

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

*MS. S., as parent and next friend of* )  
*L.S.,* )  
 )  
 *Plaintiff* )  
*v.* )  
 )  
*SCARBOROUGH SCHOOL* )  
*COMMITTEE,* )  
 )  
 *Defendant* )

***Docket No. 04-111-P-H***

***RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW***

Ms. S., mother of severely learning disabled student L.S., challenges the decision of a Maine Department of Education hearing officer (“hearing officer”) issued pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.*, denying a requested transportation accommodation. After careful review of the entire record filed in this case and the parties’ memoranda of law, I propose that the court adopt the following findings of fact and conclusions of law, on the basis of which I recommended that judgment be entered in favor of the defendant Scarborough School Committee (“School”) as to all claims.<sup>1</sup>

**I. Proposed Findings of Fact**

1. L.S. was born on February 25, 1990. He is eligible for special education services. He has been diagnosed with cerebral palsy, vision problems, a seizure disorder and mental retardation. Findings 1-2,

---

<sup>1</sup> The scheduling orders adopted by this court contemplate adjudication of this matter on the basis of (i) the administrative record, (ii) such supplemental evidence as might be approved by the court on motion of a party and (iii) the parties’ briefs. Scheduling Order (Docket No. 8); Alternative Scheduling Order (Docket No. 10). The plaintiff moved to (*continued on next page*)

State of Maine Special Education Due Process Hearing [Decision], *S. v. Scarborough School Department*, April 29, 2004 (“Hearing Decision”), Record at 142-48. L.S. functions at a three- to four-year-old developmental level in most areas, with a particular weakness in understanding safety concepts. Finding 2, *id.* at 143-44.

2. L.S. was placed in a full-inclusion setting from kindergarten through fifth grade. Finding 3, *id.* at 144. Since entering middle school, he has been placed in some self-contained academic settings but continues to be integrated in homeroom, physical education, technology, art, drama club and field trips. *Id.* He currently functions at the kindergarten-first grade level academically. *Id.*

3. L.S.’s parents are divorced and share custody. Finding 4, *id.* Both live in Scarborough. *Id.* L.S. lives with each parent on alternate weeks. *Id.*

4. L.S. rode the regular school bus through his fifth grade year, when he lived with his mother most of the time. Finding 5, *id.* During the sixth and most of the seventh grade years, Ms. S. transported L.S. to and from school, due to the long bus ride on his route. *Id.*

5. L.S. is able to ride the regular bus successfully; his behavior on the bus is excellent. Finding 6, *id.* He prefers this mode of transport. *Id.*

6. L.S. receives after-school services from CASA, an agency that provides in-home habilitation services for individuals with developmental disabilities. Finding 7, *id.* Ms. S. does not complete work in time to meet L.S. when he is dropped off by the bus in the afternoon. *Id.* CASA is unable to guarantee that its employee will be present at the time when L.S. is dropped off every day. *Id.*

---

supplement the record; that motion was denied. Docket Nos. 14 & 20.

7. In May 2003, Ms. S. and Rick Soules, transportation director for the Scarborough school system, agreed that L.S. would again ride the regular bus to and from his mother's home. Finding 8, *id.* They also agreed that there would be an adult available to meet L.S. in the afternoon and, if no adult was present, L.S. would not be permitted to get off the bus. *Id.* In that case, Ms. S. would be called and it would be determined where she would pick L.S. up. *Id.*

8. Ms. S. and Soules agreed to the following informal protocol, which was not incorporated into L.S.'s Individualized Education Plan ("IEP"): when there is no adult to receive L.S. at the bus stop, the driver will radio the transportation office; if no one answers, the driver will call Soules, who is most likely to be driving a bus himself; Soules will first call Ms. S.'s home to see if anyone is there; if not, he will then call Ms. S. at work and agree on a place where the bus will stop and Ms. S. will pick up L.S.; he will then contact the bus driver and give him or her this information. Finding 9, *id.* at 144-45.

