

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
SPECIAL EDUCATION APPEALS**

In Re: Student v.
Ipswich Public Schools

BSEA # 1602849

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), the state special education law (MGL ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

On October 21, 2015, Parents requested a Hearing in the above-referenced matter. At the request of the Parties the matter was continued for good cause and the case scheduled to proceed to a Pre-hearing Conference on December 8, 2015 and Hearing in January 2016. On January 14, 2016, Parents requested that the Hearing be continued to March 2016. Parents' Request was granted for good cause and the matter was scheduled to be heard in March 2016 as requested.

The Hearing was held on March 9, 2016, at the Offices of DALA/BSEA, One Congress St., Boston, Massachusetts before Hearing Officer Rosa I. Figueroa. Those present for all or part of the proceedings were:

Student's Parent¹

Sean Goguen, Esq.
Donna Nimec, MD

Attorney for Parents
Director of Pediatric Physical Medicine and Rehabilitation
Spaulding Medical Center

Colby Brunt

Attorney for Ipswich Public Schools

Alan Davey

Bus Driver, Ipswich Public Schools

Beverly Hegedus

Director of Special Education, Ipswich Public Schools

Meg Finnegan

Program Manager, Ipswich Public Schools

Elona Roth

Teacher, Cotting School

Leah Thibodeau

Director of Special Education, Cotting School

Alexander K. Loos

Court Reporter, Doris O. Wong Court Reporting

The official record of the Hearing consists of documents submitted by Parents marked as exhibits PE-1 through PE-6 and documents submitted by Ipswich Public Schools (Ipswich) marked as exhibits SE-1 through SE-18; recorded oral testimony and written closing arguments. On March 23, 2016, the Parties requested and were granted a postponement for

¹ "Student's Parent" refers to the Parent present at Hearing who provided testimony.

submission of closing written arguments through March 28, 2016. The closing arguments were received on March 28, 2016 and the record closed on that date.

HEARING ISSUE:

1. Whether Student's pick-up time of 6:30 AM interferes with her ability to receive a free, appropriate public education (FAPE) consistent with state and federal law?

POSITIONS OF THE PARTIES:

Parents' Position:

Parents contend that Student is being subjected to an unreasonably long commute between her home in Ipswich and her placement located in Lexington. Specifically, they contend that the bus pick-up time of 6:33 AM is unduly burdensome to Student who is experiencing stress over concerns that she may miss the bus and not make it to school on time.

According to Parents, Ipswich changed the pickup time ostensibly because the traffic along the route Student traverses is so heavy that the only way to get Student (and another student in her van) to school on time was by leaving Ipswich earlier. Parents allege that the early pick-up time is impacting Student's stamina as well as her ability to benefit from the school day. According to them, Student has become irritable and distressed at home. Parents state that the morning routine causes havoc because Student is not sleeping enough and she is not eating her breakfast, both of which have a negative impact on Student's health.

Parents are aware that the commute to Lexington will take approximately one hour and twenty minutes and wish for Student to be picked up between 6:50 AM and 7:00 PM as in previous years. While they understand that Ipswich would want to save money on transportation costs, their main concern is that the early pick-up time interferes with Student's ability to receive a free, appropriate public education.

Ipswich's Position:

Ipswich states that it is currently offering Student door-to-door transportation (although not required under her IEP), and asserts that the pick-up time of 6:33 AM is necessary in order to get Student (and the other student who travels with her) to the Cotting School on time.

According to Ipswich, the traffic on the route the bus takes is very heavy and unpredictable. Student was late to school 41 times during the 2014-2015 school year, and 60 times the year before, when she had a later pick-up time, mostly due to the traffic on Route 128. This school year she was late three times in September/ October. It is Ipswich's goal to get all students to school on time 100 % of the time and it argues that the only way to achieve this is with an earlier pick up-time.

Ipswich noted that Student starts school at 8:30 AM and the other student on the bus starts at 8:15 AM because he is in the upper school. Student is likely to transition to the upper school later this year at which time she would also have an 8:15 AM start time.

Contrary to Parents' assertions, Ipswich argues that getting to school early benefits Student and allows her to access a FAPE. According to Ipswich, Student does not like to be late to school and when she arrives late she becomes frazzled and out of sorts, preventing her effective participation in school.

Ipswich contends that the later departure accommodation requested by Parents is also unreasonable because it is likely to cause the students to arrive late, and because acquiescing to Parents' request of a later pick-up time for Student would necessitate providing two separate vans to transport the Ipswich students attending Cotting, which would be an excessive financial burden on the District. Ipswich argues that while Parents are entitled to a reasonable accommodation they are not entitled to the optimal option of having Student being picked up at the time Parents choose, on a van transporting solely Student

Lastly, Ipswich noted that transportation pick-up and drop-off times were a school administrative decision falling outside the purview of the BSEA.

