

**BEFORE THE STATE DEPARTMENT OF EDUCATION  
STATE OF NEBRASKA**

	)	<b>CASE NO. 22-06 SE</b>
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	)	
<b>Petitioner,</b>	)	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER</b>
	)	
<b>vs.</b>	)	
	)	
<b>PAPILLION LA VISTA COMMUNITY SCHOOLS 420 S. Washington St. Papillion, NE 68046,</b>	)	
	)	
<b>Respondent.</b>	)	

**THIS MATTER** was heard on April 24, 2023. Mona (Molly) Burton, the duly qualified and appointed fair Hearing Officer, presided. Petitioner, \_\_\_\_\_, appeared via Zoom video conference and was represented by Amy Bonn who appeared in person. Respondent, Papillion La Vista Community Schools, was represented by its attorneys, Karen Haase and Sara Hento. The hearing was recorded by Summer Martinez, Court Reporter for Great Plains Reporting. The case was adjourned on April 24, 2023, the record closed, and the case taken under advisement.

Jurisdiction is premised upon Title 92 Ch. 55 and the Individuals with Disabilities Education Act, 20 U.S.C. § 1415 which confers on the Hearing Officer exclusive original jurisdiction of this case.

Petitioner, \_\_\_\_\_ filed a petition on June 22, 2022, requesting this Hearing Officer issue an order determining \_\_\_\_\_ is eligible for special education transportation as a related service, requiring Respondent provide transportation to and from school, requiring Respondent reimburse Petitioner \$1,520 for incurred out-of-pocket school transportation expenses, declaring Petitioner the prevailing party and determining Respondent’s use of its “Transportation Eligibility Considerations” flow chart violates the Individuals with Disabilities Education Act (IDEA) and Rule 51. Petitioner subsequently filed an Amended Petition without objection. The Amended Petition adds reimbursement expenses for the 2022-2023 school year. Respondent filed an Answer and Amended Answer requesting dismissal of Petitioner’s claims.

## ISSUES

1. Whether the use of a rubric to assist IEP teams in making determinations about transportation for special education students is facially violative of Rule 51;
2. Whether [redacted] IEP team appropriately determined [redacted] does not qualify for special education transportation as a related service; and
3. Whether [redacted] was denied FAPE due to the School District's determination did not qualify for transportation as a related service.

The following witnesses testified:

- Vern Davis-Showell, School Psychologist with Papillion La Vista High School. Ms. Davis-Showell has been a school psychologist with Papillion La Vista High School for 23 years. (18:2-10) She was part of the team that provided pedestrian crosswalk training for [redacted] (23:11-15) Ms. Davis-Showell received a Bachelor's Degree in Psychology from the University of Arizona with an emphasis in Special Education. She additionally received a Masters and an Education Specialist Degree from the University of Minnesota. (43:14-18) After her schooling, she worked for Omaha Public Schools specializing with autistic students. (43:19-22) She is trained in Structured Teach which is a special program for autistic students. (43:23-25) During her time at Papillion La Vista Schools she has worked with many students with autism spanning the entire spectrum. (44:3-7)
- Tammy Voisin, Director of Special Services for Papillion La Vista High School (also known as Director of Special Education). (73:10-16) Ms. Voisin has held this position for 6 years. (73:17-19)
- Emma Calhoun, Speech Pathologist with Papillion La Vista High School. Ms. Calhoun has worked in this capacity since 2014. (142:12-21) Ms. Calhoun was a member of [redacted] IEP team. (142:22-24) Ms. Calhoun was a part of the Pedestrian Crosswalk Training for [redacted] (143:6-9) Ms. Calhoun works with students diagnosed with Autism Spectrum Disorder and assists with executive functioning to help support cognitive processing, organization, task initiation, and task completion. (175:8-17) Ms. Calhoun has a Bachelors Degree in Communication Disorders from Truman State University and a Masters Degree in Speech Language Pathology from Central Missouri State University. (176:4-7) Ms. Calhoun additionally has specific training in TEACH and PEERS which focus on Autism Spectrum Disorder and how students of all abilities on the spectrum interact. (176:20-177:4)
- Dr. Carol Quirk, Director of Special Projects with the Maryland Coalition for Inclusive Education. (231:7-11) Dr. Quirk was previously the Director of Special Learning as well as the Chief Academic Officer for the organization. (231:12-15) She has been with the organization since 1990. (231:16-19) She works with State

and local education agencies. Dr. Quirk also has worked as a special education teacher as well as a school psychologist. (233:3-6) She has a Bachelors Degree in Psychology and a Masters Degree in Educational Psychology from the University of Connecticut, and a Doctorate in Communication and Severe Disabilities from Johns Hopkins University. (233:7-12) (Petitioner’s Exhibit 22) Dr. Quirk was proffered as an expert.

- , Petitioner and mother
- , stepfather.
- , sister-in-law.
- Heather Post, Special Services Supervisor for Papillion La Vista Middle Schools and High School. (350:13-19) Ms. Post is a School Psychologist and Special Education Administrator. (351:5-7) She was proffered as an expert (351:11-14)

The following Exhibits were received from Petitioner:

Exhibit 1: Rule 51 of the Nebraska Department of Education, Regulations and Standards for Special Education Programs.

