

**62 Ed Dept, Decision No. 18222 (NYCOMMED), 2023 WL 397715**

New York State Education Department

Decisions of the Commissioner

Appeal of T.C., on behalf of his child, from action of the Board of Education  
of the Lynbrook Union Free School District regarding transportation.

Decision No. 18,222

Decided: January 10, 2023

\*1 Frazer & Feldman, LLP, attorneys for respondent, Laura A. Ferrugiari, Esq., of counsel

ROSA., Commissioner

Petitioner, on behalf of his child (the “student”), appeals the decision of the Board of Education of the Lynbrook Union Free School District (“respondent” or “board”) to deny late bus transportation<sup>1</sup> to nonpublic school students. The appeal must be dismissed.

Petitioner is a district resident; the student attends a nonpublic school outside respondent's district. Respondent does not provide late bus transportation to any students, regardless of whether they attend public or nonpublic schools.<sup>2</sup>

During the public comment portion of respondent's February 9, 2022 meeting, petitioner asked the board to consider including the cost of nonpublic school late busing in its 2022-2023 budget proposal. The board did not discuss petitioner's request thereafter.

At respondent's February 16, 2022 budget workshop, the board briefly discussed whether afterschool transportation should be included in respondent's draft budget proposal. Two board members expressed their opinion that if late busing were offered, it should be offered to all district students. According to an affidavit from respondent's assistant superintendent for personnel, transportation, and student support services, “all Board members were in agreement that they did not want to consider modifying current District policy and/or the District's draft proposed budget to include the cost of late bus transportation.”<sup>3</sup>

By email dated February 17, 2022, respondent informed petitioner that the board “decided not to offer late busing for private schools due to the cost.” On March 2, 2022, the assistant superintendent emailed petitioner the “anticipated costs” of providing afterschool busing for the 2022-2023 school year. According to her calculations, the total cost to provide late busing would be \$1,034,535.60, consisting of the cost of transporting all district students (\$864,788.40) plus the cost of hiring additional staff (\$169,747.20). The assistant superintendent further calculated that, of the \$864,788.40 needed to transport all students, \$379,663.20 would be needed to pay for late busing for nonpublic school students. This appeal ensued.

Petitioner argues that respondent should have voted on the late busing issue. He further argues that respondent's decision was based on a faulty cost analysis and, therefore, arbitrary and capricious. For relief, petitioner requests that I remand the matter to respondent for “an appropriate vote [,]” “disposition,” and “discussion.”

Respondent argues that it was not required to vote on the matter. Respondent further asserts that the issue of late busing was within its discretion and based upon a proper analysis of the costs.

\*2 Initially, I must address two procedural matters. First, respondent objects to the scope of petitioner's reply. The purpose of a reply is to respond to new material or affirmative defenses set forth in an answer (8 NYCRR 275.3, 275.14). A reply is not meant to buttress allegations in the petition or belatedly add assertions that should have been raised in the petition (*Appeal of*

*Nappi*, 57 Ed Dept Rep, Decision No. 17,300; *Appeal of Caswell*, 48 *id.* 472, Decision No. 15,920; *Appeal of Hinson*, 48 *id.* 437, Decision No. 15,908). Therefore, while I have reviewed the reply, I have not considered those portions containing new allegations or exhibits that are not responsive to new material or affirmative defenses set forth in the answer.

Next, petitioner purports to bring his appeal on behalf of a class. An appeal may only be maintained on behalf of a class where: (1) the class is so numerous that joinder of all members would be impracticable and (2) all questions of fact and law are common to all members of the class (8 NYCRR 275.2; *Appeal of Radford, et al.*, 57 Ed Dept Rep, Decision No. 17,284; *Appeal of Pollicino, et al.*, 48 *id.* 279, Decision No. 15,858). A petitioner must set forth the number of individuals he or she seeks to represent and show that all questions of fact and law are common to all members of the class (*Appeal of Radford, et al.*, 57 Ed Dept Rep, Decision No. 17,284; *Appeal of Pollicino, et al.*, 48 *id.* 279, Decision No. 15,858). Petitioner has failed to set forth the number of district residents in the class he purports to represent and has not established that all questions of fact and law are common to the class. Therefore, class status is denied.

Turning to the merits, “school districts are not legally required to provide a late bus for any pupil” (*Matter of Cronin*, 15 Ed Dept Rep 114, Decision No. 9,101). Should they elect to do so for public school students, however, they must offer transportation to nonpublic school students “in like circumstances” (*id.*; see generally *Appeal of Treacy*, 61 Ed Dept Rep, Decision No. 18,038). This amounts to a nondiscrimination principle that requires districts to “treat all similarly situated individuals alike” (*Appeal of Treacy*, 61 Ed Dept Rep, Decision No. 18,038 [quoting *Vassallo v. Lando*, 591 F Supp 2d 172, 183 [ED NY 2008]]).

In an appeal to the Commissioner, a petitioner has the burden of demonstrating a clear legal right to the relief requested and establishing the facts upon which he or she seeks relief (8 NYCRR 275.10; *Appeal of P.C. and K.C.*, 57 Ed Dept Rep, Decision No. 17,337; *Appeal of Aversa*, 48 *id.* 523, Decision No. 15,936; *Appeal of Hansen*, 48 *id.* 354, Decision No. 15,884).

Petitioner has not met his burden of proving a legal right to his requested relief. As stated above, school districts are not legally obligated to provide late busing. Petitioner concedes as much in his reply, admitting “that the decision to offer late bus transportation is within the discretion of the board.” He nevertheless contends that he has a right to “challenge the method [by] which the Board made th[e] purported ‘decision’” as well as the “metrics and data” upon which it relied. Petitioner, however, has no right to compel the board to discuss or vote upon a discretionary topic (see generally *Appeal of V.B.*, 62 Ed Dept Rep, Decision No. 18,214).

\*3 Petitioner has also failed to demonstrate that respondent does not apply its policy in an evenhanded manner. The only “late busing” the district provides to public school students is a “shuttle service” for student athletes who are required to “travel from one in-district school to another ... for practice.” Petitioner does not identify the purpose for which he seeks transportation, let alone allege that this purpose is comparable to the shuttle service.

In sum, respondent acted within its discretion in choosing not to offer late bus transportation to all students, regardless of the school they attend. This is true regardless of whether the cost considered is for the transportation of all students (\$864,788.40 plus associated costs) or only for students attending nonpublic schools (\$379,663.20 plus associated costs).<sup>4</sup>

In light of this disposition, I need not address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

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## Footnotes

- 1 Late bus transportation, or “late busing,” is transportation provided to students after the end of regular classes, which enables them to participate in additional school-sponsored activities.
- 2 In an affidavit, respondent's assistant superintendent explains that the district provides transportation from one district school to another for athletic purposes.
- 3 I have reviewed a videotape recording of this portion of the meeting, which supports the assistant superintendent's description of this interaction.
- 4 Petitioner argues that the proper metric to consider is the cost of nonpublic school late transportation because district students who attend district schools, special education programs, and BOCES programs “do not have a need for late busing.” As indicated above, if provided, late busing must be offered to public and nonpublic school pupils alike. Respondent, therefore, reasonably included the potential costs associated with providing late busing to all students.

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