

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

# Pennsylvania Special Education Hearing Officer

## DECISION

Child's Name: B. L.

Date of Birth: [redacted]

Dates of Hearing: 1/8/2016

## CLOSED HEARING

ODR File No. 17067-15-16

Parties to the Hearing:

Representative:

Parents

Parent[s]

Parent Attorney

Pro Se

Local Education Agency

Owen J. Roberts School District

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215-345-9111

Date of Hearing

January 8, 2016

Date Record Closed:

February 8, 2016

Date of Decision:

February 23, 2016

Hearing Officer:

Charles W. Jelley Esq. LL.M.

## **I. Background and Procedural History**

The procedural history prior to and in the days after the hearing, is very lengthy and detailed encompassing more than 100 emails since November 24, 2015. Therefore, to ensure the prehearing and post hearing record is fully described the Hearing Officer will set forth the procedural history in detail. The Parties agree, but for the dispute over the bus aide, the Student's<sup>1</sup> Individual Education Program (IEP) and Notice of Recommended Educational Placement/Prior Written Notice (NOREP/PWN) educating the Student, at the private day school, is otherwise appropriate.<sup>2</sup>

### **A. The Parents learn the bus aide was removed**

The Parents contend on July 15, 2015, when the Father met the Student's Extended School Year (ESY) summer school bus, he learned the District had discontinued the bus aide. Since 2012, the bus aide rode the Mini-Bus, the Student and two peers, take to, and from the agreed upon District funded private school placement. The Parents contend the District failed to provide Prior Written Notice (PWN) before the bus aide was removed from the bus (P###11-12).<sup>3</sup> They further allege this procedural failure, violated their due process rights; and, essentially changed the Student's then pendant program (P###11-12). They contend the decision to remove the bus aide was made by an individual, rather than the Student's IEP team (P###11-12). To remedy the alleged violation the Parents seek the immediate return of the bus aide, and request an IEP team meeting to discuss safety concerns and the role of the bus aide (P###11-12).

The District, on the other hand contends, since 2012, when the Student first enrolled, as a transfer student, with an IEP from [a neighboring state], the Student's Pennsylvania IEPs, do not include a bus aide as a necessary service, or identify the need for adult supervision during transportation (S#6, pp.21-22). Therefore, they contend the District was not required to provide PWN. In the alternative, they contend the aide is not necessary (S#9).

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<sup>1</sup> This decision is written without further reference to the Student's name or gender, and as far as is possible, other singular characteristics have been removed to provide privacy.

<sup>2</sup> The testimony of every witness, and the content of each exhibit, was reviewed and considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. The parties' written closing arguments were likewise carefully considered.

<sup>3</sup> The following abbreviations will be used to reference Exhibits and Testimony "S#, p." for District Exhibits, "P# p." for Parent Exhibits, NT for Notes of Transcript and HO# for Hearing Officer Exhibits.

## **B. The Due Process Complaint**

On November 23, 2015, the Parents filed an Individuals with Disabilities Education Act (IDEA ) due process Complaint seeking reinstatement of the bus aide, provided on the Student's related service of transportation to and from, the agreed upon private school (P##11-12). On November 25, 2015, the Parents filed an Amended Complaint, modifying the statement in Paragraph 13 of the Complaint describing the Student's transportation (P#12).

On November 25, 2015, the District agreed not to oppose the Parents' Amendment to the Complaint or seek an extension of the Resolution Session time line (P#12). On December 3, 2015, the District filed its Answer to the Complaint. In the Answer, to the Complaint, the District agreed to place a bus aide on the Student's daily transportation to and from the private school placement (S#8). The Answer also stated the District would confirm the Resolution in a separate letter to the Parents (S#8). On December 4, 2015, the Family disagreed with the District's December 3, 2015, offer to reinstate the bus aide, contending the District's letter did not comply with the binding agreement Resolution Session requirements found at 34 CFR §300.510(d) (P## 19-20).

On or about December 7, 2015, the District provided the Parents with a Notice of Recommended Educational Placement (NOREP/PWN), returning the aide to the bus (S#9). The NOREP provides in pertinent part at #3 states: "This agreement was as a result of a resolution meeting pursuant to 34 CFR 300.510 in order to avoid litigation and is not a determination that an Aide is necessary for the Student" (S#9, p.1).

In the box describing the "Options Considered," the NOREP states, "Not providing an aide on the bus [the Student]<sup>4</sup> rides" then in the adjacent box the document provides "Reasons for Rejection" the District wrote "In order to avoid litigation the LEA agrees to put an Aide on the bus that [the Student] rides"(S#9, p.2). The Parent agreed to the proposed NOREP/PWN action, of returning the aide to the bus. However, in a note, at the end of the NOREP/PWN the Parents wrote, "Parents agree to the action to put Aide on bus, but disagree with the words 'is not a determination that an Aide is necessary for [the Student]'" (S#9, p.3). On December 7, 2015, the District placed the aide on the bus (S#8).

On December 7, 2015, the Hearing Officer requested the Parties provide dates for prehearing telephone conference call (P#20). In the same email, the Hearing Officer provided the Parties with a copy of the Resolution Session regulations found at 34 CFR §300.510 (P#13). On December 8, 2015, the District filed the Resolution

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<sup>4</sup> Redacted for privacy purposes.

