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DECISION

Due Process Hearing for KM

ODR File No. 8028/07-08 KE

Date of Birth: xx/xx/xx

Date of Hearing: October 5, 2007 – Open Hearing

Parties to the Hearing:

(mother)

Philadelphia City School District
Center City Region
540 North 13th Street, Room 103
Philadelphia, PA 19130

Representative:

(none)

Mimi Rose, Esq.
Philadelphia City School District
Office of General Counsel
440 North Broad Street, 3rd Floor
Philadelphia, PA 19130

Hearing Officer: Debra K. Wallet, Esq.

Record Closed: October 9, 2007

Date of Decision: October 23, 2007

BACKGROUND:

Student is a xx-year-old (date of birth xx/xx/xx) student who attended the Private School [redacted] during the 2006-2007 school year. Student lives with her Parents within The School District of Philadelphia [hereinafter School District]. The School District provided a city cab to take Student and three others between the Private School and her home until an incident occurred in April 2007 which caused Parents to determine that it was no longer safe for Student to use the cab service. After informing the School District of their concerns, Parents obtained alternative transportation until the end of the 2006-2007 school year. Parents seek reimbursement from the School District in the amount of \$1,159.20, representing transportation costs for the balance of the school year.

The School District contends that the Hearing Officer has no jurisdiction over transportation because no IEP was in place providing transportation as a “related service.”

ISSUES:

1. Does the Hearing Officer have jurisdiction over this transportation reimbursement request?
2. Should Parent be reimbursed for transportation between April and the end of the 2006-2007 school year?

FINDINGS OF FACT:

Background

1. Student is a xx-year-old (date of birth xx/xx/xx) enrolled at the Private School for the 2006-2007 school year. (HO-1, pp. 7-8).

2. Student lives with her Parents within the School District. (HO-1).
3. Student qualifies for special education programs and services because of a speech and language impairment and a specific learning disability impacting on the language arts. (P-1, p. 7).
4. On August 14, 2007, Mother requested mediation of her request for transportation reimbursement. The School District elected not to use this voluntary procedure. (P-10; P-12).
5. On August 20, 2007, Mother requested a Due Process Hearing on her request for transportation reimbursement. (HO-1).
6. An August 28, 2007 Due Process Hearing Notice set the date and time for the October 5, 2007 Due Process Hearing. (HO-2).
7. By letter dated August 30, 2007, the Hearing Officer reminded the School District of its responsibility to respond to the Parents' request within ten days of receipt. (HO-3).
8. When Mother brought it to the attention of the Hearing Officer that the School District had not responded, the Hearing Officer, by letter of September 5, 2007, directed that an answer be served and filed. (HO-5).
9. On September 18, 2007, the School District first answered Mother, asserting that "there is no jurisdiction over the transportation reimbursement claim" and that "there is no requirement for a resolution meeting or mediation." (HO-6).
10. Both parties participated in a pre-hearing telephone conference on September 19, 2007.
11. During the pre-hearing conference, the School District agreed to hold a resolution session which took place on September 24, 2007. No resolution was offered by the School District at that time. (N.T. 17, 115).
12. The Hearing Officer took testimony and received documentary evidence at a due process hearing on October 5, 2007.
13. The following exhibits were admitted: Hearing Officer Exhibits HO-1 through HO-7 (N.T. 11); Parent Exhibits P-1 through P-7 (N.T. 57), P-9 through P-17 (N.T. 57; 101); and School District Exhibits S-1 through S-4. (N.T. 110; 112).

14. Two witnesses testified at hearing: Mother and Mr. L, Senior Vice President of Transportation Services for the School District of Philadelphia.

IEP and Placement

15. After the family adopted Student from [country redacted] in September 2001, Student attended [Elementary] School, within the School District, from September 2002 to the present with the exception of the 2006-2007 school year. (N.T. 13).

16. The School District proposed an IEP as a result of a team meeting on August 29, 2006. This IEP provided learning support in speech and language in a resource room. Student was fluent in [language redacted] upon coming to the United States, but difficulties in phonological awareness, comprehension, and written language skills affected her progress in the general education curriculum. (P-1).