FINDINGS OF FACT:

1. Student is a fifteen year-old resident of Ipswich who has been diagnosed with global developmental delays and Apraxia, caused in part by a major dysfunction of the right hemisphere of her brain. She is also susceptible to anxiety and stress, which has been manifested during transitions and/or changes in schedule or routines, and when academic demands are challenging to her (PE-1; PE-3; PE-4; Roth; Hearing Request). Student's IEP describes her overall performance as "variable on a day-to-day basis" (SE-1). Physically, Student has scoliosis, poor motor skills, and decreased muscle tone and strength (PE-1; SE-1; Nimec).
2. Student "exhibits pronounced inattention, disorganization, and deficits in the areas of working memory and automaticity." She also displays substantial deficits in the areas of "visual motor and visual spatial learning, emotional awareness, sequencing, and social communication" (SE-1). Student's disabilities and her entitlement to special education services are not disputed.
3. In 2012, Student had a grand-mal seizure which appeared to have impacted her cognitive performance in a subsequent evaluation conducted by Dr. Rafael Castro (PE-3). Anxiety, stress and lack of sleep may lower Student's seizure threshold making her more vulnerable to having one (Nimec).
4. Student attends the Cotting School (Cotting) in Lexington, Massachusetts, under a partially accepted IEP (SE-1).

5. Student was originally placed at Cotting as a result of a settlement agreement entered into by the parties in February 2011 after Parent filed a Hearing Request with the Bureau of Special Education Appeals (BSEA) seeking placement of Student at Cotting (SE-15). The agreement expired in the summer of 2013 (Parent, Hegedus).
6. Regarding transportation the February 2011 settlement agreement provided that

The parties agree and acknowledge that due to the distance between the Student's home and Cotting School and reasonably anticipated traffic considerations, the Student may be required to spend in excess of sixty (60) minutes per trip being transported between her home and Cotting and the Parents agree to waive any need for Team consideration or approval of the Student's transportation in excess of sixty (60) minutes per trip (SE-15).
7. After the expiration of the Settlement Agreement, Student continued her placement at Cotting pursuant to IEPs (SE-1; Hegedus; Parent). By all accounts (and Progress Reports), her academic and educational needs are being met at Cotting. Ipswich however asserts that Student's educational needs can be met in district or at other private placements, either of which would involve a shorter commute for Student (SE-2; SE-12; SE-13; Roth, Hegedus).
8. The record contains a recent observation of Student at Cotting conducted on March 27, 2015 by Jennifer Reimold, Ipswich School Psychologist (PE-4). In her observation report Ms. Reimold noted that Student was engaged in the academic lesson, was able to read the material with teacher assistance, answered questions, accepted direction from her teacher, appeared comfortable with her peers and teachers, and spontaneously conversed with other students (PE-4). The observation and teacher report make no mention of Student displaying anxiety or stress in school at that time (*Id.*).
9. During Student's tenure at Cotting, her transportation pick-up time has varied from as early as 6:20 AM to as late as 7:00 AM (Parent; PE-3).
10. In the fall of 2012, Parent filed a complaint with the Office of Civil Rights (OCR), raising the travel time between her home and Cotting as the reason for her complaint. She also filed two (2) complaints with the Department of Elementary and Secondary Education's Program Quality Assurance Office (PQA), in the spring and in the fall of 2013, due to brief interruptions in transportation services while the route was under bid and because of the one hour travel time to Cotting (SE-16; SE-17; SE-18; Administrative Notice of Parents' Hearing Request). The first complaint with PQA resulted in a finding of a violation because of the transportation provider's inconsistent service and Student remaining in the vehicle for over one hour (PE-16). Recommendations for corrective action were made and Ipswich implemented said corrective action on or about November/December 2012² (SE-16). PQA

² "As of November 12, 2013, the District has secured a new provider who was able to provide transportation on a consistent basis within the required 1 hour time frame for each way. The Department contacted the complainant who confirmed that the transportation is being provided on a consistent basis and the student is not remaining for

found no violations of education law, regulation or policy and/ or declined to address the other issues because they had been resolved (SE-17; SE-18).

11. According to Dr. Hegedus it is difficult to get vendors to provide transportation because the drivers must possess a “7D” license to drive special education vans. Transportation can be expensive because vendors/drivers set their own rates. Dr. Hegedus testified that on a recent bid for coverage, she contacted twenty-one vendors (21) before securing a company from Wilbraham, Massachusetts (Hegedus).
12. Student’s most recent IEP covers the period from May 6, 2015 to May 5, 2016. This IEP does not contain a goal to address anxiety or stress.³ The IEP states that transportation will be provided on a regular transportation vehicle and provides the following caveat/modification

Parents are aware the transportation is likely to extend beyond one hour per trip because of the distance of the placement from the Student’s residence (SE-1).

13. On October 16, 2015 Parent accepted the proposed placement at Cotting and partially rejected the IEP noting

We reject the statement on page 21, “Parents are aware that transportation is likely to extend beyond one hour per trip because of the distance of the placement from the student’s residence”, as well as any other statement in the IEP that could be construed to mean that we accept the current transportation situation. [Student’s] ride to and from Cotting has been unreasonably and unnecessarily long, and not due to the distance to Cotting (SE-1).

14. The IEP does not call for door-to-door transportation, or for specialized transportation. However, Ipswich is providing door-to-door transportation for Student (SE-1; Parent).
15. At Hearing Parent testified that “We’ve never had any problem with the length of the trip due to traffic, weather or the fact that she has to travel down 128 a fair distance” (Parent).
16. Dr. Hegedus, who has been Director of Special Education in Ipswich since July 2014, wrote to Parent on September 23, 2015 sharing her concerns that Student’s IEP had not been accepted, and suggesting alternatives to address the issue of the lengthy commute from Ipswich to Lexington (SE-11). Concerned with the heavy traffic and the previous year’s issues with the arrival time at Cotting, Dr. Hegedus informed Parent that the pick-up time for Student would be changed to 6:40 AM with a 5 minute wait time upon arrival (SE-11; PE-3; Hegedus). Up to that point, Student’s pick-up time had been changed from 7:00 AM the

longer than 1 hour in the vehicle” (SE-16). The Department accepted Ipswich’s Corrective Action Report and based on assurance of its implementation, the complaint was closed on December 4, 2013 (SE-16).

