

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

In Re: Soleil¹

&

BSEA #1906526

Ipswich Public Schools

DECISION

This Decision is issued pursuant to M.G.L. c.71B and 30A, 20 U.S.C. §1400 *et seq.*, 29 U.S.C. §794 and the regulations promulgated under those statutes. A Hearing was held on September 18, 2019 at the BSEA in Malden, MA. The Parents proceeded *pro se* at all times. The School district was represented by Attorney Colby Brunt.

The official record of the Hearing consists of exhibits submitted by the Parents marked P-1 through P-3, P-5 through P-7 and P-10; exhibits submitted by Ipswich Public Schools (the “School”) marked S-1 through S-23; and approximately 4 hours of recorded oral testimony. The Parties submitted written closing statements on October 2, 2019 and the record closed on that date.

PROCEDURAL HISTORY

The Parents originally filed a Hearing Request on February 21, 2019 seeking an award of “custom” transportation for Soleil from the Masconomet Regional School District. After determining that Ipswich was the proper respondent a recalculated notice of hearing was sent to both school districts. Ipswich filed a counterclaim seeking substitute consent to conduct a three year re-evaluation. A prehearing conference was held on April 9, 2019 at which the issues for resolution were clarified. The Hearing was scheduled for June 13 and 14, 2019. On June 11, 2019 Parents requested a postponement of the Hearing. The School initially objected but withdrew the objection when the Parents agreed to consent to the School’s proposed re-evaluation. The Hearing was rescheduled to September 18 and 19, 2019. The Parents did not follow through on their oral commitment to provide consent to re-evaluate. Ipswich sought summary judgment on that discrete issue. The School’s Motion for Summary Judgment was denied on September 6, 2019.

¹ “Soleil”, the name used for the Student here, and Ms. S. and Mr. S., the derivative designations for the Parents, are pseudonyms selected by the Hearing Officer to protect the family’s privacy in documents available to the public.

At the commencement of the Hearing Ipswich withdrew its counterclaim, leaving only the two issues advanced by the Parents for resolution. After presentation of the Parents' case Ipswich moved for a Directed Verdict arguing that the Parents had failed to present evidence sufficient to support a *prima facie* case that Soleil was entitled to IEP or Section 504 related transportation. Due primarily to the Parents *pro se* status the Motion for a Directed Verdict was denied.

ISSUES

1) Whether the 2018-2019 IEP developed by Ipswich Public Schools and Masconomet R.S.D. fails to provide the Student with a free appropriate public education because it does not address participation in school-sponsored athletic activities?

2) Whether the 2018-2019 IEP developed by Ipswich Public Schools and Masconomet R.S.D. fails to provide the Student with a free, appropriate public education because it does not include individualized, door-to-door transportation that accommodates the Student's participation in school-sponsored athletic activities?

SUMMARY OF THE EVIDENCE

1. Soleil is a seventeen year old high school senior. He has received special education services throughout his school history due to diagnoses of autism spectrum disorder ("ASD") and attention deficit hyperactivity disorder ("ADHD"). Soleil is a resident of Ipswich. He began the 9th grade at Ipswich High School in the fall 2016. During the first semester Soleil experienced serious physical harassment from his classmates on school grounds. As a result the Parents and Ipswich agreed that a "fresh start" at nearby Masconomet Regional High School would be prudent. The Parties agreed that Ipswich would fund the programmatic costs, if any, and provide door to door transportation. Soleil has successfully attended Masconomet since 2016. (S-1; Ms. S., Hegedus)

2. Soleil's 2018-2019 IEP is substantially similar to his previous Masconomet based IEPs. The IEP provides for a daily period of special education academic support to address difficulties with executive functioning such as time management, organization, managing distracting devices, test preparation and self advocacy. The IEP also provides for weekly, individual sessions with a school adjustment counselor to address weaknesses in social skills, social behavior, problem solving, self regulation and self esteem. Soleil otherwise follows a general college-prep academic curriculum. He achieves As and Bs in all courses. The IEP does not contain any reference to, or supportive service in, school-related sports. The transportation section of the IEP notes that Soleil does not require transportation as a result of his disabilities. (S-1; Ms. S.; Hildebrand)