Session Data Sheet indicating the Parties reached a Preliminary Agreement. From December 8, 2015, through December 15, 2015, the Parties actively discussed Resolution (P## 16-17).

On December 16, 2015, the Parties participated in a 45-minute joint prehearing conference call with the Hearing Officer. The Parents expressed concern absent a binding Resolution Agreement the District could remove the bus aide in the future (P#20). During the call, the Parents also presented their concerns about the bus aide NOREP/PWN language and pressed the need for a bus aide.

During the conference call, the District contended if they were required to go to a hearing, despite the agreed upon action in the NOREP/PWN returning the bus aide, they would instead reverse positions and oppose the placement of the aide on the bus.

First, they argue they did not have to provide the Parents with PWN, as the bus aide was not listed as a service within the four corners of the Student's IEP. Next, seeking to reverse the NOREP/PWN placing the aide on the bus, they contended, consistent with the limiting language in the IEP and the NOREP/PWN the District would present evidence the Student does not require a bus aide (S#6 p.22). The Parents objected to the District's arguments opposing the aide, as the defense was not raised in the District's Answer, to the Parents' Complaint or the Amended Complaint (P#20).

During the conference call, the Parent and the District agreed the scope of the claim was limited to the time from July 2015 to December 7, 2015, when the District returned the aide to the bus (P#20, p.3). On December 16, 2015, at the conclusion of the conference call the Hearing Officer emailed the Parties copies of the Office for Dispute Resolution (ODR) Generally Applicable Prehearing Directions, and a copy of the Hearing Officer's Due Process Hearing Preparation guidelines, noting other free additional hearing resources at the ODR web site (P#20, pp.3-4).

After receiving emails from the Parties, on December 23, 2015, and again on December 24, 2015, the Hearing Officer directed the Parties to submit written prehearing statements and written offers of proof as to the witnesses' testimony, five days before the January 8, 2016, due process hearing. On January 6, 2016, the District submitted a four-page Brief and offer of proof listing nine witnesses. Similarly, on January 6, 2016, the Parents submitted a five-page statement.

### **C. The Due Process Hearing**

On January 8, 2016, a one session Due Process Hearing took place, the Hearing was orderly and civil in nature. The District called six witnesses and submitted 12 Exhibits without objection. One Parent testified and submitted 21 exhibits without objection. At the close of the hearing, the Hearing Officer, asked the District to explain its

contradictory positions between the NOREP/PWN, returning the aide and its current position to remove the aide. Similarly, the Parents were directed to explain how an email from a former District administrator, at P#2 discussing aides on District buses, factored into the Parents' decision-making in accepting the 2012 Pennsylvania IEP without a bus aide (P#2, NT pp.82-84).

At the conclusion of the January 8, 2016, Hearing the District made an on the record motion to extend the Decision Due Date (NT p.132-133). On January 8, 2016, the Parents, in an email, agreed to the extension of the Decision Due Date. On the record at the Hearing, the Parties were directed to file written closing statement, by February 8, 2016, with a final decision to follow by February 23, 2016.

#### **D. The Post Hearing Motions and Communications**

On January 9, 2016, the Parents, in a letter attached to an email, raised their original concerns about the Hearing Officer's jurisdiction, to decide the District's NOREP/PWN arguments about the aide. On Saturday, January 23, 2016, the Parent sent an email raising a second concern that Parents' Exhibit P#1, a one-page document describing [the previous state of residence's] IEP's bus attendant requirement, was not included, in the Index of Exhibits. On Sunday, January 24, 2016, the Hearing Officer responded to the email stating that the Hearing Officer would review the transcript. On January 26, 2016, after reviewing the transcript the Hearing Officer emailed both Parties noting the transcript on page 4 and again on pages 97 and 98 referred to Parent P#1. The Hearing Officer directed the Parents to make, any and all, arguments including Exhibit P#1. The District did not object to the inclusion of Exhibit P#1 as part of the record. Accordingly, P#1 is part of the record.

On January 27, 2016, the Parents emailed Hearing Officer, about the need to reopen the record. Parents contend the District witnesses' testimony about the bus ride conflicts with District Exhibit S#11, a video of the Student without an aide, on the bus, on October 21, 2015. The video depicts the Student suddenly standing in the bus aisle and then lunging forward; as the bus approached, the mutually agreed upon Parent pick up point. In the same email, the Parent alleged District Exhibit #5, an October 21, 2015 email, from the School Bus Supervisor to other staff members describing the events of October 21, 2015, and the contents of a second email on the same page may be a "forged email."

During the Hearing, the Hearing Officer requested the District review the communication file to determine if the top portion of the second email in S#5 could be produced as the best evidence. The top portion of S#5 was cut off obscuring the identity of the sending and receiving party (NT p.75). The Parent argued the concern about Exhibit S#5 as an alternative basis to reopen the record. The Parents stated they wanted to call five witnesses, several of whom had previously testified, at the

January 8, 2016, hearing, about the contents of S#5, the email and S#11 the video. Both exhibits were disclosed 5-days before the hearing (NT pp8-9).

