

**KENTUCKY DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND EARLY LEARNING
AGENCY CASE NO 2425-05**

██████████

PETITIONER

V

FINAL ORDER GRANTING SUMMARY JUDGEMENT

██

SCHOOLS

RESPONDENT

The parties agreed to brief the only issue in this case -- whether Student is entitled to special needs transportation while attending ██ -- believing the question can be settled as a matter of law based upon undisputed facts. This is, in effect, a motion for summary judgment by Respondent. Although the rules of civil procedure are not expressly applicable to IDEA cases by provisions in state or federal statutes and regulations, numerous courts have upheld the use of summary judgment in IDEA cases. “Nothing in the language or legislative history of the [IDEA] precludes a court from deciding appeals on the basis of summary judgment.” *Vander Malle v. Ambach*, F. Supp. 1015, 1033 (S.D.N.Y. 1987)., *Accord Victoria L. By Carol A. v. District School Board of Lee County, Florida*, 741 F.2d 369,373 (11th Cir. 1984).; *Ivan P. v. Westport Board of Education*, 865 F. Supp. 74, 83 (D. Conn 1994); *E.H. v. Tirozzi*, 735 F. Supp. 53, 59 (D. Conn. 1990).

KENTUCKY’S SUMMARY JUDGMENT STANDARD

Summary judgment does not try the case on its merits or require that a party prove the elements of a claim. Summary judgment disposes of claims for which fact-finding is not necessary. Civil Rule 56, both the federal and Kentucky’s, states

[t]he court shall grant summary judgment if the movant shows that there is no genuine

Summary judgment can be granted only if there are no disputed issues of material fact and the movant is entitled to judgment as a matter of law. However, “no genuine issue as to any material fact” has a different meaning in Kentucky courts than in federal courts. “Kentucky and federal courts have taken a divergent stance in utilizing [summary judgment].” See K. Phillips, D. Kramer and D. Burleigh, *Kentucky Practice*, Vol. 7, Civil Rule 56.01 cmt 1, p. 408 (6th ed. 2005). Kentucky’s standard is more rigorous. Kentucky courts will only grant summary judgment if it would be *impossible* for the non-moving party to produce evidence at trial warranting a judgment in their favor. *Id.*, citing *Steelveest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). The term “impossible” means impossible in its “practical sense, not the absolute sense.” *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

For reasons set forth below, the hearing officer enters summary judgment in favor of the Respondent and orders dismissal of the case.

BACKGROUND

Student attended fifth grade at [REDACTED] School in 2023-2024. The parties agree that the operative IEP, both then and now, is the one dated October 9, 2023, and provides for special needs transportation (SNT). The ARC conference summary notes from the October 9, 2023, meeting state “[i]t should be noted that [Student] does continue to require SNT as a related service due to her emotional dysregulation, as it relates to a safety concern.”

Providing SNT is required when riding a school bus would be unsafe for the disabled student.

Guidance for Special Transportation in Kentucky. KDE, p. 5, states:

Whenever a student cannot be safely transported on the regular school bus route due to a disability, or when a student is transported on a special route in order to attend an approved special education program or activity, the district will provide transportation or contract with the parent to transport.

(emphasis added).

The student completed fifth grade and was ready to enroll in middle school for the 2024-2025 school year. It is undisputed that her reside middle school is [REDACTED]. It also undisputed that in the summer of 2024, the parent applied for the student to be transferred to [REDACTED] School. The parent's transfer request was approved. The reason the transfer was requested by the parent, according to Petitioner's due process complaint, is that [REDACTED] School was unable to provide FAPE:

[Student}'s reside school, [REDACTED] School, cannot provide the aforementioned accommodations as the school utilizes a team of special education teachers and a hall of classrooms; both of which would require numerous transitions for [Student}'. During an ARC Meeting on May 14, 2024, a [REDACTED] representative confirmed that [Student}'s IEP requires a special class be used to provide instruction, and that if [Student}'s mother wanted to transfer [Student}', the school would need to have a special class in order to implement the IEP appropriately. [REDACTED] School is able to provide these accommodations, which is why [Student}'s mother applied for [Student}' to transfer to [REDACTED] School upon entering the sixth grade.