Exhibit 2: Rule 55, Nebraska Department of Education, Regulations and Standards for Special Education Programs.

Exhibit 5: Respondent’s Answers to Petitioner’s Interrogatories.

Exhibit 7: Multidisciplinary Team Evaluation Report for , February 4, 2020.

Exhibit 8: IEP for -February 11, 2021.

Exhibit 9: IEP for -February 9, 2022.

Exhibit 10: IEP for -April 23, 2022.

Exhibit 11: Excerpt from medical autism diagnosis for .

Exhibit 12: Letter from Angela Gilfillan, APRN.

Exhibit 13: Transportation Eligibility Considerations.

Exhibit 14: Pedestrian Crosswalk Training: notes, meeting documentation, signature pages.

Exhibit 15: Prior written notice-October 18, 2021.

Exhibit 16: Career Clusters Interest Survey for .

Exhibit 17: Autism Safety-Teaching Safety FAQ.

Exhibit 18: Teen Safety-Walking While Distracted documents.

Exhibit 19: Telephone call notes.

Exhibit 20: Spring Safety notes.

Exhibit 21: “Walking” questions.

Exhibit 22: Email from Angie O’Hanlon to Tammy Voisin-July 7, 2022.

Exhibit 23: Email from Annette Eyman to Tammy Voisin-July 12, 2022

Exhibit 24: Email chain regarding .

Exhibit 25: Email from Nicole Schroeder to Tammy Voisin-July 7, 2022

- Exhibit 26: Email from Emma Calhoun to Tammy Voisin- July 8, 2022
- Exhibit 27: Email from Vern Davis to Tammy Voisin-July 10, 2022
- Exhibit 28: Email from Samantha Deck to Tammy Voisin-July 12, 2022
- Exhibit 29: C.V. of Dr. Carol Quirk
- Exhibit 30: Google Map
- Exhibit 31: Neb. Rev. Stat. § 79-1129
- Exhibit 32: Neb. Rev. Stat. § 81-1176
- Exhibit 33: PLCS Boar Policy 5701
- Exhibit 34: NDE Reimbursement Rates
- Exhibit 35: Neb. Rev. Stat. § 79-611
- Exhibit 36: Email exchange between Rosa and Audrey Jarvis-October 2022
- Exhibit 37: PLCS Board Policies 6301
- Exhibit 38: Special Education Toolbox Agenda
- Exhibit 39: Life Journey Through Autism: A Guide to Safety

The following Exhibits were received from Respondent:

- Exhibit 7: “Walking” Notes
- Exhibit 9: Spring Safety Notes
- Exhibit 10: Walking Notes (Continued)
- Exhibit 11: Teen Safety-Walking While Distracted documents
- Exhibit 18: Autism Safety-Teaching Safety FAQ

### **FINDINGS OF FACT**

is a sophomore enrolled at Papillion La Vista High School, and Petitioner, is . (18:18-20) Three years ago, when was in middle school, was verified as a child with a disability eligible for special education. (Pet. Ex. 7) multi-disciplinary team determined primary disability is autism. (Pet. Ex. 7) individualized education plan team crafted an IEP that did not include any assistance in navigating the middle school and did not provide for transportation as a related service. (Pet. Ex. 8 at 11) Every IEP since initial plan noted does not need transportation as a related service. (Pet. Ex. 8 at 11 ; Pet. Ex. 9 at 19 ; Pet. Ex. 10 at 20 ) overall functioning is high, receives straight A’s in all classes, and was able to make the transition from middle school to high school without any specialized support. (45:18-25)

has attended Papillion La Vista High School since August of 2021 and has had very few absences. (23:4-6; 61:6-12; 360:13-20) lives with Petitioner, and three other children. (329:23-25; 331:25-332:7) gets to and from school via these family connections. (332:8-333:1; 342:13-20) Petitioner does not have a driver’s license. (321:8-10) Instead of driving and children, Petitioner walks or arranges rides with friends and family. (321:11-12) lives in Omaha and has a driver’s license, although work schedule makes it difficult for to transport to and from school. (323:10-324:4)

Petitioner's \_\_\_\_\_ does drive and lives with Petitioner and \_\_\_\_\_ children. (324:8-10) \_\_\_\_\_ work schedule makes it difficult for \_\_\_\_\_ to transport \_\_\_\_\_ to school, but \_\_\_\_\_ can and does pick up after school. (324:15-21) Until recently, Petitioner has walked \_\_\_\_\_ younger children to school, but during the spring of 2023 these younger children began walking to school without Petitioner's accompaniment. (322:2-8; 36:10-18) Petitioner's household also includes a child who will be in 9th grade during the 2023-23 school year. (331:25-332:7)

The District does not offer general transportation to all students. (104:15-105:14) Petitioner contacted the Respondent before \_\_\_\_\_ started high school in August of 2021. (19:16-19) For the first time, \_\_\_\_\_ requested transportation for \_\_\_\_\_ as a related service. (Ex. 24) (83:7-10) Prior to this, \_\_\_\_\_ was receiving general transportation services due to the distance between \_\_\_\_\_ home and the middle school. (Pet. Ex. 8 at 241) (113:6-11) On August 11, 2021, IEP team met to discuss Petitioner's request. (35:14-19) The team concluded there was no data indicating \_\_\_\_\_ has a need for special education transportation. (90:9-23) Nevertheless, the team agreed special education staff would provide \_\_\_\_\_ with pedestrian crosswalk training to assist the team in collecting additional data to see if the team had missed an issue related to safety in walking to school. (33:1-9)