On January 27, 2016, the District, without waving attorney client privilege, produced the complete version of the second email at S#5. The missing heading in S#5, revealed an email exchange, between the District Supervisor of Special Education and District Counsel about the October 21, 2015, bus trip. The District opposed the Parent's request to reopen the record, arguing that S#5 was not forged document. As for S#11 the video and S#5, the email, the District argues each exhibit was disclosed to the Parents 5-days before the hearing. The District further argues the Parents could have asked questions about each exhibit, at the hearing. Finally, the District contends the Parents have waived these arguments.

Later in the day on January 27, 2016, the Parents repeated the request to reopen the hearing and for the first time raised concerns that Exhibit S#11, the Student transportation video, in record may not be a true copy of the video event on October 21, 2015. On January 28, 2016, after reviewing the ten emails about the request to reopen the record, the Hearing Officer denied the Parents' request to reopen the record. The Parents had access to the S#11, the video, and S#5, the email, five days before the hearing. The Parent had an opportunity prior to and at hearing to prepare and organize cross-examination for whatever reason they chose not to, therefore, the request to reopen the record was denied.

On January 29, 2016, the Parent responded to the Ruling repeating earlier contentions about the Hearing Officer's lack of jurisdiction to hear the District's arguments on the need for the bus aide, this time however, they alleged the Hearing Officer favored the "bigger" side.<sup>5</sup> The Parents did not request that the Hearing Officer be recused.

On February 8, 2016, the Parties filed their closing statements; the Parents filed a 47 page closing, the District filed a seven page closing, the Pleadings are now closed the matter is ripe for decision.

For the reasons set forth below, I find that the District did not violate the PWN requirements when they removed the bus aide. The requirement for a bus aide does not appear within the four corners of any of the Student's IEPs since enrollment in the 2012-2013 school year in Pennsylvania. Therefore, the removal of the aide from the bus was not a change to an IEP component or service subject to the PWN requirements. I also find that once the Parties approved the return of the bus aide in the December 7, 2015, NOREP/PWN the bus aide became an IEP service. At the

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<sup>5</sup> A copy the Emails from the Parties on the request to reopen the record are marked as Hearing Officer Exhibit#1.

time of the hearing, the District did not present sufficient evidence to remove the bus aide promised in the NOREP/PWN. First, the District did not hold an IEP meeting to discuss the bus aide. Second, the District did not provide the Parent with the PWN describing the basis for the District's proposed action, at the hearing, to remove the agreed upon NOREP/PWN bus aide. Accordingly, within 20 days of the entry of the attached Order, the District must hold an IEP meeting, at which time, the Parties will discuss the Student's transportation needs and the bus aide.

### **E. Statement of the Issues**

The first issue is whether the District violated the IDEA PWN provisions when the bus aide was discontinued.

The second issue is whether the student was denied a Free Appropriate Public Education (FAPE) from July of 2015 to December of 2015 when the aide did not ride the bus.

The third issue is whether the District should have convened an IEP meeting to discuss the bus aide.

## **II. Findings of Fact**

1. In 2012, the Student moved to the District from [a neighboring state]. While residing in [the neighboring state], the student had an IEP (P#1, NT pp.97-98).
2. The [neighboring state] IEP stated "Student needs special transportation accommodation/services as follows: Adult supervision – bus with an Attendant, Type of Transportation – Door to Door Transportation, Vehicle and/or equipment needs – Mini Bus" (P#1, NT 97-98).
3. On August 15, 2012, the District issued a NOREP/PWN offering to place the Student in a Full time Life Skills Support classroom at an Approved Private School on a Day Basis (Special School) (S#1, p.2).
4. The 2012 NOREP also provides "The components of the student's out-of-state IEP will be evaluated and implement (pending completion of an initial evaluation for Pennsylvania), within the context of [redacted] Special School classes. Classroom teacher or aide support will be provided on an as needed basis within the classroom. Services will be provided within the normal school day of [redacted] Special School. The degree and frequency of related services also will be assessed" (S#1, p.2). On August 15, 2012, the Parents approved the NOREP (S#1). The NOREP did not mention a bus aide.
5. On August 24, 2012, the then Supervisor of Special Education, sent an email to the Parents. The email states "Dear Parent, Thank you for taking the time to

speak with [the transportation director]<sup>6</sup> and myself today in order to clarify transportation pick-up for the Student as [Student] start school at [redacted] this year. As we agreed, and until [Student's] IEP from [the neighboring state] is rewritten, door-to-door transportation will mean pick-up and drop-off at the intersection of [redacted] Road and [redacted] Road. Aides are provided on buses for students with disabilities. Thank you again for your willingness and that of your husband to work with us to find a viable solution. I look forward to meeting with you at [redacted] after the school year begins" (P#2, NT pp.97-99).