Petitioner's due process complaint. Subsequently, in a footnote in Petitioner's brief, Petitioner says "**Whether [REDACTED] School can implement [Student]'s IEP is not being argued;** though Petitioner and Respondent do not agree on this point." The hearing officer treats this as a concession, for purposes of summary judgment, that [REDACTED] *can* and at all relevant times was able to implement the IEP. This is important because it means that transfer to [REDACTED] was *not* necessary in order to provide FAPE but was a choice made by the parent for other reasons.

██████████ does not guarantee transportation for students, disabled or otherwise, to attend schools that are not their reside school. Respondent's position is that it has offered FAPE, including SNT, at ██████████, but parent chose to transfer to ██████████, and by offering FAPE at student's reside school Respondent discharged its obligations. The Draft IEP of September 25, 2024, which triggered filing of the due process complaint, states:

Per the ARC meeting held on 10/8/24 (sic), the ARC determined that SNT was warranted as a related service based on the current data. The ARC agrees with that as a need, at this time. The student's resides school (school of assignment) based on their home address is ██████████ School, and SNT can be provided to that school for the student to access their programming. At the end of school year 2023-2024, per the Office of School Choice, the parent submitted a transfer request in which the ██████████ policy states that transportation is not guaranteed, if accepted. The student was accepted on a parent choice transfer to ██████████. Transportation is not available to ██████████, but SNT can be provided to the student's resides school. At this time, transportation to ██████████ would be the responsibility of the parent, as a parent transport. The student will be provided, as needed, SNT for field trips or activities held during the school day.

Petitioner's Exhibit E. Petitioner argues that ██████████ has not provided a description of any evaluation procedure, assessment, record, or report ██████████ used as a basis for the removal of transportation as a related service" but the removal of SNT simply recognizes that student does not qualify for SNT to circumvent safety dangers incident to riding a school bus because riding a school bus is not an option for transfer students. The draft IEP does preserve SNT for field trips or activities as needed, which is consistent with the only other situation for which SNT is required per *Guidance for Special Transportation in Kentucky* ("when a student is transported on a special route in order to attend an approved special education program or activity"). It is undisputed that Respondent has not provided SNT to or from school during Student's matriculation at ██████████ except on one occasion, in response to a phone call from the parent, in early August of 2024, the circumstances of which are disputed.

Petitioner contends in the due process complaint that Respondent must provide SNT, regardless of where the student attends school:

Pursuant to the Individuals with Disabilities Education Act (IDEA), and guidance provided by the Office of Special Education and Rehabilitative Services (OSERS), the ARC's determination that [STUDENT} requires transportation arrangements/accommodations in order to access her education, means the Local Education Agency [REDACTED] must provide those services. This is irrespective of what school she is attending. It is [REDACTED] responsibility to transport [Student] to and from her school as it is a related service required by the IEP. Being a transfer student does not mean the school can withhold accommodations necessary for her to access her education. If [Student]'s IEP required her materials to be in Braille, [REDACTED] School would need to provide her material in Braille, regardless of whether [REDACTED] School was her reside school.

Analogizing SNT to Braille instruction is inappropriate. Transportation is neither educational nor therapeutic. SNT is only required as a related service if the student attends [REDACTED] because *all* [REDACTED] students are entitled to school bus transportation to their reside school, but riding a regular school bus poses a safety danger for this particular student because of the nature of her disabilities.

I. TRANSPORTATION POLICIES ARE AT THE DISCRETION OF THE SCHOOL, SO LONG AS THEY ARE NOT DISCRIMINATORY

“School boards have wide discretion in the management of the school systems under their 6 jurisdiction. This includes . . . the transportation of pupils within the school system.....”
Jefferson County Bd. of Educ. v. Fell, 391 S.W.3d 713, 726 (Ky. 2012), quoting *Skinner v. Bd. of Ed. of McCracken County*, 487 S.W.2d 903, 905 (Ky. 1972). Intra-district transfer policies that require parental transportation and which are applicable to all district students do not discriminate against disabled students.

