive behavioral supports

- Student could not travel from door of apartment to bus; Hearing Officer ordered District to provide transportation aide to assist in getting Student on the bus.
District of Columbia v. Ramirez, 43 IDELR 245 (D.D.C. 2005)
- This is a unique needs analysis.

- George has CP and weighs 160 lbs. and bus drivers deemed it unsafe to carry him up and down steep steps from front door to street. Parents transported Student after District refused. Federal court ordered District to reimburse parents for their costs incurred in transporting George to school. *Hurry v. Jones*, 555 IDELR 543 (1st Cir. 1984).

- Decision concerning whether to pick up student at home or at designated bus stop must be made on case-by-case basis. *Letter to Smith*, 211 IDELR 191 (OSEP 1980)

- Safety harness was appropriate to restrain Student in her seat; it permitted movement of legs and arms but prevented her from getting out of her seat. This was not an impermissible restraint. *P.T. v. Jefferson County Bd. of Edu.*, 106 LRP 40276 (N.D. Ala. 2005)

- Properly trained aide ordered for Student who needed suctioning during 20 to 30 minute bus ride; service could be performed by someone other than a physician and was a necessary service during transportation, not a medical service. *Skelly v. Brookfield Park Sch. Dist.*, 95 IDELR 288 (N.D. Ill. 1997).

- Climate controlled bus is not required unless Student has unique need for air conditioning on bus. *Q&A on Serving Children with Disabilities Eligible for Transportation*, 53 IDELR 268 (OSERS 2009).

This is a unique needs analysis.

- Student's psychiatrist recommended separate and direct cab transportation related to rather long ride to and from school. District offered van transportation instead when cab company terminated its service. District had the option of contracting with another cab company. District ordered to reimburse parents for the cost of hiring a cab to transport Student to and from school. *Zak v. Cambridge*, 30 IDELR 863 (D. Mass. 1999).

- Student age 9, CP. Parent requested transportation on regular education bus for socialization. Student could not walk without walker and aide nor could she walk long distances. District's offer of special education transportation upheld where District had realistic concern for Student's safety on regular education bus. *Gwinnett County Sch. Dist. v. J.B.*, 45 IDELR 60 (N.D. Ga. 2005)

- Travel training in and around school campus required to enable student to increase independence and improve behavior and socialization during travel. Goals and objectives required. *Letter to Smith*, 23 IDELR 344 (OSEP 1995)

- Transportation may be necessary to provide an equal opportunity to participate in non-academics and extracurriculars including after-school activities. If the IEP team has included special transportation in the IEP, District is responsible for providing after-school transportation to extracurricular activity. *Q&A on Serving Children with Disabilities Eligible for Transportation (OSERS 2009)*
- *What if transportation is not specified in the IEP?* Still must be discussed on case-by-case basis.

- Student objected to two-hour bus ride and demanded that District change several bus routes to shorten length of ride. This would have caused economic hardship for District and would have inconvenienced other students.
- Parent said lengthy ride had negative effect on Student and caused denial of FAPE. Parents did not prevail; their evidence was subjective and even if riding in family car, long bus ride necessary. *Brett K. v. Momen Unit Sch. Dist. No. 1 (47 IDELR 257 (N.D. Ill. 2007)*

- Unless the IEP requires some other arrangement, the Student should be educated in the school where he would be educated if non-disabled. 34 C.F.R. 300.116(c). However, school's recommendation that Student with CP be transported to campus ten miles from his home campus upheld where the District had centralized services for severely disabled students. *Murray v. Montrose County Sch. Dist.*, 51 F. 3d 921 (10th Cir. 1995)

- Parent requested transportation drop-off about a mile outside District boundaries. District refused. 5th Circuit held Student entitled to an exception because the only available child care option was outside District boundaries. *Alamo Heights v. State Bd. Of Edu.*, 790 F. 2d 1153 (5th Cir. 1986).

- Student requested voluntary intra-district transfer then demanded that the District establish a new bus route for her lift bus. District policy: parents responsible for transportation if they choose an intra-district transfer. 8th Circuit agreed with District. Transfer and request for transportation was based on parental preference, not necessity. *Timothy H. and Brenda H. v. Cedar Rapids Comm. Sch. Dist.*, 178 F. 3d 968 (8th Cir. 1999)
- No access or unique needs issues.

Transportation and Discipline

- If bus transportation is written into IEP, then suspension from bus is a suspension under 34 C.F.R. 300.530. If transportation is not part of IEP, suspension from bus is not treated as a lost day of FAPE.

- A school district is not required to provide alternative transportation to a student who has been suspended from transportation for 10 days or less unless the District provides alternate transportation to students without disabilities. 34 C.F.R. 300.530(d).

- Suspension of Student from bus specified in IEP as related service constitutes change of placement if District has been transporting Student, suspends Student as disciplinary measure, and provides no other form of transportation. Student suspended from IEP transportation for more than 10 days must have manifestation determination and District must return Student to transportation if conduct resulting in suspension was manifestation of a disability. 34 C.F.R. 300.530(g).

- Student may be removed from IEP transportation for not more than 45 days without regard to whether behavior is manifestation of disability if Student has brought weapon to school, has illegal drugs, or inflicts serious bodily injury. 34 C.F.R. 300.530(g)

- When multiple violations of the Student Code of Conduct occur on bus (regardless of whether the result is suspension from the bus), even if the transportation is not specified in the IEP, the IEP team should meet and determine whether a functional behavioral assessment is warranted and whether a behavioral intervention plan should be developed for the bus. 34 C.F.R. 300.536. Proactive measures are warranted to avoid suspension from the bus.

