BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of: STUDENT, Petitioner, vs. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent. .	OAH NO. N2006020443

DECISION

STATEMENT OF THE CASE

Wendy A. Weber, Administrative Law Judge of the Office of Administrative Hearings, Special Education Division, heard this matter in Los Angeles, California on May 2 and 3, 2006.

Petitioner/Student was represented by Carol Hickman Graham, Attorney at Law. Also in attendance at times throughout the hearing were Student and his parents.

Respondent Los Angeles Unified School District (District) was represented by Vivian Haun, Attorney at Law, and Susan Glickman, Administrative Coordinator.

Petitioner filed a request for Due Process Hearing on February 16, 2005. On April 10, 2006, the matter was taken off calendar. At the hearing, oral and documentary evidence were presented. On May 3, 2006, testimony was concluded, and the matter was scheduled for briefing. On May 5, 2006, a telephonic status conference was conducted at the request of Petitioner, at which time the introduction of the aforementioned documents into evidence was clarified. Student's closing brief was timely received and marked for identification as Exhibit G. Respondent's closing brief was timely received and marked for identification as Exhibit 32. The matter was submitted for decision on May 22, 2006.

ISSUE

Does Student require, for safety purposes, a one-on-one aide to accompany him on his bus ride from school to home each school day?

CONTENTIONS

Petitioner contends an aide is necessary to protect Student from another student who rides the same bus. The District contends a one-on-one aide is not necessary in order for Student to benefit from his educational program, nor is an aide necessary for his safety.

FACTUAL FINDINGS

Background

1. Student, currently 3-years 11-months old, is eligible for special education and related services as visually-impaired (VI).

2. Student attends the preschool special day class (SDC) for VI students at Topeka Drive Elementary School. When Student was initially assessed in May, 2005, he scored average in nonverbal cognitive development and significantly above average for verbal development, but delayed in social-emotional development. Social development was an area of weakness as he was observed banging toys, stomping his feet, jumping and hitting, and showed impulsiveness and poor personal boundary awareness. He did not need instruction in self-help, orientation or mobility, as his functional vision allowed him to meet his travel needs at school. An Individualized Educational Plan (IEP) was developed and provided for transportation services. From November, 2005 to February, 2006, Student's achievement and efforts improved in all academic areas, but socializing and developing cooperative play remained an area of weakness.

3. Student rides the school bus home in the afternoon, at the request of his mother, to develop his independence and to benefit from interacting with his peers. The ride to Student's home takes approximately 50 minutes. Student and three other VI students from the SDC at Topeka Drive Elementary, ride the same bus.

January 12, 2006 Bus Incident

4. During a bus ride home on January 12, 2006, the driver heard some "playful" noises from Student and Steven[1], stopped the bus and went back to

[1] In order to protect the privacy of this other student, he will be referred to by the alias "Steven."

investigate. He saw no problems, told the children to behave, and continued to drive the student's home. During the ride, Student and Steven were strapped into separate child safety seats on the same seat, two or three rows behind the driver.

5. Upon arriving at Student's house, Student showed his hand to his mother. Student's mother believed Steven bit Student on the right hand and forearm. A bus supervisor investigated the incident, and Student was treated at St. Joseph Medical Center Emergency Department that day, where he was diagnosed with a human bite right hand and right forearm. Student returned to school on January 23, 2006.

Prior Incidents

6. Gloria Bosman, a credentialed special education teacher, has worked with VI students for eight years. Throughout the 2005/2006 school year, Student and Steven have been students in Ms. Bosman's VI SDC class at Topeka Drive Elementary.

7. Steven, 3 years old and completely blind, is able to finger feed himself and is learning to open a milk carton, but cannot button his jacket, use scissors without assistance, or hold a crayon or pencil properly due to limited hand mobility.