Many cases have upheld intra-district transfer policies like [REDACTED]. See *Timothy H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968, 972 (8th Cir. 1999); *Fick ex rel. Fick v. Sioux Falls Sch. Dist.* 49-5, 337 F.3d 968, 970 (8th Cir. 2003); *Boulder Valley School District RE-2, Colorado State Educational Agency*, 123 LRP 24955, pp. 6-7 (Aug. 11, 2023).

II. RESPONDENT DISCHARGED ITS OBLIGATION BY OFFERING FAPE AT THE STUDENT'S RESIDE SCHOOL

Respondent has an obligation to offer an IEP that is appropriate. Respondent's obligation is fulfilled when FAPE is offered. *N.W. v. Boone County Board of Education*, 763 F.3d 611, 615-616 (6th Cir. 2014). Petitioner does not take issue with the content of the IEP, except removal of SNT, and has chosen not to dispute that the IEP can be implemented at [REDACTED]. Consequently, Respondent offered the student an IEP where she would receive special education services per the IEP to allow her to progress academically and behaviorally if Student attended [REDACTED] her resides school. This satisfied the school's duty to offer an appropriate IEP which could be implemented to provide FAPE.

Per cases cited above, case law upholds dropping SNT from an IEP where intra-district transfer policies limit transportation obligations in a non-discriminatory way. As set forth in Respondent's brief, [REDACTED] also sought guidance on this question from KDE, who affirmed Respondent's position and recommended removing SNT from the student's IEP. In counterargument, Petitioner cites this provision in *Guidance for Special Transportation in Kentucky*. KDE, p. 7:

If a school district does not provide transportation services to general education students, the ARC team or 504 team must decide on a case-by-case basis whether the special education student requires transportation as a related service in order to receive a FAPE. If the special education student requires transportation as a related service, the school

district must provide it. Even if a school district does not ordinarily provide transportation to students, the district will need to provide special transportation services for students who require these services due to a disability.

It is not clear that this provision would apply to █████ because █████ *does* provide transportation to general education students to their reside schools. But regardless, by its own terms SNT would only be required under the cited provision if necessary “in order to receive a FAPE.” In the present case, █████ offered FAPE at █████ rendering the contingency in the above-cited provision moot.

Petitioner also cites as authority *Mundo Verde Pub. Charter Sch. v. Dist. of Columbia*, Civil Action 22-2290 (CKK), 8 (D.D.C. Sep. 28, 2023) (citing *North Allegheny School v. Gregory P*, 687 A.2d 37, 40 (Pa. Cmmw. Ct. 1996)), but as Respondent points out in its reply brief, both of those cases rule *against* requiring SNT for out-of-boundary residences. Petitioner cites *Alamo Hgts. Ind. Sch. v. State Bd. of Educ*, 790 F.2d 1153, 1160 (5th Cir. 1986), but *Alamo* holds SNT is not limited by geographic boundaries “so long as it is required for the special circumstances of the handicapped child...” In the present case, SNT to █████ is not required to provide FAPE, because FAPE was offered at █████ and is still available at █████. The student does not need to attend █████ to receive FAPE.

Petitioner argues that *Timothy H.* and *Fick*, cited by Respondent, are distinguishable from the present case based upon facts or the relief sought, but the underlying principle is the same principle at issue in this case and is expressly connected by the court to IDEA. *Fick* states:

We believe our decision in *Timothy H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968 (8th Cir.1999), is dispositive. That case, like this one, involved a parental request to transport a disabled child to a school outside a neighborhood school boundary. The Cedar Rapids School District had an intra-district transfer policy which allowed parents to send their child to a school other than the neighborhood school as long as the parents paid for transportation. We held the school district did not violate Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, by refusing to pay to transport a disabled