6. The current Supervisor of Special education testified he learned of the former Supervisor's email from review of the Parent's 5-day Disclosure of exhibits (NT p.79). The Supervisor also testified, "Having seen what [the past Supervisor of Special Education] wrote in there, I would have called an IEP meeting to address this" (NT p.75). The District did not schedule an IEP meeting to discuss the bus aide.
7. On November 30, 2012, the Parties met and developed a Pennsylvania IEP placing the Student at the private school. The District's 2012 IEP changed "door to door" transportation to "curb to curb." The 2012 did not include "Adult-Supervision-Bus with Attendant" (S#2, p.31, NT p.71-73).
8. On November 30, 2012, the District issued and the Parents approved a NOREP placing the Student in a Full-time Life Skills Support in an Approved Private School (S#2, p.40, NT pp.70-73). The NOREP did not mention the bus aide.
9. On March 12, 2015, and on June 20, 2015 the Parties met and agreed to an IEP continuing the placement at the private school maintaining the "Curb to Curb" transportation, with "Daily drop off and pick up to be provided by the school district" (S#6, p.51). The IEPs did not mention a bus aide.
10. On June 3, 2015, the District issued a NOREP and the Parents consented to the Student's continued placement at the private school. The Parent did however note concerns with Physical Therapy (PT) services, the Student's primary and secondary disabilities, and the Student's summer educational program (S#3, p.3, NT pp.106-108). The NOREP/PWN did not mention the bus aide.
11. On July 15, 2015, when the Father met the Student's Extended School Year (ESY) summer school bus, he learned then for the first time the District had discontinued the bus aide (S#4, NT pp. 101, NT 73-74).
12. Upon learning the aide was removed from the bus, the Parent contacted the District's Special Education Supervisor requesting an IEP conference (NT 101-102). The Supervisor informed the Parent the Student's IEP did not include a

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<sup>6</sup> Redacted for privacy purposes.



bus aide as a necessary service (P#6, NT 101-102). In a subsequent email, the Supervisor informed the Parent that after speaking with the former bus aide, the Student does not require an aide (P#6). An IEP meeting was not scheduled.

13. On October 11, 2015, the Parent sent an email to the Special Education Supervisor inquiring about the bus aide; the Parent testified that he never received a reply to the inquiry (P#8, NT p.103).
14. The Supervisor of Special Education and the Transportation Director made the decision to discontinue the bus aide after reviewing the IEPs for all of the children on the Student's bus (NT pp.80-81). The Supervisor testified the bus aide was not listed in the Student's IEP, therefore, the District did not notify the Parent the aide was removed (NT pp.81-82).
15. The Supervisor testified the aide rode the Student's bus because [the aide] was a required service in another child's IEP, who rode the bus after the Student was dropped off at the private school (NT pp.81-82). When the child on the second bus run no longer needed the aide, the District removed the aide from the Student's bus (NT p.82).
16. On October 21, 2015, the Student boarded the bus and appeared agitated. On the ride home, another student hit the Student two to three times (NT p.36). On the same day, when the bus was approaching the Father, at the drop off point, the Student unbuckled [Student's] seat belt stood up in the aisle. When the bus stopped, the student lunged forward, causing the bus driver to throw out her arm to catch the Student (S#5 p.1, NT pp.37-40). When the Student exited the bus, the driver briefly talked to the father about the hitting and stopping incident (NT pp.39-44). The driver then called the dispatcher and reported catching the student when stopping the bus and the other student's misconduct (NT p.39-44).
17. The Student's bus is equipped with video surveillance (NT pp.35-36; NT pp.52-53, NT pp.65-66).
18. The District authenticated the video and established the chain of custody describing how they retrieved the video data from the bus camera, uploaded it to a secure server and reproduced the contents of the video for the hearing (NT pp.53-56).
19. On October 21, 2015, the bus driver reported both incidents on the bus to her supervisor (S#5, NT pp.35-38).
20. The bus video was disclosed to the Parents 5-days before the hearing and available to the Parents for cross-examination of all District witnesses (NT pp.35-36; NT pp.52-53, NT pp.65-66).

21. The two bus drivers and the bus aide testified that the Student did not display inappropriate behaviors on the bus ride (NT pp.27-28, NT p.33, NT p.38, NT p.46).
22. The Student's October 2015 Occupational Therapy Report, Physical Therapy Report, and the Student's November 21, 2015, IEP state the Student needs constant supervision and support to complete self-help skills (P#8, NT p.104, S#6, pp.17-23).
23. On November 11, 2015, the Parent attended an IEP Team meeting to discuss the Student's recent Physical Therapy and Occupational Therapy Report about [Student's] self-help skills (P#9). At the IEP meeting the Parent asked the District Special Education Supervisor about the bus aide and the October 21, 2015, bus incident (P#10, NT p.105-108). The District Supervisor advised the Parent that the Student did not display any behavior to warrant an aide (NT pp.106-107).
24. On November 18, 2015, the Director of Educational Programs, at the private school, sent an email to the Parent and the District Supervisor asking each to review an insert to the IEP, drafted by the Director, about the District's and the Parents positions about the bus aide (P#10). The email ended with a request "Please let me know, if this draft can be finalized. Thank You" (P#10, p.2). In response to the request, on that same day, the Parent asked the Director to delete the insert. Instead, the Parents proposed to insert a paragraph describing their safety concerns and the observation of the child on October 21, 2015 (P#10, p.1). Later that same day, the Supervisor of Special Education replied to the email stating, "In addition to Mr. [redacted]'s input please include the following on the PLEP. **There are not patterns of behavior that would warrant an aide at this time on the bus. The video from 10/21/15 (afternoon ride) was reviewed**" (bolded emphasis in the original) (P#10, p.1). The Parent's written statement and the District's statement were then inserted into the Draft IEP ((S#6, p.22). The IEP team did not meet to discuss either Parties input on the bus aide.
25. On November 20, 2015, the District issued and the Parents agreed to a NOREP continuing the Student's placement at the private school. The Parents however noted the following "Parent agrees the OT [Occupational Therapy] & PT recommendation, but reserves the right to challenge the PT recommendation when it becomes necessary. Busing is not within the scope of the Nov.11 meeting Thank you, [Parent Signature] (S#7, p.3).
26. The November 2015 IEP team did not discuss either the Parents' busing statement, or the District's busing statement or discuss any data about the Student's conduct on the bus or the role of the bus aide (S#6, S#7, P#6, NT pp.105-108, NT 122-128, NT 68-69).