During August 2021, \_\_\_\_\_ received six pedestrian crosswalk training sessions which occurred on August 13, 16, 17, 18, 19, and 24, 2021. (Ex. 4) The purpose of the training was to determine \_\_\_\_\_ "knowledge of safety, \_\_\_\_\_ knowledge of the ability to cross the street, knowledge of the ability to get from point A to point B." (33:6-9) Additionally, the training served as a trial to examine \_\_\_\_\_ skill set to see if \_\_\_\_\_ had a need for special education transportation. (41:4-25)

During the pedestrian crosswalk training, "\_\_\_\_\_ demonstrated awareness of cars and crosswalks that allowed \_\_\_\_\_ to independently cross multiple streets safely with no modeling or prompting from staff." (Pet. Ex. 14) (155:18-156:2) Vern Davis concluded in her professional opinion and based on her personal observations, \_\_\_\_\_ was able to demonstrate the ability to safely navigate the path on the way to and from school. (51:25-53:8) Similarly, Emma Calhoun opined "\_\_\_\_\_ did demonstrate skills that would support \_\_\_\_\_ in traveling back and forth to school." (192:17-19)

On August 30, 2021, \_\_\_\_\_ IEP team met to review the new data collected from the pedestrian crosswalk training and staff observations to determine whether the new information indicated \_\_\_\_\_ needed transportation as a related service. (Pet. Ex. 14) (94:13-23) The team considered \_\_\_\_\_ strengths such as following routines, moving independently from class to class, the crosswalk training, observations from the special education staff, the student's general independence in school, and input from the IEP team members. (Pet. Ex. 14) (94:13-23) In addition to these individualized factors, \_\_\_\_\_ IEP team also considered issues outlined on the district's "transportation rubric." (Pet. Ex. 14) (94:13-23)(359:1-3) The transportation rubric is a flowchart created by the district to assist IEP teams like \_\_\_\_\_ in their consideration of transportation as a necessary related service. (118:11-119:9; 356:5-10) The copy of the

transportation flowchart considered by IEP team contains notations the team considered beyond items listed on the rubric such as grades, absences, and additional supports. (Pet. Ex. 14) The team examined all of the data and once again concluded ineligible for special education transportation services. (Pet. Ex. 14)

IEP team met for a third time on October 18, 2021, to revisit eligibility to receive transportation as a related service. (Pet. Ex. 15) The team reviewed a note provided by Rosa from Angela Gilfillan, APRN which, in pertinent part, reported “ reports has episodes of inattentiveness not paying attention to surroundings and will walk into traffic unknowingly. Therefore, I feel busing is a necessity for for safety.”(Pet. Ex. 12) This note did not identify any personal observations or diagnostic assessments upon which Ms. Gilfillan rested her conclusion. The IEP team considered Ms. Gilfillan’s additional input but ultimately decided Ms. Gilfillan’s input was outweighed by the professional observations of the staff who had personally observed that is very attentive to the road. (56:19-57:7)

At the October 18 meeting, the team reviewed most recent IEP, data collected from the pedestrian crosswalk training, new school observations, a note from Angela Gilfillan, APRN, parent input, and the special education transportation eligibility considerations flow chart. (Pet. Ex. 15) Again, the team determined did not qualify for special education transportation. (Pet. Ex. 15)

## **ANALYSIS AND CONCLUSIONS OF LAW**

### **I. The Use of a Rubric is not Facially Invalid under Rule 51.**

In both Petitions, Petitioner asserts the District inappropriately relied on the “Transportation Eligibility Consideration” flow chart (“the rubric”) when determining the inclusion of transportation as a related service and the use of such rubric is unduly and unreasonably restrictive. Additionally, Petitioner alleges the rubric failed to provide with an individualized IEP.

Rule 51 provides an: “Individualized education program (IEP) means a written statement for a child with a verified disability that is developed, reviewed and revised in a meeting . . . [and] which specifies the special education and related services necessary to assure the child a free appropriate public education.” Title 92, NEB. ADMIN. CODE § 51-003.31 (2022). The federal regulations implementing the IDEA further provide: “[i]n developing each child’s IEP, the IEP Team must consider - the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial or more recent evaluation of the child; and the academic, developmental, and functional needs of the child.” 34 CFR 300.324 (a). Neither Rule 51 nor the IDEA limits or restricts the IEP team’s ability to utilize a rubric as a means of organizing or considering the data and input utilized to develop an IEP.

Here, school professionals testified uniformly the rubric was a tool utilized by the IEP team when considering transportation as a related service, and the rubric is only a guideline for discussion for all of the IEP teams who work within the district.

Q. Yes, ma'am. What is this?

A. This is the flow chart that the district uses to determine if a child can qualify for special education transportation.