child to a school outside the neighborhood boundaries. Specifically, we said the child's parents failed to prove the child was denied the benefits of participating in the intra-district transfer program, because all parents in the district had to pay for transportation costs in order to participate in the program. *Id.* at 971–72. We concluded **all of the disabled child's educational needs were being met by the school within the neighborhood boundaries, and the request for transportation to a school outside the boundaries was “for reasons of parental preference” only.** *Id.* at 973. **In short, Timothy H. indicates 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.** See also *N. Allegheny Sch. Dist. v. Gregory P.*, 687 A.2d 37, 40 (Pa.Comm. Ct. 1996) (holding IDEA requires transportation of disabled child only to address his educational needs and does not require school district to accommodate a parent's unrelated non-educational preferences). **We conclude Timothy H. controls our decision here because the pertinent obligation of the District under Section 504 is the same as its obligation under the IDEA: “To provide disabled students with a free appropriate public education.”** *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1034 (8th Cir. 2000).

Fick ex rel. Fick v. Sioux Falls Sch. Dist. 49-5, 337 F.3d 968, 970 (8th Cir. 2003). The obligation to provide FAPE does not require schools with open-enrollment policies to transport disabled students to the school of their choice where such transportation is not required for all students.

Boulder Valley School District RE-2, Colorado State Educational Agency, 123 LRP 24955, pp. 6-7 (Aug. 11, 2023) is on point with this case. In *Boulder*, student's IEP provided for SNT because of safety and elopement concerns riding a regular school bus. The student's parent chose to enroll student in a choice school rather than student's reside school. The District did not dispute the need for SNT or that it was on the IEP, and would provide SNT if the student attended his reside school. The parent insisted SNT had to be provided to the choice school so the student would have access to FAPE. As in the present case, the choice school was more convenient due to parent's work schedule, and the parent said she never would have enrolled in the choice school if she had understood that SNT would not be provided, and that she did not worry about the statement in the transfer form about transportation because SNT was on the IEP.

Boulder held that Districts don't have to provide transportation to a school the parent prefers if the home school can meet the student's needs and provide FAPE. In *Boulder*, the district properly discontinued a teen's transportation services because he enrolled in a choice school through its open enrollment program, despite that the home school could meet the teen's needs with the same program and provide transportation. Quoting from *Boulder*, pp 6-7:

[W] here a student with a disability chooses based on personal preference and not on a disability-related education need to attend another school in the district other than his neighborhood school, the district is not obligated to provide transportation to that school. El Paso County School District #11, 120 LRP 8085 (SEA CO 12/23/2019); See also, *Fick v. Sioux Falls Sch. Dist.*, 337 F.3d 968 (8th Cir. 2003); *Timothy H. v. Cedar Rapids Cmty.Sch. Dist.*, 178 F.3d 968 (8th Cir. 1999); *Baltimore County Pub. Sch.*, 61 IDELR 210, 113 LRP 14987 (SEA MD 12/21/12). If the disability-related educational needs of a child with a disability can be met by a neighborhood school and the parents or child select a school outside the neighborhood for "reasons of personal preference," then a school district may refuse to provide special transportation. *Fick*, 334 F.3d at 970. "[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 policy is not based on the child's educational needs, but on the parents' convenience or preference." *Id.*

III. NO LAW IS CITED TO SUPPORT AN ESTOPPEL ARGUMENT

Petitioner's reply brief raises what appears to be an estoppel argument, asserting that (1) parent may have been misled by statements in [REDACTED] brochures or websites into thinking SNT would be provided to her student regardless of where the student attended school or (2) that SNT was actually approved as a service at [REDACTED] as evidenced by one instance of transportation at parent's request and, once approved, cannot be "un-approved." Setting aside evidence from Respondent contrary to Petitioner's assertions, and assuming the truth of Petitioner's assertions for purposes of summary judgment, no law cited supports SNT by estoppel.

The closest case cited by either party that might relate to estoppel is *Boulder*. In *Boulder*, a formal application for SNT was approved in error. The parent was notified in writing that SNT would be provided for the school year. SNT was actually delivered in error for an entire school

year. The hearing officer and court held that the school was not obligated by its previous error and delivery of unrequired SNT services, nor by the fact that the IEP had not been amended to remove SNT.

The hearing officer has not found any case law under which estoppel could require a school to provide or not discontinue a related service not necessary to provide FAPE if the school, intentionally or accidentally, promised or provided that service in the past.