9. During May and June 2003 there were two occasions when the bus driver dropped L.S. off at the bus stop when an adult was not present to meet him. Finding 10, *id.* at 145. Other students helped L.S. to his home, where he called his mother. *Id.* He was extremely upset by these situations. *Id.*

10. In August 2003 Ms. S. and Soules discussed L.S.'s transportation for the coming school year. Finding 11, *id.* When Ms. S. suggested that L.S. travel on the special education bus, she was told that the ride on that bus would be 45-60 minutes while the ride on the regular bus would be only 15-20 minutes. *Id.* It was agreed that L.S. would ride on the regular bus, be dropped at the bus stop unless no adult was present to meet him, in which case Ms. S. would be called and pick up L.S. at an agreed location. *Id.*

11. On five occasions during September 2003 the bus driver dropped L.S. off at the stop without an adult being present. Finding 12, *id.* A meeting of L.S.'s Pupil Evaluation Team ("P.E.T.") was held on September 30, 2003 at which Ms. S. raised the issue of these incidents, which had seriously upset L.S. *Id.*

She asked the P.E.T. to determine that L.S. would not be allowed to get off the bus unless there was someone waiting for him and , if not, that she be called to pick him up, at the bus terminus or back at school. *Id.* The P.E.T. only agreed to consult Scarborough’s special education director; Ms. S. strongly disagreed with this course of action. *Id.* The IEP developed that day continued to list L.S.’s transportation as “standard.” Finding 13, *id.*

12. Following another occasion in October 2003 when L.S. was allowed to leave the bus without an adult waiting for him, Ms. S. contacted Scarborough’s superintendent of schools to discuss the situation. Finding 14, *id.* The superintendent explained that it was the transportation policy of the school system to discharge all students from the bus at the appropriate stop without checking for the presence of an adult. *Id.*

13. After L.S. had surgery in late October 2003 that required him to wear a temporary cast, the bus driver began dropping him off in front of his mother’s house instead of at the end of the street. Finding 15, *id.* at 146.

14. At a P.E.T. meeting on December 5, 2003 Soules explained that if the regular bus driver were required to check for adult supervision and, if no one was present, to stay at the stop while making and receiving one or more telephone calls, all of the students on the bus would experience delays. Finding 16, *id.* In addition, since L.S. rides on the first of three consecutive runs for that bus each afternoon, the second and third runs could also be delayed. Testimony of Rick Soules, *id.* at 279-80. Alison Marchese, the special education director, stated at the P.E.T. meeting that door-to-door transportation, with the adult hand-off requirement, could more expeditiously be handled by the special education bus, what has at most five students at a time, thus reducing the number of students who would experience delays. Finding 16, *id.* at 146. There are always two adults on this bus, so one could make the telephone calls while the other was driving. *Id.* Ms. S. rejected this option. *Id.*

15. The school department sent Ms. S. formal written notice of the special-education bus option on December 10, 2003. Finding 17, *id.*

16. On one occasion in either December 2003 or January 2004 there was no adult available when the regular bus driver brought L.S. to his house. Finding 18, *id.* On that day, the driver kept L.S. on the bus and called Soules, who called the office at Blue Point School and Ms. S. *Id.* Ms. S. left work and picked L.S. up at the school. *Id.*

17. On December 31, 2003 Ms. S. filed a request for a complaint investigation, alleging that the school department violated the IDEA by offering transportation only by the special education bus on those afternoons when L.S. would be returning to his mother's home. Finding 19, *id.* A complaint investigation report issued on February 24, 2004 found no violations. *Id.*

18. Ms. S. filed a hearing request on March 18, 2004 appealing the investigation report. Finding 20, *id.* Pending the hearing and any following appeals, L.S. continues to be transported to his mother's home on the regular school bus with the adult hand-over provision. Finding 21, *id.*

19. A hearing was held before a state Department of Education hearing officer on April 7, 2004. Hearing Decision at 142. The hearing officer's decision, finding no violation, was issued on April 29, 2004. *Id.* at 142, 148. This appeal followed.

## **II. Proposed Conclusions of Law**

### **A. Standard of Review**

The portion of the IDEA invoked by the plaintiff, Plaintiff's Memorandum of Law ("Plaintiff's Memorandum") (Docket No. 11) at 13, provides:

- In any action brought under this paragraph, the court —
- (i) shall receive the records of the administrative proceedings;
  - (ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(i)(2)(B). “The court’s principal function is one of involved oversight.” *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 989 (1st Cir. 1990). The court’s task is “something short of a complete de novo review.” *Id.* (citation omitted). The court must give “due weight” to the state agency’s decision while making an independent decision. *Id.* at 989-90. This court applies the following standard of review:

First, the Court carefully reviews the entire record of the due process hearing. Second, appropriate deference is given the Hearing Officer and [her] expertise, particularly with regard to factual determinations. Finally, the Court makes an independent decision whether the Hearing Officer’s determination is supported by a preponderance of the evidence.

