

DEPARTMENT OF EDUCATION, SPECIAL EDUCATION,  
STATE OF COLORADO

Case No. L2005: 119

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER**

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[STUDENT], by and through his mother, [PARENT],  
Petitioners,

v.

MOUNTAIN BOCES,  
Respondent.

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This matter came before the Impartial Hearing Officer (IHO) for hearing on November 16, 2005. The request for due process was filed on October 7, 2005, pursuant to 20 USC 1400, et seq.

**FINDINGS OF FACT**

1. Respondent, Mountain BOCES (Board of Cooperative Educational Services), is a contracting agency administering the Individuals with Disabilities in Education Act (IDEA) on behalf of the Eagle County School District (District or ECSD).
2. The District follows policies promulgated by Mountain BOCES in administering the provisions of IDEA.
3. A portion of those policies were introduced and admitted into evidence as Respondent's Exhibit 15, Special Education Process and Provision of Services.
4. The child has a speech and language disability.
5. During the 2004-2005 school year, the child received services pursuant to his IEP at Avon Elementary School.
6. Transportation, though offered by the District, was declined by the Parents as they were able to provide transportation. It is uncontested that the child received educational benefit from the services provided by the District during the school year, and that the child received FAPE (Free Appropriate Public Education).
7. On March 23, 2005, the annual review of the Child's IEP was conducted, and the parents again declined Transportation offered by the district.
8. At the IEP meeting, the participants were unaware of the change of policy regarding transportation of pre-school children.
9. That the ECSB, because of new requirements imposed on Head Start, decided to cease providing transportation to pre-school children, both disabled and non-disabled due to the expense thereof for the 2005-2006 school year.

10. That Petitioner first became aware of the change in transportation policy when the child was denied boarding the bus on the first day of school of the 2005-2006 school year.
11. That Petitioner has, to date, been able to find alternate transportation for the child with a friend.
12. That both parents of the child work in jobs which prevent either parent from transporting the Child at either 12:00 noon (when the half day educational services provided to the child twice a week end) or at 2:50p (when the available extended care ends).
13. That the friend will be unable to provide ongoing transportation for the child after November 18, 2005.
14. That on October 3, 2005, the IEP team was convened, at the mother's request, to consider provision of transportation from Edwards elementary School to Pooh corner, the child's day-care center, two days per week, on the days that the child was receiving the educational services provided for in his IEP.
15. The IEP team did not reach a consensus, and no changes were made to the IEP.
16. On October 7, the mother requested this due process hearing on the question of whether the District was obligated, under IDEA, to provide transportation to the child as a related service to the child's disability.
17. That on November 10 and 15, 2005, the parties stipulated to certain facts, and the IHO hereby incorporates those stipulated facts into the findings, as if fully set forth herein.

### **CONCLUSIONS OF LAW**

18. The IHO, concludes that the burden of persuasion lies with petitioner, and as will be evident below, Petitioner has met this burden.
19. 20 USC 1401(22) defines "Related Services" as "transportation and such developmental, corrective, and other supportive services as may be required to assist a child with a disability to benefit from special education."
20. 34 CFR 300.24(a) provides: "the term related services means transportation and...such supportive services as are required to assist a child with a disability to benefit from special education and includes speech-language pathology...".
21. 34 CFR 300.24(b)(14) defines speech-language pathology as including "provision of speech and language services for the habilitation or prevention of communicative impairments."
22. 34 CFR 300.24(b)(15) states that transportation includes "travel to an from schools and between schools."
23. In Respondent's exhibit 15, at page 38, the District's policy as set by Mountain BOCES is articulated to be, in pertinent part, "It should be assumed that most children with disabilities receive the same transportation services as non-disabled children. The IEP team should

consider whether the child's disability prevents the child from using the same transportation provided to non-disabled children, or from getting to school in the same manner as non-disabled children. Special transportation is only provided for a student whose disability is so severe that the transportation provided to non-disabled children does not provide the level of support necessary to ensure the student will be safely transported to and from school".

24. In this case, the district interprets this language to mean that the child's disability does not prevent the same access to transportation as that provided to non-disabled children, which is to say, no access at all since none is provided to non-disabled children.
25. The IHO concludes that the District and Mountain BOCES misinterpret the transportation requirements of IDEA. The district's policy, as stated and as applied, is not designed to provide educational benefit to the child and denies him FAPE.
26. It is not enough to not discriminate against the child by treating him the same as non-disabled children. IDEA mandates that the child must be treated differently, precisely because of his disability.
27. In this case, access to educational benefit will occur only if the District provides transportation since, otherwise, this four year old will have to walk somewhere between 1.4 miles and 12 miles depending on the destination. It is not appropriate to compel one parent to leave his or her employment to allow an eligible child to attend the educational services mandated by the IEP team. To treat failure to attend as a refusal of service is, at best, disingenuous.
28. While it is correct that the transportation decision is made on a case-by-case basis, the District was unable to offer any criteria on which that decision was made in this case. Only one other disabled pre-school child in the District receives transportation services and the witnesses declined, for privacy reasons, to disclose what qualified that child for the service.
29. Apparently, the district piggy-backed on Head Start grants to also satisfy its independent obligations to provide transportation to special needs children. When the grant proved inadequate, the District decided to stop providing any transportation to special education students except in rare instances and determined that "access" was not such an instance.
30. Without access to Edwards elementary school, the child will receive no educational services and no educational benefit. This will deny the child FAPE. Either the Parents can provide transportation, or the District can. For the parents to provide transportation may require compromises of employment that can threaten the child with loss of other essential services such as housing or health-care.
31. Respondent cites the Palmyra case, 40 IDELR 197, as persuasive authority supporting their denial of transportation. The IHO is not convinced. It is not apparent from the facts of Palmyra that the circumstances are the same or similar to the instant case. For one thing, the school district was an entirely walking district. Of far more concern is that there was no legal

- authority set forth for the decision. It is impossible to gauge the basis of the decision in light of the clear language of 34 CFR 300.24 which mandates transportation services to provide access to educational benefit.
32. Respondents cite Timothy H. and Brenda H. v. Cedar Rapids Community School District, 178 F. 3d 968 (1999) as authority for their position. The IHO finds this case to be inapposite because the child was receiving FAPE in her current placement so the District met its obligation under IDEA without transporting her to a desired different placement. Here, the child will not receive FAPE without transportation from the district.

### CONCLUSION AND ORDER

Based on the foregoing and the testimony from the hearing, The IHO concludes that the District and Respondent have an obligation to provide transportation services to the child. The policies set forth by Mountain BOCES must be interpreted consistently with the requirements of the IDEA. Failure to provide the child with access to educational benefit is a defacto denial of FAPE.

THEREFORE, the IHO ORDERS Respondent and the district, forthwith, to begin providing the child with appropriate transportation services, to and from Edwards elementary School, on the days designated for the delivery of educational service to the child. Transportation services are to be provided without cost to the parents. A copy of the procedures for appeal of this decision are attached to the mailed copy.

Done this 21<sup>st</sup> day of November, 2005

Myron A. Clark

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Impartial Hearing Officer

### Certificate of Service

This certifies that the foregoing Findings of Fact, Conclusions of Law, and Order were transmitted electronically, and sent by certified mail, postage pre-paid on the 21<sup>st</sup> day of November, 2005 to:

[PARENT]

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