8. Two classroom incidents occurred between Student and Steven. In October, 2005, Steven twisted Student's nose after Student pulled something away from Steven. On November 8, 2005, Steven bit Student on Student's shoulder after Student attempted to take a box out of Steven's hands. No other incident has occurred in the classroom.

9. After both classroom incidents, the Ms. Bosman spoke to Steven about his behavior, gave him a "time out" and took Student aside and held him until he felt safe. Steven cried and was upset, but Student was not hurt and did not appear afraid, traumatized or frightened of Steven. After the second incident time out, Steven apologized to Student, and Student hugged Steven.

10. Ms. Bosman works daily with Steven on the use of his hands, and believes it is unlikely Steven could unfasten his child safety seat belt or harness. Ms. Bosman is not concerned about Student's safety around Steven, and her testimony established that Steven does not seek out any student offensively to cause harm, but only reacted defensively to Student when Student took something out of his hands. Steven is not a threat or menace to Student, is quiet in class, has friends, and has never bitten or physically injured anyone unprovoked.

11. Student is known to push other children, and is more aggressive. The morning of January 12, 2006, prior to the bus incident, Student pushed Steven for no apparent reason.

Events Post-Incident

12. After the January 12, 2006 incident, the interim assistant principal requested an investigation and drafted a new routing sheet which instructed all bus drivers to keep Student separated from Steven on the bus at all times.

13. A January 20, 2006 emergency IEP meeting requested by Student's parents was conducted to address the bus incident and Student's safety on the bus. After discussions between the parents and the other IEP team members, the IEP was amended to implement seating procedures designed to prevent similar incidents from occurring. The parents and the District agreed Ms. Bosman would daily board the bus with Student and ensure he was placed on the seat directly behind the bus driver by himself, near the aisle and away from the window, and that Steven would sit away from Student towards the rear of the bus. The VI SDC teacher was instructed to accompany Student to the bus daily to ensure these instructions were followed. At the request of his parents, Student was also mainstreamed into the kindergarten general education classroom with 20 students 30 to 45 minutes a day for higher level education, and as a respite from Steven. Concerned about Steven verbally taunting and irritating Student, Mother purchased headphones for Student to wear during the bus ride.

14. After the IEP was amended, all bus drivers were given the seating instructions verbally and in writing, and the seating instructions were included on the daily route sheet. Route sheets are checked daily for any change in instructions, and a PURL[2] is attached to the route sheet.

15. Since the incident, the VI SDC teacher daily accompanies Student onto the bus, repeats the instructions to the bus driver, and ensures the seating arrangement is in accordance with the parents' instructions and the route sheet. Ms. Bosman walks Student to the bus, places him in his child safety seat in the seat directly behind the bus driver on the aisle and away from the sunlight and Steven's reach, straps him into his child safety seat, and places headphones on him after he has been secured onto the seat. Steven is seated in the back of the bus, strapped into his child safety seat and harnessed to the bus seat in the same manner. Ms. Bosman does not allow the bus to leave if the children are not seated in this manner. If Ms. Bosman is not present, either her assistant or the substitute teacher monitored by the IEP designee, who is also a credentialed VI special education teacher, ensures these steps are followed.

[2] A PURL is a document generated by the special education department which gives specific detailed instructions on each child's disabilities and unique needs.

16. Steven has no physical access to Student on the bus. Steven sits four or five rows behind Student on the opposite side of the aisle, approximately ten feet away. The children are secured in child safety seats that are placed on the bus seat and secured to the bus seat with a specially designed harness. The harness wraps around the back of the bus seat, across and over the shoulders, around the waist and down between the legs, and clasps in the middle front. The harness straps the upper portion of the child safety seat to the bottom, impairs mobility in the seat, and prevents movement out of the seat.

17. The harness is secured by three buckles and a release button, and requires strength to release. No pre-school VI student has released the safety belt or harness. No pre-school VI child has gotten out of the child safety seat alone. Steven cannot not release the safety belt or harness by himself. A child with handicapped hands such as Steven's is incapable of getting out of the seat.