17. Parents rejected the NOREP providing for learning support services at the [Elementary] School in [region redacted], Philadelphia. (P-6)

18. The parties stipulated that Parents placed Student at the Private School for the 2006-2007 school year, not as a result of any judicial or due process order, but because of a family decision. (N.T. 108-109).

19. Student has had IEP's from the School District in place for the years before the 2006-2007 school year and after. (P-3; P-6; N.T. 43-44).

20. The family paid for the tuition at the Private School for the 2006-2007 school year. (N.T. 107).

21. Neither the IEP for the 2005-2006 school year, nor for the prior year when Student attended a School District elementary school, included any requirement for transportation. (N.T. 43-44).

Transportation

22. The Private School is 7.6 miles from the Student's home. (N.T. 13).

23. The School District initially offered Student school bus transportation, but when Mother objected, the School District agreed to provide round-trip private city cab transportation for Student and three boys also attending the Private School. (N.T. 13-14).

24. Mother was generally satisfied with the school-provided cab transportation even though an incident in March involved the boys shooting stones out of the cab windows. After investigation, Mother continued with the cab transportation. (P-10, p. 2; N.T. 36-37).

25. In April 2007, one of the male students in the cab wrote a note threatening to kill the cab driver. Mother removed Student from the cab transportation because she then felt her child was unsafe. (P-10, p. 2; N.T. 14).

26. Mother repeatedly requested alternative transportation, but when the requests were ignored, Mother arranged for [redacted], a not-for-profit transportation service, to transport Student for the balance of the school year. (N.T. 14).

27. The transportation expense for the period April 30, 2007 through June 8, 2007, as arranged by Mother through [redacted], was \$1,159.20. (N.T. 15; P-10).

28. Mother's original request for reimbursement was submitted to the School District on forms sent to her by Ms. Manager, Approved Private Schools\Alternative Special Education Setting for the School District of Philadelphia. (N.T. 32; P-9).

29. After submitting the written request, Mother received no written response. Mother initiated conversation with the transportation department. (N.T. 32-33).

30. Although Mother made numerous telephonic and written communications to obtain transportation reimbursement, Mother never received any communication initiated by the School District transportation department regarding her inquiries. (P-10, pp. 2-3).

31. The School District's senior vice president of transportation services testified that it would be customary for any inquiry to receive a response. (N.T. 94).

32. Having received no satisfaction, Mother submitted requests for mediation and a due process complaint on July 10, 2007. (HO-1; P-10; N.T. 33-36).

33. After a brief telephone conference call, the first assigned Hearing Officer determined that he had no jurisdiction. Upon appeal to the Special Education Due Process Appeals Review Panel, the decision of the Hearing Officer with respect to jurisdiction was vacated by decision dated August 30, 2007. (P-13).

34. Mother's second, but identical, due process complaint notice is currently before this Hearing Officer. (HO-1).

35. Based upon the testimony of the School District's vice president of transportation services, all students in grades one through eight are provided with transportation in the event that the Pennsylvania Department of Transportation deems the route to be hazardous. This is one of five or six reasons the School District, by policy, will provide free transportation. (N.T. 62-63).

36. The hazardous condition criteria applied to students attending the Private School . (N.T. 63).

37. The route between Student's home and the Private School was deemed by the School District to be hazardous. This Hearing Officer finds that the route is hazardous. (N.T. 78).

38. With regard to elementary school students, during the relevant school year, the School District provided free public transportation in the form of a bus or cab to those living on a hazardous route. In order to lessen the riding time for the children on a bus, the School District provided a cab for Student and at least three other children attending the Private School. (N.T. 79).

39. Based upon the undisputed testimony of Mother, continued cab transportation after April 30, 2007 was unsafe for Student. (P-10, p. 3; N.T. 14; 113; *see* N.T. 21: "The District's position is really not to challenge the merits of [Mother's] claim, her subjective belief about the safety of her child.").

40. During the 2006-2007 school year, it was School District policy to offer Parent mileage reimbursement for transportation. (N.T. 80).

41. Mother testified credibly that she was never offered mileage reimbursement either as a result of her communications with the transportation department or during any mediation session. The Hearing Officer finds that Mother did not know of the mileage reimbursement option and was never told of this option by the School District. (N.T. 102; 105).

42. The only reason given by the School District for failing to provide free transportation to Student after the April cab incident was that Student had no IEP providing transportation as a related service.