³ The only reference to Student’s reactions to heightened frustration levels is found in the Social Communication (Goal #1) section of the IEP, noting in pertinent part that “When frustrated, [Student] can be quick to show unexpected behaviors (e.g., becoming disproportionately upset when needing help)...” (SE-1).

previous school year to 6:50 AM at the beginning of the 2015-2016 school year (PE-3). She also noted that if Parent had concerns regarding the travel time, Student's Team could reconvene to locate a placement closer to Ipswich, or, Parent could transport Student and Ipswich would reimburse Parent (SE-11; PE-3).

17. Dr. Hegedus wrote to Parent again on October 2 and October 7, 2015, offering new options for transportation pick-up times so as to ensure that both students commuting together from Ipswich would arrive at Cotting on time. These letters informed Parent that Student would be picked up at her home at 6:20 AM, Parent could drive Student to the Middle School where the van would pick her up at 6:30 AM, or Student could be placed in a commercial route with other students and this bus would make additional stops. She also offered to reconvene Student's Team to discuss alternative placement for Student. The letters noted that the options were not intended as punitive but rather were geared toward getting the students to Cotting on time (SE-12; SE-13). Dr. Hegedus had used the driver's log and Cotting's attendance logs as evidence of Student's arrival time in Cotting (logging numerous late arrivals during the previous two years and a few the beginning of the 2015-2016 school year) which justified the need for the pick-up time adjustments (SE-13; SE-14; SE-5; SE-4).
18. During the past two years Student and another student resident of Ipswich also attending Cotting (student A) have been on the same van route from Ipswich to Lexington (Davey).
19. During the 2014-2015 school year, both Student and student A attended middle school and both started the school day at 8:30 AM. This year, 2015-2016, student A moved to the upper school. Upper school students at Cotting start the school day at 8:15 AM while as a middle school student, Student's program starts at 8:30 AM. It is likely that Student will move up to the upper school during the next school year (2016-2017) (Thibodeau, Hegedus).
20. During the 2014-2015 school year, Student was picked up between 6:50 AM and 7:00 AM (Parent). That school year, Student was late to school 41 days (SE-14). The previous year, 2013-2014, Student was late to school over 60 days (SE-13).
21. Student's pick-up time was adjusted several times between September 2015 and December 2015 (PE-3; SE-7; SE-8; SE-11; SE-12; SE-13; Parent; Hegedus; Administrative Record).
22. On October 26, 2015, Leah Thibodeau, Cotting's Special Education Coordinator, wrote to Parent who had inquired about Student's level of alertness in school after the transportation pick-up time had been moved to 6:20 AM (SE-6; SE-13). Ms. Thibodeau reported that after conferring with Student's teacher, Elona Roth, she could report that Student

... seemed to be alert and had the ability to endure through the school day. [Ms. Roth] indicated that Student is out of sorts when the bus has arrived late a couple of times due to traffic. [Student] likes to be on time. [Ms. Roth] feels that being on time for school allows [Student] to be grounded to start the school day. [Ms. Roth] feels that being a little early also allows [Student]

socialization time with her friends... [Ms. Roth] would be happy to keep an eye out for [Student's] energy level if [Parent] need any concrete data (SE-6).

23. Following a Pre-Hearing conference on December 8, 2015, the Parties agreed to a 6:33 AM pick-up time for Student, seventeen (17) minutes earlier than the time Student was being picked up the previous year (PE-3; SE-8). Ipswich also coordinated with Cotting to help Student work on relaxation techniques and develop a social story to help Student adjust to the new pick-up time. These interventions addressed concerns raised by Parent during the Pre-hearing Conference that Student's anxiety had increased over the pick-up time, impacting her ability to eat and sleep (SE-7; SE-8; SE-9; SE-3).

24. Cotting began implementing the relaxation techniques and social story interventions in December 2015 and January 2016 (SE-9; SE-10), which included positive coping strategies to help Student self-regulate if she woke up in the middle of the night, calm herself if she was feeling stressed and develop night and morning routines to help alleviate stress (SE-3; Hegedus). In an email from Ms. Thibodeau to Dr. Hegedus dated January 26, 2016, Ms. Thibodeau noted

I got another e-mail from our school psychologist who met with [Student] to go over the social story. She reports that [Student] appeared to enjoy this and is already utilizing some of the strategies to stay rested and relaxed. [Student] took the story home to share with her parents (SE-10).

25. Parent testified that overall Student is getting approximately 30 minutes less sleep during the week as a result of having to wake up earlier to make the 6:33 AM pick-up time (Parent).

26. Parent testified that Student goes to bed at 8:00 PM and that her alarm clock is set for 5:50 AM. It typically takes Student 15 to 20 minutes to get out of bed after which she brushes her teeth, gets dressed and ready to be picked up (Parent). Student is always nervous that she is going to miss the bus and not make it to school on time. This year, she has not wanted to eat breakfast at home and instead looks out the window waiting for the bus (Parent). Every day, Parent packs Student a snack and places it in Student's back-pack (Parent).