27. The Parent asked the District to schedule an IEP team meeting, including the classroom teacher, the bus driver, and the former aide to discuss the role of the bus aide (NT pp.107-110).
28. On November 20, 2015, the District issued a NOREP/PWN (S#7). The NOREP/PWN does not mention the bus aide, or state a reason why the LEA proposed or refused to take action on the bus aide. The NOREP/PWN notes the IEP meeting was held to discuss the recent Physical and Occupational Therapy Reports (S#7, p.2).
29. The Parent approved the November 20, 2015, NOREP/PWN and placement at the private school (S#7, NT pp.125-127, NT 67-68).
30. On November 23, 2015, the Parents filed a due process Complaint seeking reinstatement of the bus aide and requested an IEP meeting to discuss transportation (P##11-12).
31. On November 25, 2015, the Parents filed an Amended Complaint, modifying the statement in Paragraph 13 of the Complaint describing the Student's transportation (P#12).
32. On November 25, 2015, the District agreed not to oppose the Parents' Amendment to the Complaint or seek an extension of the Resolution Session time line (P#12).
33. On December 3, 2015, the District filed its Answer to the Complaint. In the Answer, to the Complaint, the District agreed to place a bus aide on the Student's daily transportation to and from school the private school placement (S#8). The Answer also stated the District would confirm the Resolution in a separate letter to the Parents (S#8).
34. On December 4, 2015, the District sent a letter to the Parents agreeing to place an aide on the bus the Student rides to and from the approved private school (S#8, p.1, NT pp.75-76).
35. On December 4, 2015, the Family disagreed with the District's letter returning the bus aide. The Parents believed the letter did not comply with the binding agreement Resolution Session requirements found at 34 CFR §300.510(d) (P## 19-20).
36. On December 7, 2015, the District issued a NOREP/PWN placing the Student at the private school, with a bus aide (S#9, p.1, Number 2, NT pp.75-76).
37. The December 7, 2015, NOREP/PWN provides in pertinent part at #3: "This agreement was as a result of a resolution meeting pursuant to 34 CFR 300.510 in order to avoid litigation and is not a determination that an Aide is necessary for the Student" (S#9, p.1-2).
38. The Parent agreed to the proposed NOREP/PWN action, of returning the aide to the bus, however in a note explaining the approval, the Parents wrote, "Parents agree to the action to put Aide on bus, but disagree with the words 'is not a determination that an Aide is necessary for [the Student]'" (S#9, p.3).

39. On December 7, 2015, the District placed the aide on the bus (S#8).
40. On December 7, 2015, the Hearing Officer requested the Parties provide dates for prehearing telephone conference call (P#20).
41. On December 8, 2015, the District filed the Resolution Session Data Sheet indicating the Parties reached a Preliminary Agreement. From December 8, 2015, through December 15, 2015, the Parties actively discussed Resolution (P## 16-17).
42. On December 16, 2015, during the prehearing conference call the Hearing Officer ruled the District was permitted to present evidence on its December 7, 2015 NOREP/PWN and November 2015 IEP contentions that the bus aide is not necessary (S#9; S#10).
43. The Parent asked the District to enter into a binding enforceable Resolution Agreement placing the aide on the bus (NT pp.111-112, P#16).
44. At the request of the Hearing Officer, the District produced S#5, which includes the complete email chain between the bus garage, the District and the District's attorney about the report of the Student being hit by a peer and getting out of [Student's] seat when the Bus was coming to the Parent drop of point (NT pp.36-38; pp.74-78). The District produced S#5, preserving all other claims privilege.

### **III Legal Basis and Discussion**

#### **A. Burden of Proof**

The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. The burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case, the Parents asked for the hearing and thus bore the burden of proof. As the evidence was equally balanced, the *Schaffer* analysis was applied.

#### **B. Credibility**

During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion, and conclusions of law.

Hearing officers have the plenary responsibility to make “express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses” *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003).<sup>7</sup> All witnesses appeared to be testifying honestly and to the best of their recollections. There were no instances of conflicting testimony where a credibility determination was needed to establish a fact.

### **C. The Due Process Complaint**

The IDEA requires the party initiating due process to file a complaint and provide notice of this complaint to the other party and the state. The complaint must include the following: (1) the name of the child, (2) the address of the child's residence, (3) the alleged violation, and (5) the action that forms the basis of the complaint, and, (6) the name of the school the child attends. The complaint should also include a description of the nature of the problem relating to the proposed initiation or a change concerning the identification, evaluation, educational placement of the child or the provision of FAPE, including facts relating to such problem. The Complaint should also include a statement describing the proposed resolution of the problem to the extent known and available to the party at the time. 34 CFR §300.508 (b).