43. Student, who lives on a hazardous transportation route, was treated differently with regard to the provision of free transportation because she had an IEP.

44. Student, who lives on a hazardous transportation route, was denied free transportation because she had an IEP.

CONCLUSIONS OF LAW

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. §794 [hereinafter

Section 504], and its accompanying regulations at 34 C.F.R. Part 104, protect otherwise qualified handicapped students from discrimination because of handicapping conditions.

2. The School District is subject to Section 504 by virtue of receipt of federal financial assistance. (*See, e.g.*, P-2 which admits applicability of federal statutes).

3. Student has a “handicap” as defined by the Rehabilitation Act of 1973, and the School District knew of her disability or handicap by virtue of the IEP’s prepared by the School District.

4. Student is otherwise entitled to free transportation because she lives on a hazardous route.

5. Student has been denied equal treatment with respect to free transportation as a result of her disability and/or handicap as evidenced by an IEP.

6. The School District violated Section 504 when it failed to provide safe transportation to and from Student’s home and the Private School during the period April 30, 2007 through June 8, 2007.

DISCUSSION OF ISSUES

1. Does the Hearing Officer have jurisdiction over a transportation reimbursement request?

The School District argues strenuously that this Hearing Officer has no jurisdiction over the transportation reimbursement request because no IEP was in place on which transportation was listed as a related service. The district’s argument continues that because this case does not involve “the identification, evaluation or educational placement of a child with a disability,

or the provision of FAPE to the child” 34 C.F.R. §300.507; 20 U.S.C. §1415(b)(6) or 22 Pa. Code §14.162(b), that this Hearing Officer has no jurisdiction to be involved in transportation issues.¹ There is certainly no dispute that Student’s IEP did not list transportation as a related service. However, this cannot be the end of the inquiry in this case.

Where a parent is unrepresented by counsel, it is incumbent upon the Hearing Officer liberally to construe the requests for relief which have been filed. In this case, the “pleadings” are the due process hearing request (HO-1). Allegations by *pro se* petitioners, “‘however inartfully pleaded,’ are held ‘to less stringent standards than formal pleadings drafted by lawyers’” *Hughes v. Rowe*, 449 U.S. 5, 9, 66 L. Ed. 2d 163, 101 S. Ct. 173 (1980) (quoting *Haines v. Kerner*, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972)). In liberally construing a *pro se* plaintiff's pleadings, courts will “‘apply the applicable law, irrespective of whether a *pro se* litigant has mentioned it by name.” *Higgins v. Beyer*, 293 F.3d 683, 687 (3d Cir. 2002) (citing *Holley v. Dep't of Veteran Affairs*, 165 F.3d 244, 247-48 (3d Cir. 1999)). In administrative proceedings such as this, a *pro se* parent is entitled to similar, less stringent, analysis of the legal basis for claims. In fact, it can be argued that because due process proceedings often do not involve attorneys, perhaps even more liberal construction should be in order.

Although Mother’s due process request does not cite to Section 504 or specifically address the issue of discrimination, Mother complained at hearing that she was treated

¹ The Hearing Officer is aware of a number of Appeals Panel decisions which have concluded that the Hearing Officer had no jurisdiction over certain transportation issues. See, e.g., *In Re: The Educational Assignment of M. V.*, Special Education Opinion Number 1459 (2004); *In Re: The Educational Assignment of A.B.*, Special Education Opinion Number 1798 (2007).

differently by the School District, that her initial attempts to contact the School District were simply ignored, and that the School District consistently refused to follow either the regulations or the Hearing Officer's orders with respect to her. (*See* N.T. 15-16). These are simple ways of expressing that Mother felt there was some form of discrimination in play.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, provides, in pertinent part:

No otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a).

To establish a *prima facie* case of disability discrimination under Section 504, a plaintiff must prove that (1) she is disabled or has a handicap as defined by the Act; (2) she is "otherwise qualified" to participate in school activities; (3) the school or the board of education received federal financial assistance; (4) she was excluded from participation in, denied the benefits of, or subject to discrimination at the school; and (5) the school or the board of education knew or should be reasonably expected to know of her disability. *W.B. v. Matula*, 67 F.3d 484, 492 (3d Cir. 1995); *Ridgewood Bd. Of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999). In satisfying the fourth requirement, "plaintiffs 'need not establish that there has been an intent to discriminate in order to prevail under § 504.'" *Matula*, 67 F.3d at 492 (quoting *Alexander v. Choate*, 469 U.S. 287, 297, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985)). There is no dispute that Student meets the requirements of a *prima facie* case, with the

exception of (4).