27. To help Student with her sleep and waking up routines, Parent attempted to set an alarm clock for Student. Parent testified that there were issues with the alarm clock; Student would accidentally reset it in the middle of the night, and in the morning she slept through the alarm when it went off at 5:50 AM (Parent). During the times when the pick-up time was changed, on several occasions Student woke up in the middle of the night asking if she had missed the van, and at times resisted going to sleep, afraid that the van schedule would change the next morning and she would miss the van. According to Parent, by the time of the Hearing these issues had decreased (Parent).

28. Parent testified that with a social story prepared by Cotting, she has been able to get Student into a nice night-time routine during which Student gets her back-pack ready, selects the clothes she will wear the next day and gets everything ready the night before (SE-3; Parent).

Parent however stated that this had not helped Student in the morning because as a result of getting everything ready the night before she was taking more time to get out of bed (Parent).

29. On October 9, 2015, at Parent's request, Dr. Donna Nimec, a pediatric physiatrist and Director of the Pediatric Physical Medicine and Rehabilitation at Spaulding Rehabilitation Hospital (Spaulding), wrote a letter addressing the impact of transportation on Student's health and emotional wellbeing (PE-1; PE-6). Dr. Nimec sees Student at Spaulding two to three times per year. She examines Student and observes her while Student does her rehabilitation exercises (Nimec).
30. Based on parental report, Dr. Nimec noted in her letter that Student's bus was picking her up two and a half hours before Student needed to be in school and that having to wake up so early in the morning was causing Student anxiety, inability to fall asleep and that Student had lost weight because she was not eating her breakfast (PE-1; Nimec). Dr. Nimec noted that as a result, Student was reported to be more irritable, she had less stamina and was having attentional difficulties in school and at home. Dr. Nimec found this situation to be unacceptable (*Id.*).
31. Alan E. Davey is the van driver responsible for transporting the two students to Cotting. He testified that last year he used to pick student A up first, but he moved and because of where he comes from this year, he picks Student up first and then picks up student A who resides on the Topsfield line near Route 1 (Davey). This year, student A is picked up at approximately 6:40 AM after Student is picked up (*Id.*).
32. The route between Ipswich and Lexington involves traveling on the Route 95/128 and 93 exchange during the morning rush hour (Davey). Travel patterns in the morning are variable. The morning commute along this road is considered to be one of the worst in the nation and has gotten increasingly worse (Hegedus).
33. Mr. Davey testified that the 6:33 AM pick-up time was more effective in getting both students to Cotting on time because even though there is a lot of traffic at that time in the morning, at least it is moving. He concluded that the 6:33 AM pick-up time for Student was best (Davey). He testified that they arrived late to school almost every day last year and that the delay was anywhere from a couple of minutes to 15 minutes. This was a problem because the teachers and aides that are supposed to meet the students as they arrive in the morning, would already be in class and there was nobody to receive Student and student A (Davey).
34. According to Mr. Davey, once Student got on the bus she greeted him, later greeted student A, and then she took a nap the rest of the way to Cotting. Mr. Davey testified that Student's routine had not changed since last year as she also napped all the way to Cotting when she was being picked-up at 6:50 and 7:00 AM (Davey).
35. During the current school year, 2015-2016, Student has been late to school four times (SE-4).

36. Mr. Davey testified that since the time change he usually gets to Cotting between 7:35 and 7:50 AM and that there are other vans that arrived at that time as well. Sometimes the van stands in line to drop the students off in front of the school's entrance and sometimes when they arrive early, they wait for the cue to get in line for drop off at a nearby park (Davey).
37. Parent testified that the reason the van picked Student up so early was that Ipswich needed the van back in Ipswich by 9:00 AM to do another route at the High School (Parent).
38. Mr. Davey testified that when they get to Cotting before 8:00 AM, they wait their turn in the bus and they joke and laugh. According to him, it is unusual to arrive at Cotting a full half an hour before doors open at 8:00 AM. He testified that after he dropped the students off at Cotting, he returned to Ipswich and kept the van until it was time to pick the two students up and return them home in the afternoon (Davey). He transported no other students for Ipswich or any other district (Davey). Regarding the transportation logs found at SE-5, he testified that he took it upon himself to keep those logs, which he did for a period of six months (Davey).
39. Cotting opens its doors to students at 8:00 AM. When the bus arrives at the school's entrance, students are met by staff and brought into the school building (Davey).
40. Parent testified that Student was told that when she arrived early she should sit on a stone wall by a water fountain until school started. According to Parent, Student waits alone with nothing to do and nobody to talk to (Parent).
41. Parent testified that she did not mind if Student arrived at school a few minutes late so long as the pick-up time was moved to a later time (Parent).
42. Dr. Hegedus testified that her goal with transportation was for students to arrive at school on time 100% of the time (Hegedus).
43. Elena Roth, Student's middle school classroom teacher at Cotting, testified that Student enters the school building at 8:00 AM with the teacher assistant who meets her at the door, and she then sits with other Cotting students who are not in her class. At 8:15 AM Student takes attendance in her class, a job she enjoys doing very much (Roth). Student is happy and excited to be in school; she walks around with a smile and giggles (Roth, Parent, Nimec). According to Ms. Roth, if Student arrives late she is "out of sorts"; the early arrival allows her to be grounded and settle in (*Id.*).
44. Ms. Thibodeau testified that she has observed Student when she arrives at school in the mornings and has seen her taking the attendance as well as interacting with other students and staff (Thibodeau).
45. Student starts her school day at 8:30 AM by eating her snack and engaging in social time (Roth). According to Parent, at home, Student eats bagels, eggs or cereal for breakfast (Parent).