*Greenbush Sch. Comm. v. Mr. & Mrs. K*, 949 F. Supp. 934, 938 (D. Me. 1996). *Accord, B.A. v. Cape Elizabeth Sch. Comm.*, 2000 U.S. Dist. LEXIS 7498 (D. Me. May 30, 2000) at \*5-\*6; *Bell v. Education in the Unorganized Territories*, Docket No. 00-160-B, slip op. (D. Me. March 27, 2001) at 3. The party challenging the hearing officer’s determination bears the burden of demonstrating that the decision was erroneous. *Gonzalez v. Puerto Rico Dep’t of Educ.*, 254 F.3d 350, 353 n.2 (1st Cir. 2001).

## **B. The Merits**

The plaintiff asserts claims under the IDEA, 20-A M.R.S.A. § 7207-B (both in Count I) and the federal Rehabilitation Act, 29 U.S.C. § 794 (Count II). Complaint (Docket No. 1) at 2-5. The IDEA and the Rehabilitation Act “apply similar standards for substantive relief,” *Nieves-Marquez v. Commonwealth of Puerto Rico*, 353 F.3d 108, 125 (1st Cir. 2003), and the plaintiff’s cursory argument directed to the latter, Plaintiff’s Memorandum at 34-35, does not identify any significant difference between the two. My

analysis of the plaintiff's federal claim will therefore address both statutes. The state statute cited in the complaint merely establishes the procedure for due process hearings and provides that a parent may appeal the decision of the hearing officer to a United States district court. 20-A M.R.S.A. § 7207-B. It does not provide any specific form of relief. My analysis accordingly will subsume the state-law claim as well.

The IDEA was enacted, *inter alia*, “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs . . . .” 20 U.S.C. § 1400(d)(1)(A). “Related services” is defined to include transportation. 20 U.S.C. § 1401(22). “To the maximum extent appropriate,” children with disabilities are to be “educated with children who are not disabled” and “removal of children with disabilities from the regular educational environment” may occur “only when the nature or severity of the disability of the child is such that education in regular classes . . . cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A). The plaintiff also relies on special education regulations promulgated by the Maine Department of Education, specifically those providing that “[s]pecial education transportation includes travel to and from school” and “shall be provided consistent with Part 11, Least Restrictive Educational Alternative, of these rules” and “[a] student with a disability shall . . . be provided an opportunity to participate in non-academic and extracurricular activities to the maximum extent appropriate,” and “[i]n selecting the least restrictive educational alternative, consideration will be given to the potential harmful effect on the student or on the quality of services that he or she needs.” Maine Special Education Regulations, Chapter 101 of the regulations of the Maine Department of Education, §§ 6.17, 11.2(D)-(E), available at [www.state.me.us/agencies/education/homepage/rulesandlegislation](http://www.state.me.us/agencies/education/homepage/rulesandlegislation). The Fifth Circuit has noted that “[t]he notion of the least restrictive environment involves not only freedom from physical restraint, but the freedom

of the child to associate with . . . able-bodied peers.” *Sherri A.D. v. Kirby*, 975 F.2d 193, 207 n.23 (5th Cir. 1992).

The plaintiff first takes issue with some of the hearing officer’s expressed and implied factual findings. Plaintiff’s Memorandum at 21-23. She incorrectly asserts that the hearing officer relied on a “mistaken assumption” — that, if no adult were waiting for L.S. on those afternoons when the regular bus delivered him to the door of his mother’s house, the bus would remain idle while the driver radioed Soules, Soules made one or more telephone calls and Soules then called the driver back. *Id.* at 21. The hearing officer made no such “assumption.” This is essentially what Soules testified would happen if the school acceded to the plaintiff’s wishes. Record at 278-79, 285-90. The hearing officer was entitled to credit this testimony. The fact that the plaintiff, who is not, from all that appears in the record, experienced in the area of public school transportation, believes that there would be no delay if the school merely issued the driver a cell phone, which the driver presumably could use to call her or someone else to make arrangements to have an adult meet L.S., does not mean that the school is required to do so, nor that this would in fact be a solution. Soules’ testimony was to the contrary. *Id.* at 298-02.