IV. FAILURE TO AMEND THE IEP SOONER IS NOT A VIOLATION

An IEP should accurately set forth related services. In *Bolder*, as in this case, a transfer student was not entitled to SNT, but failure for two years to amend the IEP to remove SNT was held to be a harmless procedural violation. However, in the present case, the parent's transfer request was not approved until August 2, a few days before school began, and the draft IEP removing SNT was presented at the end of September. Given the start of school and the logistics of arranging an ARC meeting, the passage of a few weeks is not so undue or unreasonable as to constitute even a procedural violation.

V. FAILURE TO PROVIDE SNT UNTIL THE IEP WAS FORMALLY AMENDED IS NEITHER DENIAL OF FAPE NOR A VIOLATION

It is undisputed that the IEP provides for SNT and that due process was commenced before the IEP could be amended to remove it. Generally, provisions of an IEP should be implemented. However, in this case, not providing SNT is neither denial of FAPE nor a violation.

A. FAPE IS NOT DENIED IF A VIOLATION IS HARMLESS

“Procedural violations of IDEA are subject to harmless analysis.” *Snyder ex. Re. Snyder v. Montgomery Cty. Publ Schs*, 2009 WL 3246579, at 6 (D. Md. Sept. 29, 2006). “[A] violation of a procedural requirement of the IDEA... must actually interfere with the provision of a FAPE before the child and/or his parents would be entitled to reimbursement relief.” *Id.* A child is deprived of FAPE only if “the school system has violated the IDEA’s procedural requirements to such an extent that the violations are serious and detrimentally impact upon the child’s right to a free public education” or the IEP is “not reasonably calculated to enable the child to receive educational benefits.” *Gerstmyer v. Howard Cty. Pub. Schs.*, 850 F. Supp. 361, 364-65 (D. Md. 1994); *see also Sch. Bd. of the City of Suffolk v. Rose*, 133 F. Supp. 3d 803, 819 (E.D. Va. 2015) (equating denial of FAPE with “loss of an educational opportunity for the disabled child” as opposed to “mere technical contravention of the IDEA”).

In the present case, FAPE has been offered and remains available at [REDACTED]. Additionally, the absence of SNT at Highlands does not deprive student of access to education to the same extent as non-disabled students – all transfer students in [REDACTED] must provide for their own transportation. As set forth in the ARC conference summary adopting the October 2023 IEP, SNT only appears on the IEP “as a related service due to her emotional dysregulation, as it relates to a safety concern,” i.e., riding on a regular school bus with other students. That danger, as well as [REDACTED] legal obligation to transport, disappeared when the parent transferred Student to [REDACTED] because transportation of transfer students to and from [REDACTED] became the responsibility of the parent. Were [REDACTED] policy to transport *all* transfer students, it would have had to provide SNT to [REDACTED] so that Student would have safe access to the same transportation benefits non-disabled students have.

Nothing in FAPE law requires ██████ to transport a disabled student to and from school for the convenience of the parent or simply because the student is disabled. The absence of SNT at ██████ did not cause a "loss of an educational opportunity for the disabled child" nor did it "actually interfere with the provision of a FAPE" nor did it "detrimentally impact upon the child's right to a free public education."

**B. NOT PROVIDING SNT AT ██████ PRIOR TO AMENDING THE IEP
IS NOT A VIOLATION**

SNT is not required at ██████ to provide FAPE legally, but also it is unnecessary factually because ██████ does not transport transfer students on regular school buses. SNT to and from school is not on the IEP for the convenience of the parent or as a shuttle service to which disabled students are entitled by virtue of being disabled. SNT is in this child's IEP for a specific purpose – to protect Student from dangers that could, because of her emotional dysregulation, arise if ██████ were to transport her on a regular school bus. The student is not exposed to that danger traveling to and from ██████ because transfer students are not transported on ██████ school buses, so circumstances triggering implementation of this related service never arose.

Going forward, this does not mean that the ARC has determined that the student does not still need SNT in appropriate circumstances:

At this time, transportation to ██████ would be the responsibility of the parent, as a parent transport. The student will be provided, as needed, SNT for field trips or activities held during the school day.