46. Ms. Roth testified that she has not observed any difference with respect to Student's anxiety except during the week of the BSEA Hearing (Roth). She further explained that getting to school on time allowed Student to be more grounded during the school day and provided her with an opportunity to socialize with other students (Roth). Concurring with her prior statement in SE-6, she noted that Student appears to be alert and has the ability to endure the school day (SE-6; Roth).
47. Ms. Roth testified that she had only received one communication from Parent raising concern that Student was anxious (Roth). Ms. Roth stated that Student has been observed to become anxious if her schedule changes and during challenging academic lessons. She was observed to have an increase in anxiety during the week of the BSEA Hearing because of the Hearing (Roth).
48. Ms. Roth arrives at Cotting between 7:30 and 7:45 AM as do other teachers/ service providers (Roth)
49. Dr. Nimec most recently saw Student at Spaulding on February 27, 2016. Dr. Nimec performs muscular-skeletal and neurological examinations of Student and chats with her while the therapist works with Student (Nimec).
50. Dr. Nimec noted her concerns regarding the importance of Student getting enough sleep and eating regular meals starting with breakfast, which Parent had reported to be a concern since the school transportation time had changed (Nimec). Dr. Nimec noted that the growth chart showed that Student had fallen behind in weight and height over the last year (*Id.*).
51. Dr. Nimec testified that she had not witnessed Student to be anxious this year stating that Student loved her program at Cotting and was excited about going to school (Nimec).
52. Dr. Nimec has not observed Student at Cotting and she was unaware that she started the morning with snack time. She also has not spoken with Student's teacher at Cotting. Her knowledge and opinions regarding Student come from conversations with Parent, Student and from her observation of Student at the clinic and her review of evaluation reports (Nimec). According to Dr. Nimec, Student has shared that

...she is worried that she'll miss the bus in the morning and that sometimes she has a hard time sleeping (Nimec).

CONCLUSIONS OF LAW:

The Parties in the instant case do not dispute Student's diagnoses or that Student is an individual with a disability falling within the purview of the Individuals with Disabilities

Education Act⁴ (IDEA) and the state special education statute⁵. The Parties' disagreement solely involves the time the Student is picked-up to be transported to Cotting. Parents argue that the pick-up time is so early that it is causing Student stress and anxiety which interferes with her eating and sleeping habits. Because Student is stressed, tired and irritable, her ability to receive a free, appropriate public education (FAPE)⁶ is affected and she is at greater risk of having a seizure. As such, Parents contend that the early pick-up time constitutes a denial of FAPE given Student's particular circumstances.

Ipswich disagrees, asserting that the early pick-up time is necessary to get Student to Cotting on time 100% of the time, and is not a punitive measure as Parents suggest. According to Ipswich, getting to school on time allows Student to remain grounded the rest of the day and allows her opportunities to socialize with other students who are not in her class, something Student enjoys greatly. Ipswich states that Student has not shown any signs of stress at Cotting and since she has a difficult time with transitions, the earlier pick-up time this year will prepare her for when she enters the upper school during the 2016-2017 school year.

Ipswich further argues that to require a special van to transport Student solely would be an unreasonable accommodation, unwarranted and too costly to the District. Ipswich also disputes the authority of the BSEA over administrative issues with respect to transportation. Lastly, Ipswich argues that if the commute is too burdensome for Student, Ipswich can serve her in- district or can locate another private placement closer to home.

The IDEA and the Massachusetts special education law, as well as the regulations promulgated under those acts, mandate that school districts offer eligible students a FAPE. A FAPE requires that a student's individualized education program (IEP) be tailored to address the student's unique needs⁷ in a way "reasonably calculated to confer a meaningful educational benefit"⁸ to the student.⁹ Additionally, said program and services must be

⁴ 20 USC 1400 *et seq.*

⁵ MGL c. 71B.

⁶ MGL c. 71B, §§1 (definition of FAPE), 2, 3.

⁷ E.g., 20 USC 1400(d)(1)(A) (purpose of the federal law is to ensure that children with disabilities have FAPE that "emphasizes special education and related services designed to meet their unique needs . . ."); 20 USC 1401(29) ("special education" defined to mean "specially designed instruction . . . to meet the unique needs of a child with a disability . . ."); *Honig v. DOE*, 484 U.S. 305, 311 (1988) (FAPE must be tailored "to each child's unique needs").

⁸ See *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) where the court explicitly adopted the meaningful benefit standard.