Q. Is this like a rigid, you must check these boxes and that leads you to a transportation decision?

A. No. This is a guideline.

(61:21 - 62:2) (Cross Examination of Vern Davis)

Q. So the three elements on the flow chart are one set of data that the team can consider?

A. I think that they're the - - they're the foundation of what we look at.

Q. But they aren't originally applied so that if it doesn't fall within the four corners of that flow chart, the kid doesn't get transportation?

A. On the IEP teams that I participated in, we don't use that as a rigid yes/no system.

(180:6-14) (Cross Examination of Emma Calhoun)

Q. Is that - - what is that rubric designed to do?

A. It's to guide our conversation and to make sure that our teams are having like a robust conversation about what are all of the needs of the student and to really determine. Okay, have we thought of all of those.

(356:5-10) (Direct Examination of Heather Post)

The evidence demonstrates IEP team had robust conversations regarding his eligibility to receive special education transportation as indicated by the notations on the rubric.

(Pet. Ex. 14)

Q. And are these notes that were taken by a team member on -  
- in discussing needs for transportation?

A. That's correct.

Q. Does - - is there a notation at the bottom that has no tardies and no absences?

A. That's correct.

Q. Is that information separate apart from the transportation eligibility consideration laid out on the rubric?

A. Yes.

Q. So this is a consideration that the team thought about other than what was pre-printed on the form?

A. That's correct.

Q. Does the notation also say that [redacted] has a grade of A or above with no supports in the school? A. Yes.

Q. Is that also a consideration that wasn't specifically laid out on the transportation group?

A. That's correct.

Q. Is there also notations in the boxes that show that the team did consider some of the elements in the flow chart?

A. Yes.

Q. So they considered the flow chart and considered other information?

A. Yes.

(358:1-25) (Direct Examination of Heather Post)

The team did not solely rely on the rubric in a restrictive way. Even Petitioner's own expert witness conceded it was appropriate for [redacted] IEP team to consider the factors contained in the rubric when determining whether [redacted] was eligible for transportation as a related service.

Q. That's right. A student would have to be eligible in order to receive [transportation]. The presumption is that the student would have to prove [redacted] needs this transportation, correct?

A. Well the team has to agree that [redacted] is eligible for transportation.

(284:20-25) (Cross Examination of Dr. Carol Quirk)

The rubric does not facially violate Rule 51, is not unduly restrictive, and does not curtail the IEP team's ability to consider other data. In fact, the evidence establishes the IEP team considered all data, including information outside the rubric. While Dr. Quirk testified the "Pedestrian Crosswalk Training" did not adequately evaluate [redacted] ability and Respondent's use of the Rubric does not on its own provide a sufficient basis to evaluate transportation eligibility, her opinion was based on a review of records and a conversation with [redacted] (not in person). (279:23-280:5; 240:2-3) The testimony provided by Respondent is credible as the witnesses worked directly with [redacted] and personally observed [redacted] abilities. *See Moss v. Associated Underwriters, Inc.*, 23 Neb.App. 739, 746 (2020) (where evidence is in conflict, deference is given to the fact finder who observed the witnesses and accepted one version of facts over another).

## **II. Does not Require Transportation as a Related Service In Order to Benefit from Special Education.**

Special education students are only entitled to transportation as a related service only when it is "**required** to assist a child with a disability to benefit from special education . . ." 34 CFR 300.34 (a) (emphasis added); *see also*, Title 92, NEB. ADMIN. CODE § 51-014.01B2 (2022) (obligating school districts to "provide transportation within the school district for any child with a disability" only when "the nature of the child's disability is such that special education transportation is required.") [redacted] does not require transportation as a related service

in order to benefit from special education. The evidence and testimony establish [redacted] did not need transportation to benefit from special education during either school year in question.

Q. Do you know approximately how many absences [redacted] had during the 21-22 school years?

A. I know it was few, but I - - I can't tell you exactly how many.

Q. Okay.

A. But it was very few.

Q. Do you know roughly how many absences [redacted] had during the 2023 school?

A. Couldn't say roughly five, I would say I would have to look back.

Okay. One more for sure.

Q. And is that any equivalent or fewer than the average student?

A. Yes.

Q. So [redacted] is getting to school?

A. Yes.

(360:13 - 361:6) (Direct Examination of Heather Post)

Multiple school personnel testified how [redacted] has benefited from the specially designed instruction provided to [redacted] by the District.

Q. In your professional opinion, has [redacted] been able to benefit from the specialty designed instruction provided to [redacted] by fulfilling with us the community schools?

A. Yes.

(361:7-13) (Direct Examination of Heather Post)

Q. Is there any doubt in your mind that [redacted] has benefited from [redacted] specialized instruction while he's been at the Papillion La Vista High School?

A. No doubt.

(141:11-14) (Cross Examination of Tammy Voisin)

Petitioner failed to meet [redacted] burden pursuant to Title 92, NEB. ADMIN. CODE § 51-014.01B2 that [redacted] has not benefited from special education in the absence of transportation as a related service. This hearing officer reviewed the evidence and observed and listened to the testimony and finds the school professionals credible.