18. Steven is delivered to his house first. He has not bitten, and cannot bite or reach Student as he passes by Student's seat. When taking Steven off the bus, the driver unbuckles the harness and child safety seat. Steven is usually groggy from sleeping and requires assistance to walk. The driver holds Steven's hand and places herself either behind or to his side and guides him down the aisle. Steven is within Student's reach when he passes Student's seat for no more than two to five seconds. Petitioner's expert witness, Victoria Frantz, psychologist, is not concerned when Steven is taken off the bus.

19. Drivers attend monthly meetings to review the safety needs of the children and every four years they receive 40 hours of continuing education in special education and safe transportation. Drivers are given assignments, the route sheet and PURL daily, which are checked for any special needs. Three times per month, a cadet driver rides with the driver to see that all special instructions are carried out.

20. Since consistency and familiar voices help make VI children feel safe, two primary bus drivers are assigned to Student's route. Lillian Montanez drives three days a week, has been a bus driver for the District for children with disabilities since 1983, and a driver for VI students at Topeka Drive Elementary since September, 2005. She holds a special school bus certificate, special endorsement certificate, and receives annual training in transporting VI children. Christina Garcia is similarly trained and has been driving VI students for the District for four years. Their primary duty is to transport children safely, and both testified credibly regarding their concern for the safety of special education children during transportation.

21. Student continues to ride the bus home four days a week. All drivers are aware of the January 12, 2006, incident. All procedures are followed daily, and are effective in keeping Student safe and separated from Steven. The drivers constantly monitor the children during transportation. Since the January 12, 2006 incident, Student and Steven have not been seated next to each other on the bus.

Since the procedures were instituted, there have been no further incidents or physical contact between Student and Steven on the bus.

22. Mother believes Student is fearful of riding the bus due to Steven's presence, and that an aide on the bus would allay those fears. Student currently exhibits sensory stimulation by fidgeting, picking his skin and digging his nails into his cuticles. Mother believes Steven taunts and terrorizes Student and that these symptoms are due to Student's fear of Steven and of being bitten again by Steven. In addition to purchasing the CD player with headphones, she instructed Student not to speak to Steven.

23. After the incident, Student started counseling with Ms. Frantz. Ms. Frantz diagnosed Student with post-traumatic stress disorder (PTSD), based on symptoms of avoidance, fear, acute anxiety, clinging to caregivers, hyperactivity, difficulty sleeping, and avoiding social interaction. Ms. Frantz believes these symptoms are a result of the bus incident.

24. Ms. Frantz and, the District's expert witness, psychologist Valerie Wallace offered reasons as to why a preschool VI child may bite another child. Both expert witnesses agree that, although not common, preschool-age VI children are known to bite when something is grabbed away from them, which in turn can lead to aggression without intervention to modify the behavior. Biting is a defensive maneuver used in an attempt to gain control of the situation, and behavior intervention is necessary to empower the child who is bitten. Even without behavior intervention, biting behavior dissipates as the child ages.

25. Ms. Frantz believes a VI child who tends to bite needs close adult supervision, and that direct supervision on the bus is required to prevent any future biting incident, and for immediate intervention and instruction on appropriate behavior. She believes a bus driver cannot handle driving and dealing with a child out of his seat at the same time. Ms. Wallace, on the other hand, believes an aide on the bus would only prevent Student from "living life" and learning how to cooperate with other children, and that it is counter-intuitive to put an adult with Student because it would make him feel less empowered and less safe. It is more important to teach skills to become empowered to feel safe.

26. Although both Ms. Frantz and Ms. Wallace are well-trained and experienced psychologists who made credible witnesses, the value of Ms. Frantz' and Ms. Wallace's testimony is limited. Neither observed Student in the classroom, on the bus, or in any situation where Student and Steven interacted, and neither interviewed Student's teacher, the bus drivers or Steven. Student's symptoms were either reported to Ms. Frantz by Mother, or observed during office counseling sessions; and Ms. Frantz admitted Student had sensory stimulation issues prior to the bus incident.