⁹ *Sebastian M. v. King Philip Regional School Dist.*, 685 F.3d 79, 84 (1st Cir. 2012) ("the IEP must be custom-tailored to suit a particular child"); *Mr. I. ex rel L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 4-5, 20 (1st Cir. 2007) (stating that FAPE must include "specially designed instruction . . . [t]o address the unique needs of the child that result from the child's disability") (quoting 34 C.F.R. 300.39(b)(3)). See also *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993) (program must be "reasonably calculated to provide 'effective results' and 'demonstrable improvement' in the various 'educational and personal skills identified as special needs'"); *Roland v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990) ("Congress indubitably desired 'effective results' and 'demonstrable improvement' for the Act's beneficiaries"); *Burlington v. Department of Education*, 736 F.2d 773, 788 (1st Cir. 1984) ("objective of the federal floor, then, is the achievement of effective results--demonstrable improvement in the educational and personal skills identified as special needs--as a consequence of implementing the proposed IEP"); 603 CMR 28.05(4)(b) (Student's IEP must be "designed to enable the student to progress effectively in the content areas of the general curriculum"); 603 CMR 28.02(18) ("*Progress effectively in the*

delivered in the least restrictive environment appropriate to meet the student's needs.¹⁰ Under the aforementioned standards, public schools must offer eligible students a special education program and services specifically designed for each student so as to develop that particular individual's educational potential.¹¹ Educational progress is then measured in relation to the potential of the particular student.¹² At the same time, the IDEA does not require the school district to provide what is best for the student.¹³

As the party challenging the adequacy of Student's proposed transportation arrangements, Parents carry the burden of persuasion pursuant to *Schaffer v. Weast*, 126 S.Ct. 528 (2005), and must prove their case *by a preponderance of the evidence*. Also, pursuant to *Schaffer*, if the evidence is closely balanced, Parents, will lose.¹⁴

In rendering my decision, I rely on the facts recited in the Facts section of this decision and incorporate them by reference to avoid restating them except where necessary. Upon consideration of the evidence, the applicable legal standards and the arguments offered by the Parties in the instant case, I conclude that Parents have not met their burden of persuasion pursuant to *Schaffer* as they have failed to show that the early pick-up time constitutes a denial of FAPE for Student. My reasoning follows.

The evidence in this case strongly suggests that this matter, involving a 17 minute dispute over the transportation pick-up time of Student, has little to do with Student's needs.

general education program shall mean to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to chronological age and developmental expectations, the individual educational potential of the child, and the learning standards set forth in the Massachusetts Curriculum Frameworks and the curriculum of the district.”)

¹⁰ 20 USC 1412 (a)(5)(A).

¹¹ MGL c. 69, s. 1 (“paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children the opportunity to reach their full potential...”); MGL c. 71B, s. 1 (“special education” defined to mean “...educational programs and assignments . . . designed to develop the educational potential of children with disabilities . . .”); 603 CMR 28.01(3) (identifying the purpose of the state special education regulations as “to ensure that eligible Massachusetts students receive special education services designed to develop the student’s individual educational potential...”). See also Mass. Department of Education’s Administrative Advisory SPED 2002-1: [Guidance on the change in special education standard of service] from “maximum possible development” to “free appropriate public education” (“FAPE”), effective January 1, 2002, 7 MSER Quarterly Reports 1 (2001) (appearing at www.doe.mass.edu/sped) (Massachusetts Education Reform Act “underscores the Commonwealth’s commitment to assist all students to reach their full educational potential”).

¹² *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 199, 202 (court declined to set out a bright-line rule for what satisfies a FAPE, noting that children have different abilities and are therefore capable of different achievements; court adopted an approach that takes into account the potential of the disabled student). See also *Lessard v. Wilton Lyndeborough Cooperative School Dist.*, 518 F.3d. 18, 29 (1st Cir. 2008), and *D.B. v. Esposito*, 675 F.3d at 36 (“In most cases, an assessment of a child’s potential will be a useful tool for evaluating the adequacy of his or her IEP.”).

¹³ *E.g. Lt. T.B. ex rel. N.B. v. Warwick Sch. Com.*, 361 F. 3d 80, 83 (1st Cir. 2004) (“IDEA does not require a public school to provide what is best for a special needs child, only that it provide an IEP that is ‘reasonably calculated’ to provide an ‘appropriate’ education as defined in federal and state law.”)

¹⁴ *Schaffer v. Weast*, 126 S.Ct. 528 (2005) places the burden of proof in an administrative hearing on the party seeking relief.

Parents argued that the earlier pick-up time was causing an increase in Student's levels of stress and anxiety which in turn impacted her health and education because: a) Student was not getting enough sleep; b) Student was not eating enough food; c) Student spent too much time waiting outside or inside school for school to start; and d) lack of sleep and food was impacting her ability to access the curriculum and was preventing Student from receiving a FAPE. Careful review of the record shows that at the time of the Hearing none of the arguments offered by Parents were supported by the evidence. I begin my discussion with a review of Student's IEP.

Student's most recent IEP covers the period from May 6, 2015 to May 5, 2016. The record shows that Parents' partial rejection of this IEP only involved transportation to Cotting (SE-1). The rejection specifically stated:

We reject the statement on page 21, "Parents are aware that transportation is likely to extend beyond one hour per trip because of the distance of the placement from the student's residence," as well as any other statement in the IEP that could be construed to mean that we accept the current transportation situation. [Student's] ride to and from Cotting has been unreasonably and unnecessarily long, and not due to the distance to Cotting (SE-1).