Federal courts utilize a five-factor test when reviewing an IEP team's transportation decision. These five factors were first articulated by the United States Court of Appeals for the Eleventh Circuit in *Donald B. by and Through Christine B. v. Bd. of Sch. Comm'rs.*, 117 F.3d 1371 (11th Cir. 1997). See also *Malehorn v. Hill City Sch. Dist.*, 987 F.Supp. 772 (D.S.D. 1997) (applying the *Donald B.* factors in a transportation challenge brought by a parent against a South Dakota school district). The factors include: "(1) [the disabled child's] age; (2) the distance he or she must travel; (3) the nature of the area through which the child must pass; (4) his or her access to private assistance in making the trip; and (5) the availability of other forms of public assistance in route, such as crossing guards or public transit." *Malehorn* at 781. Each of these

factors supports the conclusion that \_\_\_\_\_ does not require special education transportation in order to benefit from special education.

**A. \_\_\_\_\_ age weighs against transportation.**

\_\_\_\_\_ is 16 years old. This factor weighs heavily against the need for transportation. In *Donald B.*, the seminal case on special education transportation, the Eleventh Circuit concluded it was not unreasonable for a seven-year-old child to walk three blocks to school. 117 F.3d 1371 at 1375. By comparison, in *Board of Educ. of the Dist. 130 Pub. Schs. v. Illinois State Bd. of Educ.*, the Court determined it was unreasonable for an eleven-year-old child diagnosed with ADHD to walk 1.9 miles to school along a route with busy streets. 26 IDELR 724 (Ill. App. Ct. 1997).

The State of Nebraska has concluded \_\_\_\_\_ is old enough to obtain a driver's license. Neb. Rev. Stat. § 60-4,120.01(1)(a). The testimony elicited clearly indicates the District considered \_\_\_\_\_ age when it concluded \_\_\_\_\_ did not need transportation.

Q. Okay. Ms. Davis, in your professional opinion, is it appropriate to expect a student who's 16 years of age to walk to school independently?

A. Yes.

Q. Is it appropriate to expect \_\_\_\_\_ to walk to school independently?

A. Yes.

Q. Is there anything about \_\_\_\_\_ autism, as it specifically presents in \_\_\_\_\_, that prevents \_\_\_\_\_ from completing this task in the same way \_\_\_\_\_ same-age peers complete it?

A. No.

(59:10-21) (Cross Examination of Vern Davis)

Q. In your professional opinion, Ms. Post, is it appropriate to expect a student who's 16 years of age to be able to walk to school independently?

A. Yes.

Q. Is it appropriate for \_\_\_\_\_ specifically including considering \_\_\_\_\_ disability to assume that \_\_\_\_\_ can walk from the apartment complex to the school?

A. Yes.

(359:8-15) (Direct Examination of Heather Post)

The evidence presented demonstrates \_\_\_\_\_ age is a factor supporting the IEP team's decision. \_\_\_\_\_ age argues strongly against a need for transportation as a related service. Again, the evidence from school officials was credible.

**B. The distance \_\_\_\_\_ would need to travel weighs against transportation**

\_\_\_\_\_ must travel approximately 1.2 miles to school. This factor also weighs against transportation. In *Malehorn*, the South Dakota District Court considered the following facts: the

child was eight years old, lived 13.5 miles from the school, and was dropped off by her mother at a school's bus stop where she was required to wait for the school bus. *Id.* at 776-777. The Court concluded the student did not require transportation as a related service as she was able to safely wait at the bus stop, and could follow instructions regarding traffic safety. *Id.* at 778.

Similarly, in *In re Student with a Disability*, 40 IDELR 172 (SEA MI August 6, 2003) a Michigan hearing officer concluded a 6th grade student with a specific learning disability was not denied FAPE when he lived less than 1.5 miles from the school which was the cutoff for bus service. *Id.*

Some decision-makers have concluded a student with significant impairments could not be expected to travel distances of around two miles without assistance. *See, e.g. Board of Educ. Of the Dist. 130 Pub. Sch. v. Illinois State Bd. of Educ.*, 1997 U.S. Dist. LEXIS 12921 (N.D. Ill. 1997) (holding that an eleven year old student diagnosed with ADHD who lived 1.9 miles from the school required transportation because the student being “socially immature, impulsive, inattentive, and easily distracted. . .”); *Maple Heights City School*, 44 IDELR 237 (SEA MI December 12, 2005) (holding transportation required for a third grade student with a cognitive disability who resided two miles from the school). lives far closer to the school than the student in *Malehorn* and closer than the students in each of the cases cited above.

Q. Do you know the distance that would have to walk from his family home to the Papillion La Vista High School?

A. I believe it is 1.2 miles.

(60:2-5) (Cross Examination of Vern Davis)

Q. Is it unreasonable to expect a 16-year-old to walk 1.2 miles independently?

A. No.

Q. Is it unreasonable to expect to walk 1.2 miles independently?

A. No.

Q. Is 1.2 miles a substantially longer distance to travel to school than other peers age travel?

A. No.

(60:9-18) (Cross Examination of Vern Davis)

Q. In your professional opinion, is it appropriate for to travel a distance of slightly over one mile between the apartment complex and the school?

A. Yes.

Q. Is it substantially further for to trans - - to walk this one mile or to be transferred this one mile? Is that further for than it is for other students?

A. No

(359:16-25) (Direct Examination of Heather Post)

The distance must travel weighs against a need for transportation. Again, the evidence proffered by Respondent in this regard was credible.