As the testimony developed, it became clear to the Hearing Officer that Student (with her mother acting on her behalf) was treated differently than other students with transportation needs or complaints about transportation. This conclusion came primarily from the testimony of the School District's vice president for transportation. All parents, according to the testimony, were to receive responses to written communications; Mother did not. All Students who lived on a route deemed hazardous by the School District receive free transportation to a non-public school; Student did not, at least not after it was determined to be unsafe to continue in the cab after the April incident. Mileage reimbursement would routinely be offered to parents; this offer was never made to Mother.

The question then arises as to the reason for this differing treatment. The only answer ever provided by the School District as to why Student's claims were largely ignored was that "Student's IEP did not provide for transportation as a related service."

This Hearing Officer may not have jurisdiction under the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.*, because this case does not directly relate to the identification, evaluation, or educational placement of a child with a disability. Nevertheless, this Hearing Officer certainly does have jurisdiction over discriminatory treatment under Section 504. *See also*, Chapter 15 of the Pennsylvania Code. Student was entitled to free transportation not because of any IEP language but because the route between her home and school were hazardous. If every other student living on a hazardous route receives free transportation but the one with an IEP does not, then this is the denial of a benefit prohibited by Section 504 as implemented in the Pennsylvania Code.

2. Should Parent be reimbursed for transportation between April and the end of the 2006-2007 school year?

This case literally cried out for resolution prior to the time and expense of a due process hearing. The School District acted at its peril when it placed all of its eggs in the “lack of jurisdiction” basket. Having lost the jurisdictional issue, the record provides no reasonable explanation for why Mother was treated so discourteously and why Student was denied services that would be provided to every other student fitting the School District’s criteria. The School District continued to repeat its mantra that “no IEP provided for transportation services.” Having an IEP is not, and should not be, a basis for denying safe transportation which is provided to *every* student living on a hazardous route.

Mother wrote letter after letter and made contact after contact with the School District but no one even gave her the simple courtesy of a response. She was denied reimbursement for the requested transportation and not a single person would take the trouble to tell her why she was being denied or how she could challenge such a denial.

Sadly, the indifference to Mother continued when School District’s counsel failed to file a timely response even after ordered to do so by the Hearing Officer. Mother learned at hearing, apparently for the first time, that mileage reimbursement may have been an option had she only known to request it. The School District did not volunteer this information at any time before the hearing. This may very well have been an alternative remedy that Mother might have accepted had only it been offered to her.

Unfortunately for the School District, the testimony of Mr. L, the vice president of

transportation services, served to underscore the way in which this Student was treated differently from other students. Given no other explanation, the only identifying factor in this record is Student's established handicap or the fact that she just happened to have an IEP. Of course, neither the federal statute nor the state regulations permit this reason to be used to deny services. Student was a protected handicapped student and she was entitled to equal treatment. Similarly, her Mother should not have been made to suffer a denial of equal treatment because of the existence of her daughter's IEP.

Mother specifically requested that the Hearing Officer "sanction" the School District in order to prevent it "from doing this to another mother." (N.T. 113). The Hearing Officer has no ability to sanction the School District for any procedural violations and declines to do so. However, our Third Circuit found in *Matula, supra*, that both injunctive relief and monetary damages are available under Section 504. *See Matula*, 67 F.3d at 494. The monetary damages suffered here were the costs Mother incurred in providing transportation in a situation where the School District should have provided safe transportation from Student's home to school, an admittedly hazardous route.

Therefore, this Hearing Officer finds it appropriate to order reimbursement for transportation which was provided by School District policy to every other student except for this one, a student with a handicap.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that Student is awarded transportation reimbursement in the amount of \$1,159.20. Payment is to be made within thirty (30) days of the date of this Order.

Date: October 23, 2007

Debra K. Wallet, Esq.
Hearing Officer
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