Parents' rejection above specifically noted their awareness that the trip to Cotting would take longer than 1 hour because of the distance between Student's home and Cotting but contended that the ride was unnecessarily and unreasonably long (SE-1). Parents were always aware that the trip between Ipswich and Lexington would take more than 1 hour, a fact they first acknowledged in their Settlement Agreement in 2011 (Parent). Generally, the Massachusetts Special Education Regulations prohibit transportation that keeps eligible students in a vehicle for more than an hour each way, unless parents and school districts forgo this limitation through the Team process.¹⁵ 603 CMR 28.06(8)(a). Parent testified that Parents were not contesting the fact that the trip to Cotting took over one hour each way, but rather contested *only* the pick-up time. Therefore, they have agreed to the exception allowed under 603 CMR 28.06(8)(a) in exchange for Student attending their preferred school placement.

Student's most recent IEP contains very specific language regarding transportation and does not contain any goals addressing anxiety or stress. In fact, anxiety and stress are not mentioned at all in this IEP as areas of concern warranting special attention, intervention, services or accommodations. The record shows that during the 2015-2016 school year Student's anxiety was only manifested in the home (Parent). Neither of the witnesses from Cotting, Dr. Thibodeau and Ms. Roth observed Student to display anxiety over arriving to school early nor was she sluggish or tired during the school day (Thibodeau, Roth). Mr. Davey did not observe Student to display anxiety in the van except when they were stuck in

¹⁵ "(a) the district shall not permit any eligible student to be transported in a manner that requires the student to remain in the vehicle for more than 1 hour each way except with the approval of the Team. The Team shall document such determination on the IEP." 603 CMR 28.06(8)(a).

traffic (Davey). Dr. Nimec also did not witness an increase in Student's anxiety or stress while at the clinic. To the contrary, Ms. Roth, Ms. Thibodeau and Dr. Nimec testified that Student loved school and did not like to arrive late. Late arrivals in school caused Student to become upset and out of sorts (Roth, Thibodeau, Nimec). When Student arrived on time, she was better able to access her education (Roth).

Regarding the pick-up time, Parents email correspondence of October 2015 noted that it was the numerous pick-up time *changes* occurring in a very short period of time that caused Student stress and anxiety (PE-3). The emails further noted that early pick-up did not allow Student enough time to get ready, that early arrival was of no benefit to Student and that the four changes in schedule (over a relatively short period of time) were "detrimentally affecting [Student], both physically and mentally" (PE-3). The changes in time stopped after the December 2015 Pre-hearing Conference during which the Parties agreed to try a compromise whereby Student would be picked-up at 6:33 AM.

Dr. Hegedus and Ms. Roth explained that while a late pickup made student A late for class, early arrivals offered Student time to socialize and transition smoothly into the school day (PE-3; Roth, Hegedus). Throughout this period, no anxiety or stress has been witnessed at Cotting by any of the professionals other than during the week of the BSEA Hearing.

According to Dr. Hegedus, she learned from conversations with Mr. Davey that Student does not like to be stuck in traffic as that creates anxiety for her (Hegedus, Davey). Mr. Davey, testified that during the three years that he has been driving Student to school she has consistently engaged in the same morning routine (i.e., exchange pleasantries and nap the rest of the way to Cotting) and he has not observed her to appear nervous or anxious in the van (Davey). To the contrary, Student and Mr. Davey enjoy a positive relationship and she is very comfortable with him (Parent, Davey).

Parents argued that Mr. Davey's testimony was unreliable because he testified that the van had been late to school about ninety times last year while the Cotting's records showed that Student had been late forty-one times. Whether Student was late 40 or 90 times, the amount of time she was late is unacceptable given her global developmental disabilities and her adverse reaction to being late.

Parents' argument that arriving late to school was not an issue for Cotting or Parents, and that many students arrived late, is not persuasive. The point is not whether Parents or Cotting cared, but rather, the fact that the late arrivals impacted Student negatively and interfered with her ability to access her education. As Ms. Roth testified, Student was out of sorts when she arrived late (Roth, Thibodeau).

Dr. Nimec's concerns regarding the importance of Student getting enough sleep and nourishment were persuasive. However, her conclusions regarding transportation adjustments were not. Dr. Nimec's information regarding the issues with sleep and nourishment came from statements made by Parent and Student. I note that Student's global developmental disorder and the manner in which her disability impacts her, render her

unreliable in her ability to understand and accurately report events¹⁶ (Student reported to Dr. Nimec that she sat alone in the school lobby when she arrived but Ms. Roth and Ms. Thibodeau reported that Student socializes with other students until it is time for her to take attendance (Thibodeau, Roth). Opportunities for unstructured socialization time with peers was described as beneficial to Student.

Dr. Nimec testified that she did not speak with anyone from either Ipswich or Cotting regarding Parent's allegations, and she was similarly unaware of Student's schedule and practices at Cotting, e.g., Student beginning her day at Cotting by having a snack. When asked whether she was aware of the fact that Student started her day at Cotting with snack time, Dr. Nimec stated that she did not know about the snack and noted that she was going to talk to someone to suggest that Student eat her breakfast when she arrived in school, intimating that this would be a good solution (Nimec).

Ms. Thibodeau also testified that there is a chance that Student will join the upper school during the 2016-2017 school year. This would change her start time to 8:15 AM as opposed to 8:30 AM. Given Student's difficulties around changes in time, her current schedule would allow her to get to school on time when she starts in the upper school and would alleviate the need for Student to get used to yet another time change. Given that Student is approaching the end of the school year it would appear to be more harmful to change her schedule once again, only to change it again the beginning of next year, especially when, as Parent testified, sleep interruption has decreased (Parent).