**C. The nature of the area would need to pass through weighs against transportation.**

route to school is a safe, suburban environment which poses no unique risks. This factor weighs against transportation. In *South Hunterdon Regional Board of Education*, a New Jersey administrative law judge (ALJ) determined an eighth-grade student with ADHD was not entitled to transportation as a related service despite her parent's concerns over the child's safety and the student's distractibility. 54 IDELR 208 (SEA NJ February 25, 2010). The parents articulated concerns the student may be vulnerable to predators. Although the ALJ acknowledged the parents' personal concerns about safety "which is certainly understandable, as they appear to be loving and caring parents," he rejected this subjective concern as sufficient to weigh in factor of transportation. *Id.*

Alternatively, in *Fort Sage Unified School District and Lassen County Office of Education*, the hearing officer determined transportation was needed as the eleven-year-old student diagnosed with ADHD, Tourette's syndrome, and Fragile X syndrome did not "appreciate dangers he might encounter his home and the bus stop, such as strangers and wild animals." 23 IDELR 1078 (June 2, 1995).

The evidence presented by the District shows the IEP team considered the nature of the area would need to pass through to school and determined it was safe.

Q. Are you familiar with the nature of the area through which must pass on its way to school?

A. Yes.

Q. Is that area unsafe?

A. No.

Q. Are you - would you be comfortable walking in that area?

A. Yes.

Q. Are you uncomfortable having a student with autism spectrum disorder that presents as does walk in that area?

A. I am not uncomfortable.

(60:19 - 61:5) (Cross Examination of Vern Davis)

Q. Okay. But in light of that, you don't consider the - - you know, the nature of the area through which the child would have to walk when it comes to safety or criminality when making the determination as to whether the child needs transportation to school; is that right?

A. If I was considering the nature as your stating, I would consider Papillion La Vista. And implicitly, like I said, I would consider that a safer community. However, that is not a direct consideration I would make.

(159:22 - 160:7) (Direct Examination of Emma Calhoun)

Q. Are you familiar with the nature of the area through which must pass on its way to school? A. Yes.

Q. Is that area unusually unsafe?

A. No.

Q. Are there any hazards in that area that would be atypical that for students to face in transporting to school?

A. No that I'm aware of.

Q. Any hazards in that area that would be unusually unsafe for ?

A. No.

(360:1-12) (Direct Examination of Heather Post)

Unlike *Fort Sage*, route to school is not rural, avoiding the danger of "wild animals." Staff personally examined the route which must travel and walked it with on multiple occasions. (Pet. Ex. 14)

Q. And then on August 24th, did you make the entire walk between home and school?

A. We did not. As I stated before, we did not go door to door. We - - we started at the Thrift America and moved towards the school from there. The Thrift America's probably two blocks away from apartment complex.

(195:17-23) (Cross Examination of Emma Calhoun)

has an appropriate understanding of how to process an interaction with a stranger and other potential concern such as dogs while on a walk.

Q. Was there a time when you were on a walk with and a pedestrian tried to engage in conversation?

A. Yes, and did not.

(54:10-13) (Cross Examination of Vern Davis)

Q. Did the team have occasion to - -?

A. Yes, there was a time that they came back and said, "Oh, there was a dog on the road."

Q. And did you have the ability to observe interact with other pedestrians?

A. I mean, casually just in crossing. did not really pay mind, I would say, to those people. I couldn't because we - - the second I - - when we were behind , I wouldn't have been able to even tell you if acknowledged their greetings, but did not stop and talk to anybody who passed us on the street.

(197:14-24) (Cross Examination of Emma Calhoun)

has the pertinent knowledge to make decisions regarding navigating to and from school using the crosswalks and having proper safety considerations.

Q. You had a conversation with Ms. Bonn about the fact that traffic patterns might be different between 8:00 and 8:30 versus during first period when you were doing these walks with .

A. Correct.

Q. Do those differences make you concerned that would not be able to navigate based on what you observed?

A. Based on how accessed the crosswalks and watched both ways and crossed the street, I would think could safely use the crosswalks to cross the streets regardless of the flow of traffic.

(197:25 - 198:11) (Cross Examination of Emma Calhoun) Petitioner disagrees with ability to safely navigate the walk between home and school. However, the evidence from school officials who personally observed is credible.

Furthermore, mastery of walking safety was regularly assessed by a member of IEP team, Emma Calhoun, who participated in a small communications group with .  
(Res. Ex. 9

Q. And then on page 2 of Exhibit 9, did volunteer information in this group about road safety?

A. When asked, did answer, yes. Uh-huh. said the we would walk on a crosswalk, we would walk on the sidewalk, and that in street, said no, would not walk in the street. As far as using a phone, said it would distract and make zone out. When I furthered to use correct signals, said, 'Use crosswalk, stop and look. Push the button if there is one.

(209:24 - 210:9) (Cross Examination of Emma Calhoun)

Over objection, Petitioner provided evidence an autistic child disappeared after leaving a nearby elementary school. No doubt this would cause concern. However, no evidence was presented including evidence from public safety or law enforcement personnel indicating the area was unsafe. Although Petitioner is a "loving and caring parent" subjective concern does not establish the route must travel is not safe. "On balance then, [the Petitioner] has not carried ] burden of showing is unable to provide transportation] with [Respondent's] help." *Donald B.* at 1375. This factor weighs against transportation for . Again, the evidence from school officials was credible.