- Hypothetical: Student's IEP specifies transportation as related service.
- Student is not successful on general education bus. IEP team meeting should be held. Student moved to special education bus. Student not successful. IEP team meeting should be held.
- IEP team adds one-to-one aide on bus. Student unsuccessful.
- IEP team adds custom-made vest to prevent Student from leaving his seat on the bus. Student not successful.
- May the IEP team demand that the Parent transport the Student to school? No, but they can ask. 16 SDR 41; 24:05:27:07 (South Dakota law). Because transportation is specified by the IEP, the District may ask the parent to transport for reimbursement but may not require the parent to transport or condition receipt of services on parent transport.

Student Not Successful During Any Mode of Transportation

1. So the Student is not successful during any mode of transportation provided by the District including a taxi with a one-to-one aide and a customized vest and transportation is specified in the IEP. The District asks but the parent refuses to transport the Student to school with reimbursement.
2. The IEP team may meet and recommend residential placement for the Student for a period of time at a State-approved facility. If the Parent declines the proposed placement, the District may file a due process complaint regarding the placement of a Student. 34 C.F.R. 300.507.
3. If the District believes that maintaining the Student on District-provided transportation is substantially likely to result in injury to the student or others, the District may request an expedited due process hearing (even over the parent's objection) which must occur within 20 school days of the date the hearing request is filed.
4. The Hearing Officer would be free to order a change of placement to a state-approved residential facility if the District met its burden of proof.

Determining Reimbursement Rates and Conditions for Parents or Others who Transport Student when Transportation is a part of the IEP or When Transportation is Necessary to Maintain the Family Bond

Mileage allowance in lieu of transportation for special education. If appropriate bus service is not provided by a school district in South Dakota, the parents or guardian of any child in need of special education or special education and related services, when legally assigned, are eligible for necessary transportation compensation for the Student as determined by the IEP team. In no case may the mileage reimbursement rate be less than the rate established pursuant to South Dakota Law Section 3-9-1. If appropriate to maintain family bonding and if it is not practical to transport the child, mileage may be paid to the parents for trips to a residential facility where services are being provided to the Student. In lieu of compensation for mileage, a district may pay the actual cost of transportation by common carrier or of bus service provided by contract with the facility in which the Student is enrolled. The District wherein a child in need of special transportation or special education and related services has school residence shall pay the transportation expenses from the District's special education fund. SDC Supp. 1960; Section 15.3004(6).

Transportation to and from Residential Placements

1. No guidance can be found in IDEA concerning the number of trips permitted to parents or students for visits. Students placed in residential facilities (RFs) by Districts should be provided transportation written into the IEP to and from the RF at the beginning and end of the school term and for scheduled school holidays and recesses. *Hinsdale Township*, 35 IDELR 75 (SEA IL 2001).
2. Beyond these minimal requirements, state and/or local school policies should allow for individual determinations on a case-by-case basis regarding how often a parent needs to visit or a student needs to go home. *Letter to Dorman*, 211 IDELR 70 (OSEP 1978). (cont'd.)

Transportation to and from Residential Placements, cont'd.

3. If the distance between the RF and student's home is significant, it may be appropriate for the Student to travel by air or train. The use of public transportation may also be required if the parents are unavailable to or cannot pick up the student in their own vehicles. Rental cars may be appropriate in some circumstances or offering the parents the use of a District-owned car. *Dundee Cent. Sch. Dist.*, 509 IDELR 201 (SEA NY 1987).
4. Districts should consider reimbursement or providing transportation when family visits are combined with IEP team meetings at the RF or necessary family counseling. *Aaron v. Yomtoob*, 38 IDELR 122 N.D. Ill 2003). (cont'd)

Transportation to and from Residential Placements, cont'd.

5. Consider writing a District policy to address reimbursement rates, visitation, and trips home associated with residential facilities and parent-provided transportation to and from school. Some Districts include such policies in the Operating Guidelines. A sample policy from New York City School of Albany is attached at page 29-30 of the handout.
6. The policy must include language that reimbursement will be considered by the IEP on a case-by-case basis at the request of the parent. No rubber stamp policies permissible.
7. Arrangements for visitation and transportation regarding residential facilities or day schools should be written into IEP team documentation.

South Dakota Mileage Reimbursement Rates

- New Jersey has the lowest mileage reimbursement rate at 31 cents per mile followed by South Dakota and Missouri at 37 cents per mile. Source: *Council of State Governments Knowledge Center; May 30, 2013.*

Reimbursement to Parents for Transportation Expenses

1. Parents who offer to transport students eligible for transportation as a related service should be offered reimbursement because special education and related services must be free.
2. Attachments to the handout discuss how to determine reimbursement rate.
3. South Dakota law: 13-37-1.1. Children ages birth through two with developmental delays and severe disabilities are eligible for transportation as a related service.
4. South Dakota law: 13-30-3. Mileage allowance in lieu of public transportation established at Section 3-9-1 for distances actually traveled in excess of 5 miles each way. This statute applies to general education students and probably does not apply to reimbursement for special education transportation.
5. South Dakota law: 13-37-8.9 applies specifically to special education students.

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The information in this handout was created by Walsh, Anderson, Gallegos, Green & Treviño, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.

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