Parent's testimony presented numerous inconsistencies which undermine the credibility of her statements. She alleged that: a) when Student arrived early to school she had to sit on a stone wall and wait alone for school to start (Mr. Davey testified that the students wait with him in the van until they are met at the door by a staff member and Dr. Thibodeau and Ms. Roth testified that she socializes with other students until 8:15 AM that she takes attendance in her class); b) noted in an email that the reason transportation occurred so early was because the van was needed back in Ipswich to transport other students (Mr. Davey credibly testified that after dropping the students he returned to Ipswich and kept the van until it was time to pick them up); c) her OCR and PQA complaints were not filed because of the distance causing over one hour of travel time but because of the length of time it took to get to Cotting¹⁷ (SE-16¹⁸; SE-17¹⁹; SE-18).

¹⁶ By parental account, Student is a truthful individual. Student's truthfulness is not questioned, but rather her ability to report accurately.

¹⁷ Parent testified "we've never had –like I said, would never had any problem with the length of the trip due to traffic, or weather, or the fact that she has to travel down 128 a fair distance... The complaints I filed stem from all other issues. I filed complaints because the transportation stopped, as I mentioned before, and she had no way to get to school. And I filed complaints –I filed a complaint –actually, I don't know that I filed the complaint, but one of the issues was at one point early on she was put on a bus that was going to two different towns and picking up several different students, and she was on the bus for 2 ½ hours because it was not a direct route. So my position – and I haven't changed this since day one –is that from our house to Cotting I understand is a long distance and may take longer than an hour. I don't object to that."

Thus, based upon the totality of the evidence presented, I find that Parents have not met their burden of persuasion pursuant to *Shaffer*, and that contrary to Parents assertions, the early pick-up time is not preventing Student from accessing a FAPE.

The evidence here supports the opposite conclusion, that is, that arriving late negatively impacts Student's ability to receive a FAPE. Student actually benefits from getting to school early and the early arrival has had absolutely no negative physical, mental or emotional impact on Student's ability to access her education and actively participate in her school program (Roth, Thibodeau).

I next turn to Ipswich's arguments regarding lack of jurisdiction and the Section 504 claim.

Relying on *In Re: Lowell Public Schools*, 115 LRP 37804 (2014), Ipswich argued that bus scheduling issues were a school administrative function outside the purview of the BSEA.²⁰ Furthermore, Ipswich argued that the 17 minute difference between Parents' preferred 6:50 AM pick up time and the schools' 6:33 AM pick up time was not a material change to the bus schedule. Parents argued that the above-cited case was not applicable to the instant matter because in *In Re: Lowell Public Schools* the change solicited by the parent was geared to benefit the parent, and had nothing to do with the student's special education. While Ipswich is correct that in general, issues regarding bus schedules and routings are administrative in nature and within the purview of the school district, Parents are also correct that the BSEA may have jurisdiction over transportation as a related service if said transportation impacts the particular child's access to a FAPE. As found above, that is however, not the case in the instant matter.

Regarding references to a Section 504 claim, I note that Parents did not establish a Section 504 claim separate from their IDEA claim. Rather, Parents simply mentioned Section 504 in their Hearing Request as a "catch all", but did not develop their theory or present evidence at Hearing to establish a separate claim. Simply asserting that Ipswich violated Student's substantive rights under Section 504 by denying Student a FAPE is insufficient to establish

¹⁸ "The complainant alleged that the student, who receives special education transportation to an out-of-district placement, is remaining in the vehicle for more than one hour each way in violation of 603 CMR 28.06(8)(a)" (SE-16).

¹⁹ "you allege that the student, who receives special education transportation to an out-of-district placement, was not transported by the District to the out--district placement for five days in September 2012 (September 11, 14, 19, 21 and 28) and for five school days from May 9-May 15, 2013. You stated that the District changed transportation companies in May 2013 because an additional student was being transported to the same out-of-district placement. The transportation company notified the complainant that the morning pick-up time would be 15-20 minutes earlier than the previously scheduled time. When the complainant questioned the time change due to concerns that the student would be remaining from the vehicle for more than 1 hour each way, the district discontinued transportation for the student in violation of 603 CMR 28.03(1)(a)" (Emphasis Supplied) (SE-17).

²⁰ "...the authority of a BSEA Hearing Officer pursuant to 603 CMR 28.08(3)(a) is limited and does not extend to issues such as determining the bus schedules and bus route which are entirely within the purview of Lowell's administration" *In re: Lowell Public Schools*, 115 LRP 37804 (2014).

such a claim. Thus, I need not engage in a Section 504 analysis separate from the IDEA claims.

The evidence is persuasive that Student is receiving a FAPE consistent with the IDEA, and that she is being provided access to her education without the need for any changes to her current transportation schedule.

ORDER:

1. Ipswich shall continue to offer Student transportation to Cotting with a pick-up time of 6:33 AM for the remainder of this IEP period.

By the Hearing Officer,

Rosa I. Figueroa
Dated: May 3, 2016

May 3, 2016

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

IPSWICH PUBLIC SCHOOLS

BSEA # 1602849

BEFORE

**ROSA I. FIGUEROA
HEARING OFFICER**

**SEAN GOGUEN ESQ., ATTORNEY FOR PARENTS
COLBY BRUNT, ESQ., ATTORNEY FOR
IPSWICH PUBLIC SCHOOLS**