**D. access to private assistance weighs against transportation.**

has access to private assistance if the family decides they do not want to walk to school. This factor weighs against transportation.

In *Donald B.*, the mother argued she was unable to leave her job to provide the child with transportation. The Court stated "[the student] has failed to present evidence regarding other means, private and public, he might have at his disposal to assist . ." 117 F.3d 1371 at 1375.

Similarly, in *Malehorn*, the parent argued she was unable to seek employment because she had to transport her child to the bus stop. 987 F.Supp. 772 at 782. The *Malehorn* Court determined “it may consider a child’s access to private assistance in making the trips a factor, but not the sole factor . . .” *Id.* at 783. Alternatively, a Colorado hearing officer in *Mountain Board of Cooperative Educational Services* determined transportation was necessary for a four-year-old with a specific learning disability to attend half-day preschool. 45 IDELR 83 (SEA CO November 21, 2005). The hearing officer asserted: “access to educational benefit will occur only if the District provides transportation . . . 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.”

The evidence demonstrates [redacted] is capable of walking to school by [redacted]. Even if [redacted] is incapable of walking, Petitioner’s own evidence established [redacted] had access to private assistance to get to school without walking. Like countless other students, [redacted] relies on a combination of friends and family to drive [redacted] to school. [redacted], Petitioner’s [redacted], takes [redacted] to school. (302:2-8) Petitioner’s [redacted] picks [redacted] up after school. (332:13-16)

[redacted] has had few, if any absences from school.

Q. Do you know how many absences [redacted] had during the ‘21, ‘22 school year?

A. I would not. I don’t know the exact number, but I know it’s very few absences.

Q. And do you know approximately how many absences [redacted] had during the ‘22, ‘23 school year?

A. Again, very few absences.

(61:6-12) (Cross Examination of Vern Davis)

Q. Do you know how many absences [redacted] had during the ‘21-’22 school year?

A. I know it was few, but I - - I can’t tell you exactly how many.

Q. Okay.

A. But it was very few.

Q. Do you know roughly how many absences [redacted] has had during the ‘22-’23 school?

A. Couldn’t say roughly five, I would say. I would have to look back to see. I don’t know for sure. Q. And is that any equivalent or fewer than the average student?

A. Yes.

(360:17 - 361:4) (Direct Examination of Heather Post)

Petitioner pays ten dollars a day to transport . (302:24-303:7)  
Payment to for transportation does not change the analysis under federal caselaw.

**E. access to other forms of public assistance weighs against transportation.**

has access to other forms of public assistance. This factor weighs against transportation.

In *Lander County School District*, a Nevada review officer determined a fourteen-year-old student who qualified for special education services was not eligible for transportation as a related service because “the student, who [was] a teenager, [was] old enough to get to a bus stop and ride the bus independently.” 102 LRP 18888 (SEA NV May 26, 1998). Similarly, in *Upland Unified School District*, a California administrative law judge ruled the parent failed to provide evidence that public transportation was not available nor private arrangements such as a carpool could be made for the student when assessing the factors for transportation as a related service. 118 LRP 8305 (SEA CA February 28, 2018). In *Upland*, the student was a twelve year old student eligible for special education services under the eligibility category of OHI due to ADHD. *Id.*

Here, the District presented evidence private arrangements such as carpooling with existed and the District discussed additional transportation options with Petitioner such as the neighborhood app.

Q. , did the school suggest any other option, other than family driving or walking with ?

A. I think they had told me about a neighborhood app - -.

(327:14-18 (Re-Cross Examination of ))

**F. Petitioner’s Convenience Should Not be Considered in the Decision.**

Petitioner does not have a driver’s license. However, Petitioner’s unique circumstances do not qualify as a need for . While special education transportation would certainly make it easier for the Petitioner to get to school, nothing in the IDEA nor Rule 51 requires transportation based upon convenience. In fact, the Eighth Circuit has held that parental convenience should not be considered in reviewing IEP teams’ transportation decisions. *Fick v. Sioux Falls Sch. Dist.* 49-5, 337 F.3d 968 (8th Cir. 2003) (“...a school district may apply a facially neutral transportation policy to a disabled child without violating the law when the request for a deviation from the policy is not based on the child's educational needs, but on the parents' convenience or preference”) citing *Timothy H. v. Cedar Rapids Cmty. Sch. Dist.*, 178 F.3d 968 (8th Cir. 1999). Other courts have joined the Eight Circuit in refusing to rule based on parental convenience. For example, in *North Allegheny Sch. Dist. v. Gregory P.*, the Court noted:

Here, however, the additional transportation requested serves not to address any of Gregory's special educational needs, but **only to accommodate the particular**

**domestic arrangements which Gregory's parents have made.** It is unfortunate that parents who live apart, whether by choice or necessity, face greater difficulties in meeting their responsibilities to their children. The particular transportation problems imposed by a shared custody arrangement between parents living substantial distances apart falls equally on those whose children have no special educational needs. **Mitigating such hardships, however, is not the purpose of the IDEA or the Public School Code.**

687 A.2d 37, 40 (Pa. Commw. Ct. 1996) (emphasis added).

The evidence established one of Petitioner's primary motivations for seeking special education transportation was her convenience.