Petitioner Exhibit E. Only when ██████ is responsible for transport is SNT necessary for the student's safety. ██████ was neither legally required to transport the student to and from ██████ and nor in fact doing so. Hence, no circumstance arose triggering implementation of the related service of SNT and there was no violation of the stay-put IEP.

FINDINGS OF FACT

Respondent contends that parent transferred Student to [REDACTED] because it was more convenient for her work schedule and childcare arrangements. Given that Petitioner has chosen *not* to dispute that [REDACTED] can provide FAPE, and given the words parent wrote in her transfer request, Respondent may be right. However, Petitioner does not claim that parent's motivation for the transfer is a legal reason Student would be entitled to SNT. Therefore, it is unnecessary, for summary judgment, to make a finding concerning the parent's motive. The following undisputed facts are sufficient to rule on whether Student is legally entitled to SNT while attending [REDACTED] as a transfer student.

1. Student's operative IEP, adopted October 9, 2023, while she attended [REDACTED] [REDACTED] School, provides for SNT as a related service because Student's emotional dysregulation presented safety concerns if Student is transported with other students on a regular school bus.
2. Student completed fifth grade at [REDACTED] School during 2023-2024 and was scheduled to begin sixth grade at a middle school in 2024-2025.
3. Student's reside middle school is [REDACTED] School.
4. [REDACTED] offered FAPE, including SNT transportation, at [REDACTED] School.
5. Parent chose to transfer Student to [REDACTED] School instead of enrolling Student at [REDACTED].
6. Student does not need to attend [REDACTED] School in order to receive FAPE.
7. [REDACTED] policy is that it does not provide transportation to transfer students, whether disabled or non-disabled.

8. Except in one instance in early August , at the request of parent and under circumstances the parties factually dispute, ██████ did not provide the student SNT to or from ██████

9. Parent's transfer request was approved August 2. An ARC meeting was not convened to change the IEP to remove SNT in late September, whereupon Petitioner filed due process, invoking stay-put.

10. Student's attendance at ██████ does not expose Student to the safety dangers of riding a regular school bus to and from school with other students that made the related service of SNT necessary as an alternative when ██████ was responsible for transport to and from school.

11. There is no proof that failure to change the IEP sooner, nor failure to provide SNT to and from ██████, interfered or will interfere with provision of FAPE, or caused or will cause loss of an educational opportunity.

12. Delay in amending the IEP to remove SNT has not been undue or unreasonable.

CONCLUSIONS OF LAW

1. ██████ policy of not providing special needs transportation to transfer students does not discriminate against disabled students and does not violate any law, including laws and regulations concerning provision of FAPE.

2. SNT to and from school is not required for this student to receive FAPE when transport to and from school is the legal responsibility of the parents.

3. Delay in attempting to amend the IEP to remove SNT was not so long as to constitute a procedural violation and did not cause harm or constitute failure to provide FAPE.

4. Not providing SNT to and from ██████ prior to amending the IEP was not a

violation and did not cause harm or constitute failure to provide FAPE

5. Respondent is the prevailing party.

FINAL ORDER

The hearing officer finds no violation of IDEA and Petitioner is not entitled to any relief.

NOTICE

A party to a due process hearing that is aggrieved by the hearing decision may appeal the decision to members of the Exceptional Children Appeals Board as assigned by the Kentucky Department of Education at Office of Legal Services, 300 Sower Blvd., 5th floor, Frankfort KY 40601. The appeal shall be perfected by sending, by certified mail, to the Kentucky Department of Education, a request for appeal within thirty (30) calendar days of date of the hearing officer's decision.

November 4, 2024.

Isl Mike Wilson

MIKE WILSON, HEARING OFFICER

CERTIFICATION:

A copy of the foregoing was served by email on November 4, 2024, to the following:

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██████████

██ █████
██

██████████

[REDACTED]
KDE

KDElegal@education.ky.gov

Isl Mike Wilson

MIKE WILSON, HEARING OFFICER