GOETZ FITZPATRICK LLP
Attorneys at Law
www.goetzfitz.com
One Penn Plaza, New York, NY 10119 | (T) 212-695-8100 | (F) 212-629-4013

Ronald D. Coleman
Partner
rcoleman@goetzfitz.com

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**BY FACSIMILE AND REGULAR MAIL**

Mary L. Gammon
Appeals Coordinator
State Education Department
Office of Counsel
Room 148 EB
Albany, New York 12234

**Re: Donn v. DOE, NYC**
**Appeal No. 18921**

Dear Ms. Gammon:

We represent the petitioner in the referenced matter. Enclosed please find Petitioner's reply submission, submitted on this date per the stipulation of the parties as the undersigned advised the Office of Counsel via correspondence dated April 14, 2009.

Very truly yours,

Ronald D. Coleman

enc.
cc: Steven D. Webber, Esq.

**STATE OF NEW YORK**
**STATE EDUCATION DEPARTMENT**

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In the Matter of LEAH DONN, on behalf of AVROHOM DONN, from action of the Board of Education of the New York City School District regarding the denial of statutorily required bus service

**VERIFIED REPLY**

**Appeal No. 18,921**

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## I. PETITIONER'S REQUEST FOR TRANSPORTATION IS REASONABLE REGARDING BOTH SCHEDULING AND FINANCES

1. As set out below, petitioner's son is a student "in like circumstances" of other students who are provided transportation by the New York City School District ("District"). For this reason, the District must offer transportation to him equivalent to that provided to students in District schools pursuant to N.Y. Education Law, §3635(1)(c). Furthermore, providing this student with transportation would not place any unreasonable burden, either financial or administrative, on Respondent.

2. It is undisputed that District buses continue to pick up students until 4:30 p.m. Verified Petition at ¶ 7; Verified Answer at ¶ 29. Petitioner's son is dismissed from school at 5:00 p.m. Verified Petition at ¶ 6.

3. As stated above, Education Law §3635(1)(c) requires a city school district that provides transportation to offer it "equally to all such children in like circumstances." If the Legislature had chosen to require the provision of transportation only to students in "identical circumstances," it would have drafted the statute to use those words. It did not.

4. In fact, the petitioner here is in "like circumstances" because he is dismissed approximately 30 minutes later than District students, which, in applying this statute, the

Commissioner has found to constitute "like circumstances." The Commissioner so ruled in *Appeal of Frasier*, 35 Ed. Dept. Rep. 499, Decision No. 13,612, where a student who was dismissed from a nonpublic school over 30 minutes after the local public schools' dismissal was deemed to be "in like circumstances" of public school students. The fact that the nonpublic school's dismissal time was 30 minutes after the last public school's dismissal time was found to be a "reasonable" departure from the public school schedule. Such an incremental difference was, the Commissioner held, not a substantial a variation from the public school dismissal schedule, and therefore the public school students were "in like circumstances" for purposes of the statute.

5. The facts in the instant case are identical to those of *Frasier*. The difference between the 4:30 p.m. dismissal time of public and other schools and the 5:00 p.m. dismissal time of the Mirrer Yeshiva Ketana, Petitioner's son's school, is a mere half hour. Under the rule of *Frasier*, therefore, Petitioner's son is therefore "in like circumstances" with the children who are currently offered transportation by the District, and is therefore entitled to transportation at the District's expense.

6. Respondent, attempting to distinguish *Frasier*, ignores its central holding: A half-hour gap between public school dismissal and non-public school dismissal does not eviscerate Education Law §3635(1)(c) for failing the law's "like circumstances" standard but, to the contrary, meets it. Ultimately, in *Frasier*, the district was required to change from using "drop-off points" to providing school-to-home transportation in order to meet its statutory obligations. The details of these changes, however, are irrelevant to the legal rule enunciated in the decision., A school district is required to offer transportation to all children in "like circumstances," which

are met when dismissal from non-public school is half an hour later than dismissal from public school, **as a matter of law**.

7. Respondent cites *Appeal of Salvia*, Decision No. 13,750, and *Appeal of Reilly*, Decision No. 15,479, where the Commissioner denied petitioners' requests for transportation, but in each of those cases the times requested for drop-off or pick-up were **at least a full hour** before or after the petitioners' **own** actual school hours. In *Salvia*, the nonpublic school's academic school day ended at 4:00 p.m. The issue was whether the district was required to provide transportation home after the student's participation in athletic activities ended at 5:30 p.m. In *Reilly*, the student sought transportation to an early-morning, pre-opening math class that the Commissioner found could have been offered during the school day. These facts have nothing to do with the facts set forth in this Petition.