3. The school day at Masconomet runs from 7:30 a.m. to 2:15 p.m. Between 2:15 p.m. and 3:00 p.m. Monday through Thursday all teachers are available in their classrooms to provide additional instruction, guidance and support. After school sports is typically scheduled to occur from 3:30 p.m. to 5:45 p.m. on Monday through Thursday, although there is some

flexibility due to competitive events, travel, coaching schedules/requirements etc. (M. S.; Hegedus; Hildebrand)

4. Soleil is a member of the Masconomet High School football team. At times football practice and games do not occur precisely within predictable time frames. Football season runs from August through November. In the “off” season members of the football team participate in a conditioning program at the Masconomet High School gym between 6:00 a.m. and 7:00 a.m. While not required, participation in conditioning efforts is “understood” to enhance prospects for football team membership. (Ms. S.)

Soleil is also a member of the Masconomet High School wrestling team. Wrestling season runs from January to April. Wrestling practices and matches more reliably fall within the established afternoon sports window. (Ms. S.)

5. After Soleil transferred to Masconomet the Parents asked Stephen Langlois, the BCBA² who had followed Soleil at Ipswich Middle School, to conduct an observation to determine whether Soleil had appropriate access to football practice. In November 2017 Mr. Langlais observed Soleil at football practice and in other school related activities and areas. He reported that Soleil was appropriately engaged and included, interacted appropriately with teammates; followed coaching directions and participated without limitations in all activities. Mr. Langlais noted that Soleil participated in football without any observable behavior supports or individualized structure, and none was necessary. (Langlais; S-8)

6. Matthew Hildebrand, the academic program coordinator for Masconomet Regional High School, has worked directly with Soleil for 2 years. Mr. Hildebrand provides daily specialized academic support to Soleil in a group of 8-10 students. He also sees Soleil frequently during the after school support period. Mr. Hildebrand described Soleil as a conscientious, hard-working, optimistic honor roll student. He testified that Soleil has had no social difficulties with peers or adults in the school community. None has been reported to him by other teachers or coaches or by Soleil. Soleil works best individually and has strong math and science skills and interests. According to Mr. Hildebrand while Soleil clearly enjoys participating in sports, particularly wrestling, his educational progress is not dependent on participation in school-sponsored sports.

7. Ms. S. testified that there has been a long history of difficulties with transportation arrangements for Soleil. She stated that since Soleil must attend an out-of-district high school due solely to Ipswich’s failure to protect him from harassment, Ipswich is required to provide individually customized transportation to permit him to take advantage of all sports related opportunities at Masconomet. Ms. S. acknowledged that participation in sports was not a special education need for Soleil. She testified that she did not want sports to appear on Soleil’s IEP. Soleil’s IEPs have never included extended day special education services. Ms. S. also acknowledged that Soleil did not need any form of specialized transportation due to his disability. Indeed she emphasized that Soleil would refuse, and be shamed by, any vehicle that appeared to be devoted to special needs transportation. Ms. S. further acknowledged that all other students participating in school-sponsored sports and conditioning programs at Masconomet are transported by their parents, not by the the school district. Finally, Ms. S.

² Board Certified Behavioral Analyst.

acknowledged that Ipswich routinely provides reliable transportation from home to Masconomet for the 7:30 a.m. school start, and from Masconomet to home at 2:15, 3:00, or 5:45 depending on the day/season as instructed by the Parents. When the Parent provides transportation outside these hours: for the 6:00 a.m. conditioning program or a late practice or game, for example, she submits a reimbursement request to Ipswich and receives appropriate compensation. Ms. S. testified, however, that Ipswich should be providing the 6:00 a.m. home to school transportation when Soleil chooses to participate in the school-related conditioning program and for the return trip home after late practices and games whenever they occur.

8. The Team met on November 27, 2018 to develop an IEP for the 2018-2019 time period. The Team members agreed that Soleil was making meaningful educational progress in the general curriculum with the type and extent of special education services he had been receiving, i.e., a daily academic support period and a weekly session with the school adjustment counselor. (Hegedus; Finnegan; Hildebrand; Ms. S.; S-16). The Team did not discuss Soleil's participation in sports or transportation. (S-4) There are no then contemporaneous professional recommendations concerning sports participation or specialized transportation in the record. There are no recommendations for extended day educational services for Soleil.