27. The testimony of Ms. Bosman and the bus drivers established that Student shows no anxiety, fears or other emotional issues getting on the bus, or during the bus ride. There is no evidence Student cried, refused to get on the bus, or was highly agitated when getting on or off the bus. Student is a quiet, very good little boy, who never makes a sound.

28. Neither the teacher nor the bus drivers observed Steven taunt or communicate with Student. Steven does not talk to, taunt, tease, reach for, or show aggression toward, Student or any other child during the trip. Steven does not speak during the ride, and, in fact, once secured to his child safety and bus seats, he usually falls asleep. Although blind children can locate people by sound, Student rarely makes any noise on the bus, and it is not likely Steven would hear Student as he is led past Student. Steven cannot reach Student and is no threat to Student on the bus.

29. Student has shown reluctance to go to the kindergarten class and soon after he started attending the class, showed signs of stress over attending it. Ms. Bosman observed that Steven's biting behavior is a result of Student's aggressiveness by taking items from Steven's hands and/or pushing him on the playground.

30. Since the bus incident, Student and Steven are separated in class. They do not sit or play together, and Steven does not taunt or tease Student in class. Student shows no behavior changes in class, and no signs of stress or anxiety toward Steven, such as fearfulness, agitation, loss of concentration, withdrawal, irritability, anger, temper tantrums, whininess, clinginess, regression, stomach aches or headaches.

31. Since the bus incident, Student is excelling and making progress in all academic areas. A Kindergarten Mid-Program Skills Assessment for Open Court Reading Program on February 13, 2006 shows Student is at the kindergarten level and continues to benefit from his education. Student displays a positive attitude toward learning, his social/emotional state is appropriate, and he appears happy.

ANALYSIS

1. Under the Individuals with Disabilities Education Act (IDEA) and state law, pupils with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. §1400; Ed. Code §56000 et seq.) A FAPE means special education and related services that are available to the pupil at no cost to the parents, meet state educational standards, and conform to the pupil's IEP. (20 U.S.C. §1401(29).)

2. "Special education" is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings." 20 U.S.C. §1401(25)(A). "Related services" means transportation and other supportive services as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. §1401(26)(A); 34 C.F.R. §300.24(a); 34 C.F.R. Part 300 Appendix A, Question 33.) (See also California Education Code §56363(a) (designated instruction and services (DIS) (California's term for related services) shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program.").)

3. Transportation as a related service includes transporting a preschool-aged child to the site at which the public agency provides special education and related services to the child, if that site is different from the site at which the child receives other preschool or day care services. (34 C.F.R. Part 300 Appendix A, Question 33.) "Transportation" is defined as "travel to and from school and between schools, travel in and around school buildings," and includes "specialized equipment (such as special or adapted buses, lifts and ramps) if required to provide a special education for a student with a disability." (34 C.F.R. §300.16(b)(15).) The public agency must ensure that any transportation service included in a child's IEP as a related service is provided at public expense and at no cost to the parents, and that the child's IEP describes the transportation arrangement. Id. It must also be provided in the least restrictive environment. (34 C.F.R. §300.553, incorporating 34 C.F.R. §300.306.)

4. Parents are guaranteed minimum procedural safeguards related to the placement or provision of a free appropriate public education. (20 U.S.C. §1400, et seq.; Ed. Code §56500, et seq.) A parent may request a due process hearing when there is a disagreement regarding the availability of an educational program that may be appropriate for the pupil. (20 U.S.C. §1415(b)(6); Ed. Code §56501, subd. (a).) As the party seeking relief, Petitioner has the burden of proving by a preponderance of the evidence that the District's offered program was insufficient to meet his unique needs. (*Schaeffer v. Weast* (2005) 126 S.Ct. 528) The "party questioning the IEP must provide sufficient information to show it does not address the student's individual needs adequately." Id.