8. Here, in contrast, Petitioner requests that her son be picked up from school at the exact end of his school day, an eminently reasonable request compared to those made in *Salvia* and *Reilly*. Petitioner's school, the Mirrer Yeshiva Ketana, must keep its students in school for core curriculum academic instruction until 5:00 p.m in order to provide its students with the religious education offered while insuring that students meet the compulsory education requirements of New York Education Law. *See* Verified Affidavit of Maita Rosenbloom, attached. Cases dealing with after school sports, individual instruction and the like are thus irrelevant to this analysis.

9. In fact, if the Commissioner were to hold otherwise and analogize sports or special classes as in *Salvia* and *Reilly*, to school-wide curricula as regards the Mirrer Yeshiva Ketana, as Respondents urge here, "like circumstances" would never be found to exist and the Legislature's intent in passing Education Law §3635(1)(c) would be completely blunted. This is

because respondents would always be able to distinguish between the curriculum offered at the public school and that offered by the non-public school, and invite the Commissioner to second-guess the manner in which the latter's educational day should be structured. Clearly what amounts to a content-based test for comparison of public and non-public schools as respective wholes was as far from the intent of the Legislature as can be contemplated, which Respondent acknowledges in its citation to *Matter of Berger*, Decision No. 11,028.

10. Respondent also alleges that providing Petitioner's son with bus service would place an "unreasonable" financial burden upon the District, based on a sketch (unsubstantiated) positing an elaborate scenario of special arrangements. A board of education cannot use economic considerations to evade a statutory mandate. *Frasier*, citing *Matter of Littenstein, et. al*, 23 Ed. Dept. Rep. 256. "Although considerations of economy cannot be ignored . . . a board of education may not be influenced by economic considerations to the point of failing to provide transportation which is reasonable," *id*., which as a matter of law it is here.

11. Respondent also insists that, to paraphrase, "If we do it for this Respondent, we will have to do it for hundreds of other schools that dismiss their students after 5 p.m." But it can never be the case that the imposition of a cost, even when that cost would aggregate into a large outlay for a large municipality, is per se an "unreasonable" financial burden. Such a standard too would eviscerate Education Law §3635(1)(c): New but small incremental outlays are "burdensome" for small districts; medium outlays for medium-sized ones; and so on. The individual's right to a statutory benefit cannot be premised on second-guessing the Legislature's judgment in extending rights to a category of eligible beneficiaries. "Therefore, the real issue is not whether a burden or restriction is unreasonable as applied to any particular class of persons; the burden or restriction must be examined in the context of its application to a particular

person." Smith v. Department of Health and Rehabilitative Services, 573 So.2d 320, 326 (Fla. 1991) (McDonald, J., *concurring in part and dissenting in part*).

12. Although appeals to posited claims by third persons are, as set forth above, irrelevant in determining an **individual**'s entitlement to a statutory benefit, it should be noted that Respondent does not wish to allow her entitlement to this relief to be prejudiced by the issue of class certification *vel non*. Petitioner has no intention of seeking a class appeal for other similarly situated parents and hereby waives any right or entitlement to do the same. This Petition is limited to the circumstances of **this case only**, namely where Petitioner's dismissal is 30 minutes after that of the public schools, an increment already determined to be "like circumstances" as defined in Education Law §3635(1)(c) as a matter of law.

13. Moreover, although Respondent plays out some possibilities of what the District might be required to do should the Commissioner grant Petitioner's request, it fails to consider the third alternative in Petitioner's request for relief: that the District merely reimburse the Donns for the costs of transporting her son home. This option would cost the District far less than the many thousands of dollars cited by Respondent. Such an outcome would render Respondent's concerns about the supposed costs of creating a new bus route and delaying existing bus schedules irrelevant.

14. Indeed, Petitioner under this option would seek as reimbursement solely the actual current cost to the District of providing busing home for one public school student, and thus the only cost to the District here would be solely what it would cost the District to transport Petitioner's son home now if he left school at 4:30 p.m. This remedy fits squarely within the precedent of *Frasier*, in which the Commissioner ordered an arrangement that would "allow the

district to provide transportation at the lowest cost consistent with its obligation to provide transportation." *Id.*

15. Consequently, Petitioner's request for relief, at least for reimbursement of what it would otherwise cost the District to transporting her son home from school, should be granted.

WHEREFORE, Petitioner respectfully requests that her Petition be granted.

Ronald D. Coleman

Goetz Fitzpatrick LLP
One Penn Plaza – Suite 4401
New York, NY 10119
212-695-8100
Attorneys for Petitioner Leah Donn

*Assisting with the Brief:*
Evan S. Kusnitz, Law Student
Hofstra University School of Law

Dated: New York, New York
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