Masconomet proposed a 2018-2019 IEP for Soleil which continued the type, level and frequency of special education services he had been participating in successfully up to that point. The 2018-2019 IEP does not include any sports-related services or settings. The 2018-2019 IEP does not offer Soleil specialized transportation. The 2018-2019 IEP does not include extended day services which might support transportation outside regular school day hours. (S-1)

9. On January 8, 2019 the Parents rejected the proposed 2018-2019 IEP because it failed to include sports and the customized transportation that would permit Soleil to participate in any and all voluntary sports programs available through Masconomet without parental assistance. (S-1)

10. The Team reconvened on February 5, 2019 to address parent concerns about sports and transportation. The Team reviewed the Transportation Reimbursement Advisory published by the Massachusetts Department of Elementary and Secondary Education (DESE special education guidance, May 31, 2011). The Team also reviewed the Ipswich Public Schools' Special Education Transportation Parent Information booklet and completed the district's transportation checklist. (S-19; Finnegan) No professional recommendations concerning sports participation or disability-related transportation were presented at the Team meeting. (Denton)

11. Brad Denton, the Assistant Director of Special Education for the Masconomet Regional School District, attended the February 2019 Team meeting. He testified that Team participants agreed that Soleil's academic progress and performance in a full inclusion placement was "great". No academic, social, emotional or behavioral concerns were brought to the Team. Mr. Denton recalled that the Parents' only concern was transportation to and from sports-related events outside regular school hours. Mr. Denton testified that none of the educators on the Team believed that sports was a necessary IEP service for Soleil. During time periods when Soleil was not participating in school-based sports, such as April-June, Soleil maintained good

grades and behavior identical to those time periods during which he did participate in sports. Therefore, there was no apparent link between sports and achievement in school. (Denton)

12. Megan Finnegan, school psychologist and program manager for Ipswich, also participated in the February 2019 Team meeting. She testified that none of the Team members saw a need for supervision, assistance or modifications to regular transportation vehicles, schedules or arrangements in order to permit Soleil to attend school, access extracurricular activities, or benefit from his IEP. (S-3; Finnegan)

13. Beverly Hegedus, Director of Pupil Personnel Services for Ipswich, testified that as a result of information developed at the November 2018 and February 2019 Team meetings, the Team determined that participation in sports was not necessary in order for Soleil to receive a free appropriate public education. The Team further determined that Soleil did not require specialized transportation as a result of his disability. Ms. Hegedus stated that Ipswich has consistently provided daily round trip transportation for Soleil during school hours or reimbursed the Parents for transportation they actually provided (not for claims reflecting dates falling on holiday or school absence days) when Ipswich was given the appropriate notice consistent with its transportation policy. (Hegedus; S-21)

14. A pharmacist's letter, dated February 5, 2019, supported Soleil's participation in football related activities. It is not clear the Team ever had access to or reviewed the pharmacist's letter. There is no indication in the record of the nature or extent of the author's contact with Soleil or with either school district. (P-3)

15. Francis McDermott, M.D. wrote two letters supported Soleil's participation in sports related activities, one dated February 5, 2019, one dated May 20, 2019. Dr. McDermott stated that it was "medically necessary" for Soleil to participate in sports and for sports to be included in his IEP. (P-2) There is no indication that the Team had an opportunity to review Dr. McDermott's letters. There is no information in the record concerning the nature or extent of Dr. McDermott's connection to Soleil or to either school district.

16. Currently Ipswich provides transportation to Soleil from his home to Masconomet Monday through Friday mornings in time for the start of school and from Masconomet to home on Friday afternoon after the end of the school day at 2:15 p.m. The Parents provide transportation after football practice on Monday through Thursday afternoons. The Parents are reimbursed in line with DESE mileage guidelines for parent-provided transportation. The Parents are not/have not been reimbursed for transportation they provide when an Ipswich provided vehicle is scheduled and the Parents have not timely cancelled the school transport; nor have they been reimbursed for claimed trips that fell on holidays, snow days or student absence days. (Hegedus, Ms. S.)