The plaintiff next asserts that the hearing officer “incorrectly assumes” that transporting L.S. on the special education bus in the afternoon on alternate weeks would take the same amount of time as transporting him on the regular bus. Plaintiff’s Memorandum at 22. In fact, the hearing officer found that transport on the special education bus would take 100 minutes while transport on the regular bus would take 20 minutes. Record at 148. Finally, the plaintiff takes issue, Plaintiff’s Memorandum at 23, with the hearing officer’s finding that L.S. “is fully included for a large portion of his day,” Record at 148. She cites evidence to the effect that all of L.S.’s academic instruction takes place in the self-contained special education classroom, and he only attends homeroom, physical education, technology and art classes, as well

as “CSS,” field trips and drama club, with his non-disabled peers. Record at 61. Neither that page of the record nor the portion of her own testimony which she cites, *id.* at 189-90, states the relative amounts of time involved in these classes and activities, so it is not possible to tell from the cited evidence whether a “large portion” of L.S.’s day is devoted to mainstream activity. In any event, the resolution of this question makes no difference in my recommended decision for reasons that will become apparent.

The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child’s potential.

*Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993). The plaintiff relies on case law in which the disputes under the IDEA concerned inclusion of the children at issue in educational services rather than services ancillary to education. Contrary to the plaintiff’s position, there is a significant difference in the nature of academic services and transportation that is relevant to the consideration of her requested accommodation. *See Shawnee Mission Unified Sch. Dist. No. 512*, 102 LRP 2903 (Kansas State Educ. Agency, Mar. 29, 2000), at 2 (“There is, therefore, of necessity, a distinction between ‘related services’ [in this case, transportation] and those services specifically designed to meet a child’s needs as expressed through the goals stated in an IEP.”). In addition, the school has made available the “least restrictive” alternative of door-to-door transportation on the regular school bus.<sup>2</sup> The only thing the school is not willing to do is to provide further services through the regular bus system on those occasions when the plaintiff is

---

<sup>2</sup> *See Modesto City Elem. Sch. Dist.*, 38 IDELR 88 (Cal. State Educ. Agency, Nov. 12, 2002), at 368 (“There is no question that the general education bus is a less restrictive environment when compared with the special education bus used for home-to-school transportation.”)

unable or unwilling to insure that an adult is present at her home when L.S. arrives there. It is willing to provide those services through its special education bus.

It is not at all clear that the “least restrictive environment” requirement of the IDEA applies to transportation. It requires that, “[t]o the maximum extent appropriate,” disabled children be “educated with” children who are not disabled and that they be “remov[ed] . . . from the regular educational environment . . . only when the nature or severity of the disability of a child is such that education *in regular classes* with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5)(A) (emphasis added). There is no sense in which a school bus may be considered to be a “regular class,” nor is education the purpose of daily trips on the school bus. Even if the requirement does apply to transportation, however, the school has made the least restrictive transportation environment available to L.S. at all times. *See* 34 C.F.R. § 300.306(a) (school shall provide nonacademic services “in the manner necessary to afford children with disabilities *an equal opportunity for participation* in those services” (emphasis added)). The fact that he is unable to take advantage of that opportunity 25% of the time, due to the plaintiff’s choice of the means by which she provides care for him at the end of the school day, does not render the school’s reasonable choice to provide transportation with an adult hand-off only by means of the special education bus a violation of the IDEA. Nothing in the statutory language; the implementing regulations cited by the plaintiff, 34 C.F.R. §§ 300.550-300.552 & Appendix A to Part 300; nor the state regulations cited by the plaintiff, requires a different outcome.

### **III. Conclusion**

For the foregoing reasons, I recommend that judgment be entered in favor of the defendant.

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 8th day of December, 2004.

/s/ David M. Cohen  
David M. Cohen  
United States Magistrate Judge

**Plaintiff**  
-----

*MS S, as Parent and Next Friend of  
Her Son, LS*

represented by **AMY M. SNEIRSON**  
MURRAY, PLUMB & MURRAY  
PO BOX 9785  
PORTLAND, ME 04101-5085  
207/773-5651  
Fax: 207/773-8023  
Email: asneirson@mpmlaw.com

**RICHARD L. O'MEARA**  
MURRAY, PLUMB & MURRAY  
PO BOX 9785  
PORTLAND, ME 04101-5085  
773-5651  
Email: romeara@mpmlaw.com

**Defendant**  
-----

**SCARBOROUGH SCHOOL  
COMMITTEE**

represented by **ERIC R. HERLAN**  
DRUMMOND, WOODSUM &  
MACMAHON  
245 COMMERCIAL ST.  
P.O. BOX 9781  
PORTLAND, ME 04104  
207-772-1941  
Email: [erherlan@dwmlaw.com](mailto:erherlan@dwmlaw.com)