### **D. Amending the Complaint may affect the Due Process Timelines**

The IDEA permits a party to amend its due process compliant notice when: (1) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a resolution session; or (2) the hearing officer grants permission no later than five days before a due process hearing occurs). 34 CFR §300.508 (d)(3). The timelines for the resolution meeting (34 CFR §300.510 (a)) and the time period to resolve (34 CFR §300.510 (b)) begin again with the filing of the amended due process complaint. 34 CFR §300.508 (d)(4).

### **E. Timeline to respond to a Due Process Complaint**

Upon receiving a due process complaint, the District must send a response to the complaint within 10 days of receiving it. The response must "specifically" address issues raised in the complaint. 34 CFR §300.508 (f). When a district does not send prior written notice to the parent regarding the subject matter contained in the parent's due process complaint, the district must, within 10 days of receiving the complaint, must send its response to the parent containing all of the following

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<sup>7</sup> See also, *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014).

information:1) An explanation of why the district proposed or refused to take the action raised in the complaint.2) A description of other options the IEP team considered and the reasons why those options were rejected.3) A description of each evaluation procedure, assessment, record, or report the district used as the basis for the proposed or refused action.4) A description of the factors that are relevant to the district's proposal or refusal. 34 CFR §300.508 (e)(1)(i) through 34 CFR§300.508 (e)(1)(iv).

## **F. Resolution Meeting Timeline**

The resolution meeting allows the parent to discuss the due process complaint, and the facts that form the basis of the due process complaint and the alleged violation, with the district thereby creating an opportunity to informally resolve the dispute 34 CFR §300.510 (a)(2). The district must convene a resolution meeting within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing 34 CFR §300.510 (a)(1). The 15-day timeframe includes days when school is closed. *Dispute Resolution Procedures under Part B of the Individuals with Disabilities Educ. Act (Part B)*, 61 IDELR 232 (OSEP 2013).

When the parties are able to resolve the dispute, they must execute a legally binding agreement. The regulations in pertinent part provide the agreement must be (1) signed by both the parent and a district representative who has the authority to bind the district; and (2) is enforceable in a state court or District Court, or by the state educational agency if the state has other mechanisms or procedures that allow parties to seek enforcement of resolution agreements. 34 CFR §300.510 (d). Either party may void the agreement within three business days of the agreement's execution. 34 CFR §300.510 (e).

## **G. Free Appropriate Public Education**

The IDEA requires that a state receiving federal education funding provide a “free appropriate public education” (FAPE) to disabled children. 20 U.S.C. §1412(a)(1). FAPE is “special education and related services,” at public expense, that meet state standards, provide an appropriate education, and are delivered in accordance with an IEP. 20 USC §1401(9).

School districts must provide a FAPE by designing and administering a program of individualized instruction that is set forth in an IEP 20 USC §1414(d). The IEP must be “reasonably calculated” to enable the child to receive “meaningful educational benefits” in light of the student's “intellectual potential.” *Shore Reg'l High Sch. Bd. of Ed. v. P.S.* 381 F.3d 194, 198 (3<sup>rd</sup> Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3<sup>rd</sup> Cir. 1988)).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). In order to provide a FAPE, the child’s IEP must describe specially designed educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176, 181-82 (1982). An eligible student is denied FAPE if his or her program is not likely to produce progress, or if the program affords the child only a “trivial” or “de *minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996).

A school district is not required to provide the best possible program to a student, or to maximize the student’s potential. *Ridley Sch. Dist. v. MR*, 680 F.3d 260, 269 (3<sup>rd</sup> Cir. 2012). An IEP is not required to incorporate every program, aide, or service that parents desire for their child. *Ibid.* Rather, an IEP must provide a “basic floor of opportunity” for the child. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 532 (3d Cir. 1995).

The law requires only that the program and its execution were reasonably calculated to provide meaningful benefit. *Carlisle Area School v. Scott P.*, 62 F.3d 520 (3<sup>rd</sup> Cir. 1995) (appropriateness is to be judged prospectively, so that lack of progress does not in and of itself render an IEP inappropriate.) The appropriateness of an IEP must be determined as of the time at which it was made, and the reasonableness of the program should be judged only on the basis of the evidence, known to the school district at the time at which the offer was made. *D.S. v. Bayonne Board of Education*, 602 F.3d 553, 564-65 (3<sup>rd</sup> Cir. 2010); *D.C. v. Mount Olive Twp. Bd. Of Educ.*, 2014 U.S. Dist. LEXIS 45788 (D.N.J. 2014).

## **H. Implementing Interstate Transfer Student’s IEP**

The federal regulations implementing the IDEA identify a school district's specific obligations to a student with an existing IEP who transfers from another state. Under these regulations, the new school district must provide a FAPE, that includes “comparable services” to those described in the student's prior IEP, until the district conducts an evaluation pursuant to 34 C.F.R. §§300.304-300.306 and develops, adopts, and/or implements a new IEP if appropriate 34 C.F.R. §300.323.