FINDINGS AND CONCLUSION

There is no dispute that Soleil is a student with special learning needs as defined by M.G.L. c.71B and 20 U.S.C. §1400 *et seq.* and is thus entitled to receive a free appropriate public education. Nor is there any dispute that Ipswich is responsible for providing daily round

trip transportation between Soleil's home and Masconomet High School in order to implement the accepted portions of Soleil's IEP. The core of the dispute concerns the question of whether sports is a necessary element of an appropriate IEP for Soleil. After careful consideration of the evidence presented in this matter, and of the arguments of both parties, it is my determination that it is not. My reasoning follows:

First, there is no persuasive substantive evidence that participation in any form of sport or exercise is necessary in order for Soleil to make meaningful educational progress towards his IEP goals. The only documents which could possibly support an alternate finding, the physician and pharmacist letters (P-3 and P-4), lack traditional indicia of trustworthiness which might lend them any probative value and were not available to the November 2018 and February 2019 Teams that developed and reviewed Soleil's 2018-2019 IEP. No other pertinent documents address sports. The uniform testimony of all witnesses, including Ms. S., established that participation in sports is not a necessary element of an appropriate IEP for Soleil. In particular I note that there was no change in Soleil's participation in IEP-related activities, his progress in the general curriculum or the grades he achieved that correlates with his participation in any particular sport or in no physical activity at all. (S-6; S-7; S-14; S-15; S-17; S-18; S-22; S-23) Therefore, I conclude that the 2018-2019 IEP developed by Ipswich and Masconomet is reasonably calculated to provide, and has during its implementation provided, a free appropriate public education to Soleil.

Resolution of the second issue flows from the first. The Parents seek to have the 2018-2019 IEP include specialized transportation to accommodate Soleil's participation in school sponsored sports and sports related activities. They seek publicly funded transportation outside regular school hours: before 7:00 a.m. and after 6:00 p.m. They seek publicly funded transportation for times and activities for which, as they acknowledge, no other student participants receive publicly funded transportation. They seek the provision of a publicly funded private car service because a "labeled" bus would "shame" Soleil. They seek publicly provided car service for those irregularly occurring early morning/late night runs even though Ipswich has offered to reimburse them for their mileage expenses.

The great weight of the evidence shows, however, and Ms. S. agrees, that Soleil does not require supervision, equipment modification or specialized transportation service connected to his disability. There is no evidence to support a finding that Soleil needs specialized transportation in order to access his IEP services at Masconomet or to participate in school sponsored extra-curricular activities on the same basis as non-disabled Masconomet students. The reasonable conclusion, therefore, is that the family is requesting that customized publicly funded transportation be added to Soleil's IEP for their convenience rather than as a necessary disability-related service.

Therefore, I find that the 2018-2019 IEP developed by Ipswich and Masconomet provides appropriately tailored special education services, and that Ipswich provides appropriate transportation for Soleil to fully access those services.

As a result of these findings the Parents' request for reimbursement of transportation expenses they claim to have incurred since November 2018 lacks both factual and legal support. Furthermore, the Parents' request for an Order compelling Ipswich to provide "custom" transportation to Soleil to accommodate participation in a 6:00 a.m. voluntary conditioning program at Masconomet and football activities that extend past 5:45 p.m. is not supported by the evidence and is denied.

The Parents have failed to prove by a preponderance of the evidence that participation in sports is a special education need, and that specialized transportation is necessary in order to implement Soleil's IEP. *Schaffer v. Weast*, 546 U.S. 49 (2005). On the contrary, all evidence supports the conclusion that Ipswich provided transportation services sufficient to fully implement Soleil's IEP, to permit him to make meaningful educational progress and to allow him access to school sponsored extra-curricular activities on the same basis as his non-disabled peers, consistent with its responsibilities under M.G.L. c.71B, 20 U.S.C. §1400 *et seq.*, and 29 U.S.C. §794. Any private agreements between schools and parents touching on modified or alternate transportation arrangements are not within the jurisdiction of the BSEA. For the purpose of this appeal Ipswich has discharged its duty to propose, and to ensure the implementation of, an IEP for Soleil that provides a free, appropriate public education. Nothing more is required.

ORDER

The 2018-2019 Individualized Education Program developed by Ipswich and Masconomet is reasonably calculated to provide a free appropriate public education to Soleil. Transportation outside of regular school hours is not required in order to implement the 2018-2019 IEP for Soleil.

By the Hearing Officer

Lindsay Byrne
Dated: October 30, 2019