5. In addressing level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the IDEA, the Supreme Court in Board of the *Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 205-206, 102 S.Ct. 3034, determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit. The IDEA does not require school districts to provide special education students with the best education available, or to provide instruction or services that maximize a student's abilities. Id. at 198-200. Rather, school districts are required to provide only a "basic floor of

opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. Id. at 201. Providing an aide to assist a student on the bus may be part of specialized transportation covered under the IDEA, particularly for students with severe disabilities. (See e.g. *DeLeon v. Susquehanna Community School Dist.* (3rd Cir. 1984) 747 F.2d 149; *San Mateo-Foster City Sch. Dist.* (SEA CA 1999) 31 IDELR 23.) However, the IDEA requires transportation of disabled child only to address his educational needs. It does not require a school district to accommodate a parent's unrelated non-educational preferences. (*Fick v. Sioux Falls* 49-5 (2003, 8th Cir.) 337 F.3d 968, reh den en banc (2003 8th Cir.) 2003 US App LEXIS 18870.)

6. Petitioners allege Student is being denied safe transportation due to the incident that occurred on the bus on January 12, 2006, and that an aide is necessary during transportation to ensure his safety from Steven. There is no dispute that Student is entitled to safe transportation between school and home as part of his IEP. Student is entitled to a FAPE within the meaning of the IDEA, which includes daily safe transportation services home from school. In determining whether the District has offered a FAPE, the focus is on the adequacy of the proposed program and related services. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307.) If the District's proposed program and related services reflect Student's needs, provide some benefit, and comport with the IEP, the District has offered a FAPE, even if the parents prefer another program or services, and even if the preferred program or services could have resulted in greater educational benefit. (*Rowley*, 458 U.S. at 207-208.) The IDEA also requires that Student be educated in the least restrictive environment. (20 U.S.C. §1412(a)(5)(A); Educ. Code §56031.)

7. No evidence was presented that the bus incident prevents Student from attending the VI SDC at Topeka Elementary, or from obtaining the educational services provided by his IEP. On the contrary, since January 23, 2006, Student still attends the VI SDC class, continues to ride the bus home from school four days a week, and receives educational benefit from his special education program, even without an aide on the bus. Student, a bright child, is excelling academically, has made progress in all academic areas since the incident, and has even progressed to kindergarten level while still in preschool. The bus incident had no impact on his ability to benefit from special education, and no evidence was presented that the bus ride home had any adverse impact on Student's educational progress. This is not a situation where transportation services prevent Student from attending school and obtaining educational services provided by his IEP. (*District of Columbia v. Ramirez* (D.D.C. 2005) 377 F.Supp. 2d 63.)

8. Moreover, although Petitioners believe an aide is necessary to provide safe transportation for Student, the evidence established the District is providing safe transportation without the presence of an aide.

9. Assigning seats and securing these VI students in this manner is directed at the nature of Student's disabilities, and therefore, comport with Student's IEP. Student's sensitivity to light is being addressed by being seated on the aisle out of direct sunlight. His safety needs are being addressed by being placed on a seat directly behind the bus driver, separated from Steven by at least four rows, and both are strapped into child restraint seats and harnessed to the bus seats. There is no question the bus incident occurred because Student and Steven were placed next to each other on the bus after two prior classroom incidents had established a history of aggressive behavior. Student's safety during the bus ride, therefore, revolves solely around preventing further contact between the two children while on the bus. Interventions since the incident successfully keep the children apart, and there have been no further incidents. VI students' orientation and mobility depend on establishing a careful routine, which is being performed daily since the bus incident by the same VI SDC teacher and bus drivers.