The status of a transfer student’s out of state IEP was addressed by the Third Circuit in *Michael C. v. Radnor Twp. School District*, 202 F.3d 642 (3<sup>rd</sup> Cir. 2002). In the *Radnor Twp.* decision, the court held that in the case of an interstate transfer student, the new school district is not required to consider the out of state IEP as continuing in effect in the new state. *Id.* 202 F.3d at 651. In reaching that decision, the court approved the reliance of both the administrative decision- and on Office of Special Education

Programs (OSEP) Memorandums. *Id.* 202 F.3d at 649, 650. The school district may choose to provide special education services while it pursues an initial evaluation.”<sup>8</sup> *Id.*

The OSEP policy memorandums note that after enrolling a student with an IEP from another state, the transferee school district’s first step is to determine whether it will adopt the out of state evaluation and eligibility determination or conduct its own evaluation. After the evaluation, the district and the Parents must meet to develop an IEP. Once the IEP is developed, the district must provide the parents PWN. *Id.*

### **I. Prior Written Notice**

Districts must issue Prior Written Notice when a district acts to initiate or change the identification, evaluation, or educational placement of a child or the provision of FAPE to the child. 34 CFR 300.503 (a). The PWN must include the following components: (1) a description of the action proposed or refused by the district; (2) an explanation of why the district proposes or refuses to take the action; (3) a description of each evaluation procedure, assessment, record, or report the district used as a basis for the proposed or refused action; (4) if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained.

### **J. When is a Procedural Violation a denial of a FAPE**

A purely procedural violation of the IDEA can result in prospective injunctive relief to ensure future compliance with IDEA procedures, not compensatory relief, or tuition reimbursement. *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir.2010). A procedural violation may rise to a substantive violation justifying compensatory education or tuition reimbursement, but only where plaintiffs can show that procedural defects caused such substantial harm that a FAPE was denied. *Id.* at 66-67. To prove such substantive harm, Parents must prove by a preponderance of the evidence that "procedural inadequacies (i) [i]mpeded the child's right to a FAPE, (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a

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<sup>8</sup>., *See also*, Memorandum 96- 5, 24 IDELR 320 (OSEP 1995), Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations, 111 LRP 63322 (OSERS 09/01/11), Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations, 47 IDELR 166 (OSERS 2007), Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations 54 IDELR 297 (OSERS 2010).



deprivation of the educational benefit.<sup>9</sup> Accordingly, not all procedural due process notice violation give rise to the denial of FAPE.

If the parents have not been denied the opportunity for meaningful participation and the student has not suffered any loss of educational opportunity, then the student may have received FAPE regardless of procedural violations. Therefore, simple noncompliance with IDEA procedures is not enough to find a denial of FAPE. *L.R. v. Manheim Twp. Sch. Dist.*, 2008 U.S. Dist. LEXIS 23966 (E.D. PA 2008).

#### **IV. Analysis and Conclusions of Law**

##### **A. Retroactive Testimony**

The Parent's argue the email, from the former Special Education Supervisor, should be read in conjunction with the 2012 IEP and NOREP/PWN to explain how the Parties allegedly agreed to place an aide on the bus. If the email were read in such a fashion then the District would have been required to provide PWN of the removal of the bus aide. In this instance retroactive testimony, will not be used to modify the four corners of the agreed upon NOREP/PWN or the IEP. If permitted the testimony would materially alter the agreed upon IEP elements, the services and the program described in the NOREP/PWN and the IEPs. Instead, the appropriate inquiry is to judge the nature of the program actually offered and provided in the written plan. From 2012 to the present, the IEPs did not mention or include the bus aide (FOF ## 9, 10, 22, 24, 25, 27, 34). Accordingly, the retroactive testimony does not bolster the Parents bus aide argument. *T.E. v. Cumberland Valley School District*, No. 13-643, 2014 WL 47340, at \*3 (M.D. Pa. Jan. 7, 2014) (applying *R.E. v. New York City Department of Education*, 694 F.3d 186-187 (2d Cir. 2012)).

##### **B. Prior Written Notice**

The Parents PWN notice argument also fails, the bus aide was never part of the IEP. When the Student enrolled, as an interstate transfer student, the District provided comparable services, conducted an evaluation, provided the Parents with PWN, and offered the Student a FAPE. The Parties agreed to the program and the placement.

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<sup>9</sup> See also, *Rodriguez v. Fort Lee Bd. of Educ.*, 458 Fed.Appx. 124, 127 (3<sup>rd</sup> Cir.2011) (not precedential); *N.M. ex rel. M.M. v. Sch. Dist. of Philadelphia*, 394 Fed.Appx. 920, 923 (3<sup>rd</sup> Cir. 2010) (not precedential).

To the extent they now disagree about the bus aide is unfortunate. The removal of the bus aide was not a change to the Student's identification, evaluation, educational placement of a child or the provision of FAPE to the child set forth in an IEP. 34 CFR §300.503 (a). Accordingly, the District was not required to provide the Parents with PWN before they removed the bus aide.