Q. Do you have a driver's license.

A. I - - I have a driver's license from Tennessee but I don't drive. No, ma'am.

(321:8-10) (Cross Examination of )

Petitioner provided testimony it would be possible, albeit inconvenient, for to walk with to high school.

Q. It would be possible for you to walk to the high school. You're telling me that instead you walk your other children to an elementary school?

A. Yes, ma'am.

(322:15-18) (Cross Examination of )

lives locally within the District, possesses a driver's license, but would face work disruption if took the time to drive to school.

Q. has a driver's license, correct?

A. Yes, ma'am.

Q. lives in Omaha, correct?

A. Yes, ma'am.

Q. The Omaha Metro, is that more accurate?

A. lives in La Vista - - lives in La Vista but work schedule, there's no way can take to school.

(323:19 - 324:1) (Cross Examination of )

Petitioner's , , also has a driver's license and frequently picks up from high school.

Q. Your has a driver's license; is that true?

A. Yes, ma'am.

Q. It would be possible for your to transport ; isn't that true?

A. No - - no ma'am. job starts at 5:00 in the morning.

Q. It would be really inconvenient for your [redacted] to change [redacted] work schedule, but it's physically possible for your [redacted] to drive [redacted]; isn't it?

A. Yes, ma'am.

Q. In fact, your [redacted] has picked [redacted] up from the high school, frequently; hasn't [redacted] ?

A. Yes, ma'am.

324:8-21 (Cross Examination of [redacted] )

Each of these facts reveal it is not necessity but personal convenience which animates Petitioner's demand for transportation services. [redacted] has multiple options for transportation to school, including walking on [redacted] own, walking with [redacted], and riding with family and friends. Petitioner's convenience is not a factor.

**III. [redacted] Was not Denied FAPE when the IEP Team Concluded [redacted] Did Not Qualify for Transportation as a Related Service.**

92 NAC 51-004.01 states:

School districts and approved cooperatives shall ensure that all children with verified disabilities, from birth through the school year in which the child reaches age twenty-one, including children who have been suspended or expelled from school, have available to them a free appropriate public education (FAPE) which includes special education and related services to meet their unique needs. School districts and approved cooperatives responsibility to ensure the availability of FAPE includes ensuring the availability of FAPE for resident children in detention facilities, correctional facilities, jails and prisons.

Title 92, NEB. ADMIN. CODE § 51-004.01 (2022).

As the Nebraska Department of Education has stated:

The procedural requirements of the IDEA impose a framework designed to guide schools and parents through a complex process, one necessarily tailored to each individual child and intended to ensure that each student has "an educational program reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances." *M.N. v. Jefferson County Bd of Educ.*, 12 F.4th 1355, U.S. Ct of Appeals (11th Cir. 2021), citing *Endrew F.*, 137 S.Ct. at 1001. There is no equivalency between procedural violation and substantive harm in the IDEA. Instead, the question turns on whether the child's education would have been substantially different but for the procedural violation. In other words, a procedural problem will not always result in a violation of

the substantive guarantee. *M.N. v. Jefferson County Bd of Educ.*, 12 F.4th 1355, U.S. Ct of Appeals (11th Cir. 2021).

Nebraska Department of Education Investigative Report 22.23.01, 57 (August 2, 2022).

The Petitioner claims [redacted] was denied a free appropriate public education when [redacted] was denied special education transportation as a related service. The District has not committed any procedural or substantive violations related to [redacted] education. [redacted] was not denied any meaningful educational benefit.

As the party challenging the IEP, Petitioner bears the burden of proof to demonstrate [redacted] IEP was inappropriate. *Schaffer v. Weast*, 546 W.S. 49, 51 (2005). Here, [redacted] had regular attendance during both the 2021-2022 school year and the 2022-2023 school year. [redacted] is a straight A student. Accordingly, Petitioner did not meet [redacted] burden to show [redacted] was denied a FAPE.

**IT IS THEREFORE ORDERED AS FOLLOWS:**

1. Petitioner failed to meet [redacted] burden of proving Respondent violated IDEA and Nebraska Administrative Code.
2. Petitioner failed to meet [redacted] burden of proof establishing [redacted] is eligible for special education transportation as a related service.
3. Petitioner is not entitled to reimbursement for transportation expenses.
4. Petitioner failed to meet [redacted] burden the “Transportation Eligibility Considerations” flowchart violates IDEA and/or Rule 51.
5. The Petitioner’s Special Education Amended Petition is dismissed as it relates to Chapter 55 of Title 92 of the Nebraska Administrative Code, the Nebraska Special Education Act, Neb. Rev. Stat. § 79-1110 et seq., and The Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 et seq.
  3. Subject matter jurisdiction is lacking to address Petitioners claims pursuant to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. Said claims are dismissed without prejudice. Petitioners have exhausted their administrative remedies for these claims.
  4. Parties shall pay their owns costs associated with this action.

Dated: August 2, 2023.

By: /s/ Mona L. Burton  
**Mona L. Burton, #21696**  
**Hearing Officer**  
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#### CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the above and foregoing was duly served on the 2<sup>nd</sup> day of August, 2023, as follows:

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