10. In light of the many precautions taken daily to prevent interaction between Student and Steven, as well as the fact that no further incidents have occurred since these measures were instituted, it is highly unlikely that Steven would be able to get close enough to Student during the bus ride to bite again. It is virtually impossible for Steven to unfasten the three-point harness or the child safety seat strap, much less extricate himself from the seat and approach Student during the bus ride. The only time during the bus ride Student and Steven are in close proximity is when Steven arrives at his destination, and the bus driver assists Steven down the aisle past Student's seat.

11. Although Mother is concerned Steven could bite Student when getting off the bus, this is an extremely remote possibility. The safety precautions in place when Steven is taken off the bus also prevent interaction between Steven and Student.

12. Mother is a very caring mother who understandably desires protection for her child. Petitioner's position that an aide is required for Student's safety is premised in part upon a subsequent diagnosis of PTSD, and that an aide will help make Student feel safer during the bus ride home. Although Ms. Frantz diagnosed Student with PTSD, it is not correct to characterize her testimony as indicating that the subsequent modifications to the transportation services did not adequately address Student's safety needs.

13. In reaching this decision, great weight was placed on the testimony of Student's credentialed special education teacher and the bus drivers. All were articulate, intimately aware of their duties and responsibilities, and genuinely concerned about the children in their care. Ms. Bosman's credentials indicate she is thoroughly qualified to render opinions on Student's ability to access his education and his safety needs. She presented as a competent, professional and caring teacher, who not only recognized the behavior problems between Student and Steven in the classroom, but also immediately implemented appropriate steps to address the biting

behavior—steps which both parties' expert witnesses opined were necessary to correct biting behavior. Her testimony is extremely persuasive.

14. Courts are cautioned to defer to the greater expertise of education officials at the state and local levels. (*Rowley*, 458 U.S. at 208, 102 S.Ct. at 3051, 73 L.Ed. 2d 690.) Deference will be given to the expertise of the District's professionals in determining an appropriate educational program for Student. Id. at 206-207, 102 S. Ct. at 3051, 73 L. Ed.2d 690.) Student's safety needs are not beyond the competence of the well-trained and concerned teacher and bus drivers, and are being met by those individuals during the bus ride home from school.

15. Petitioner's assertion of unsafe transportation is unsupported by the evidence. There is no evidence that any further incident has occurred—either on the bus or in the classroom,[3] since the IEP was amended and procedures keeping Student and Steven separated were instituted. Student's grades before and after the January 12, 2006 incident, attendance record, and lack of expression of fear or anxiety around Steven on the bus, all support the conclusion that he is safe and not fearful during transportation. The January 12, 2006 bus incident was clearly unfortunate and understandably concerning for Student and his parents. However, that incident arose solely because Student and Steven were seated side-by-side on one bus seat—a situation that has been remedied.

CONCLUSIONS OF LAW

The preponderance of the evidence establishes the educational and transportation services provided by the District are designed to meet Student's unique needs, and assist Student to benefit from special education. The District is providing Student a FAPE and safe transportation on the bus ride home from Topeka Drive Elementary without the presence of an aide.

ORDER

Student's request for an order requiring Los Angeles Unified School District to provide him with an aide during the bus ride home from school is denied.

[3] The prior classroom incidents, although showing a tendency toward aggression between Student and Steven, cannot serve as evidence of a "failure" of the District's plan for the provision of special education transportation services to Student. (*S.B. v. City of South Portland* (D.Me., Feb. 24, 2006) U.S. Dist. LEXIS 7292.) Student's safety within the classroom is not accomplished by special education transportation. It is an entirely separate concern. Id.

PREVALING PARTY

Under Education Code section 56507, subdivision (d), this Decision must indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Respondent school district prevailed on each and every issue heard and decided in this matter.

Dated: June 8, 2006

Wendy A. Weber
Administrative Law Judge
Office of Administrative Hearings

NOTICE OF APPEAL RIGHTS

This is the final administrative decision and both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days.