Assuming arguendo, that retrospective testimony can modify the contents of the IEP, and the NOREP/PWN, the removal of the aide did not (i) impeded the child's right to a FAPE or (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE; or (iii) cause a deprivation of the educational benefit." *See, Rodrigues v. Fort Lee Bd. of Educ.*, 458 Fed.Appx. 124, 127 (3d Cir. 2011) (no deprivation of parental rights found when procedural error did not impede parents participation or deny a FAPE) (not precedential); *N.M. ex rel. M.M. v. Sch. Dist. of Philadelphia*, 394 Fed.Appx. 920, 923 (3<sup>rd</sup> Cir. 2010) (no deprivation of parental rights found when the proposed IEP provides a FAPE and when the parents do not demonstrate any impediment to participation rights or deprivation of educational benefits) (not precedential); 34 C.F.R. § 300.513(a)(2). Therefore, if an error occurred, it was harmless error, as the Student benefitted from [the] transportation to and from school. Accordingly, as the bus aide was not part of the Student's IEPs the District was not required to provide PWN when they removed the bus aide.

### **C. Bullying**

In their written closing, the Parents suggested that the Student is being bullied on the bus; therefore, the aide is essential. But for the October 21, 2015, incident the Student's bus rides are relatively uneventful. While the conduct of the peer striking the Student is unacceptable, the bus driver immediately responded to the incident, reported it to her supervisor, which then caused the District to review the video tape. From October 21, 2015, through the date of the Hearing in January of 2106, no other bus incidents have been reported. Beyond the one unacceptable incident, the Parents did not produce any evidence to suggest that a pervasive, persistent, hostile environment of bullying exists. Accordingly, I find the single reported incident on the bus does not rise to the level of bullying causing a denial of a FAPE

### **D. The District Returned the Aide**

After the timely Resolution Session, the dispute became complicated. First, the District filed the Resolution Session Summary agreeing to provide the aide, and then the District sent the Parents a letter confirming the return of the aide. Finally, the District proposed the action of returning the bus aide in the December 2015

NOREP/PWN. While the Parties agreed to the aide, they could not agree on how the aide would be described in the documents. Once both Parties executed the NOREP/PWN, a binding agreement existed on the District's part to provide the aide. When the Parents raised concerns about the enforceability of the NOREP/PWN agreement, the District reverted to its original July 2015 contention that the Student did not require an aide. The District as the moving party has not produced the quantum of evidence necessary to support the conclusion now that the aide is not otherwise needed.

The Supervisor testified that if he knew about the email from the former supervisor he would have scheduled an IEP meeting (P## 11-12, NT p.79, FOF## 5-6). Yet when he did learn of the former Supervisors email, an IEP meeting was never scheduled. The Parent on more than one occasion requested an IEP meeting, about the aide, yet for some unexplained reason an IEP meeting was never scheduled (P## 11-12, NT p.108). The manner in which the Parties' bus aide position statements were added days after the IEP meeting is troubling. The decision to provide a bus aide should be made by the IEP team at the IEP meeting. *DeLeon v. Susquehanna Cmty. Sch. Dist.*, 556 IDELR 260 (3<sup>rd</sup> Cir. 1984); 34 CFR §300.34 (c)(16); *Letter to Anonymous*, 23 IDELR 832 (OSEP 1995).

The IEP and the agreed upon NOREP/PWN, of November 2015, recognize the Student needs constant supervision in a private school setting. Based upon the existing record unanswered factual questions exists if personalized services needed in the classroom, are also needed on the school bus. *Dallas Indep. Sch. Dist.*, 26 IDELR 364 (SEA TX 1997).

The Parents' Amended Complaint demanded two forms of relief, return of the aide and an IEP meeting to discuss the aide (P##11-12). The December 7, 2015, NOREP/PWN mooted the dispute over the immediate presence of the bus aide. The determination of whether the bus aide is needed, however, is best left to the full discussion at an IEP team meeting. Accordingly, the District should schedule an IEP meeting within 20 days of the attached Order to discuss the need for a bus aide.

By way of dicta, although it is not apparent on the substance of the record and findings above, during the course of the hearing and in communications, the Parents engaged in relentless personal attacks on District staff and District counsel. This is unacceptable and places in jeopardy the trust and collaboration necessary for the healthy functioning of the student's IEP team. Parents may wish to re-think such language and interactions going forward.

## ORDER OF THE HEARING OFFICER

**NOW**, this February 23, 2016, the hearing officer having carefully reviewed each of the Parties' Prehearing Statements, the Exhibits, the testimony and the Post Hearing Statements and for good cause shown, it is hereby **ORDERED** as follows:

1. The District was not required to provide the Parents Prior Written Notice before the removed the bus aide in July of 2015.
2. From July 15, 2015 through December 7, 2015, the failure to provide a bus aide did not violate the Student's procedural or substantive right to a Free Appropriate Public Education.
3. The District's request to remove the present bus aide is denied. The Notice of Recommended Educational Placement/Prior Written Notice placing the aide on the bus shall remain in effect unless modified by agreement of the Parties or further legal action.
4. Within 20-days of this Order the District will hold an Individual Education Program meeting to review the Student's unique transportation needs, including discussion of whether a bus aide is necessary to provide the Student with a FAPE

Dated: February 23, 2016

Charles W. Jelley Esq. LL.M.  
Charles W. Jelley Esq. LL.M.  
HEARING OFFICER