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.B.

Date of Birth: [redacted]

ODR No. 18911-16-17-KE

OPEN HEARING

Parties to the Hearing:	Representative:
Parent[s]	Sean J. McGrath, Esquire Education Law Center 1315 Walnut Street, Suite 400 Philadelphia, PA 19107
Pennsylvania Department of Education 330 Market Street, 9th Floor Harrisburg, PA 19101	Alaina C. Koltash, Esquire Assistant Counsel Pennsylvania Dept. of Education 330 Market Street, 9th Floor Harrisburg, PA 19101
Date of Hearing:	June 27, 2017
Date of Decision:	July 17, 2017
Hearing Officer:	William F. Culleton, Jr., Esquire, CHO

INTRODUCTION AND PROCEDURAL HISTORY

The child named in this matter (Student)[1] is a three year old eligible resident of the District named in this matter (District). Student receives early intervention services from the respondent Early Intervention program named in this matter (EI Program), pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). These services include the related service of transportation, pursuant to Student's Individualized Education Program (IEP). Parents request due process, asserting that on multiple occasions the District as Student's transportation provider has provided excessively long rides to Student; failed to provide appropriate safety equipment during transport; and failed to arrive on time to Student's program. Parents request an order requiring DOE to ensure appropriate transportation services.

The Pennsylvania Department of Education (DOE) responds that it has provided and will continue to provide appropriate supervision and coordination of services provided by the EI Program and the District to ensure appropriate provision of transportation services pursuant to Student's IEP. Thus, DOE argues that the matter is moot and asks the hearing officer to dismiss Parents' claims. In the alternative, DOE argues that the responsibility for providing appropriate provision of transportation services pursuant to Student's IEP rests with the District, which is authorized and tasked with this responsibility pursuant to state law.

Parents filed separate requests for due process, naming as respondents all three of the agencies with possible responsibility to provide transportation to Student pursuant to Student's IEP: the EI Program, which is respondent in ODR No. 18909; the District, which is respondent in ODR No. 18910; and DOE, respondent in this matter. I consolidated these three matters for

[1] Student, Parent and the respondent DOE are named in the title page of this decision; personal references to the parties are omitted in order to guard Student's confidentiality.

purposes of hearing and adjudication; the decision that follows encompasses and decides all three claims.

The parties agreed to submit a stipulated record, and stipulated a number of exhibits into the record. I convened a one session hearing in the form of oral argument. I have considered and weighed all of the evidence of record.[2]

I conclude that DOE retains responsibility to assure that Student receives transportation services consistent with the provision of a FAPE. I exercise equitable authority to order DOE to provide additional appropriate services to ensure that the deficiencies of the past are not repeated in the upcoming school year. In addition, I order the EI Program and the District to participate in an educational planning meeting with DOE, in order to ensure that Parents are provided with appropriate, complete and effective relief. G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015).

ISSUES

1. What are the relative legal responsibilities of the EI Program, the District and DOE to provide Student with the related service of transportation pursuant to Student's current IEP?

2. Should the hearing officer order any of these parties to provide Student or Parents with transportation-related services in addition to those which they have agreed to provide?

3. Should the hearing officer order any of these parties to provide Student with compensatory education on account of any denial of a FAPE from March 17, 2017 to date?

[2] During argument, I raised the question whether or not additional evidence should be elicited at a subsequent hearing on my motion. I have decided to proceed without that evidence. Similarly, I was asked to take notice of Appendix A to Parents' brief. I decline to do so.

GOVERNING STATE STATUTES

The issues in this matter are governed in part by Pennsylvania statutes that authorize the provision of special education services to children with disabilities. The Early Intervention Services System Act, 11 Pa. Stat. 875, implements the IDEA by prescribing criteria for eligibility and the services that must be made available to children like Student who are between the ages of three to five and eligible for early intervention services (eligible young children), and by allocating responsibility to state agencies for children like Student who are eligible for early intervention. Section 304 of the Act designates the DOE as the agency responsible for the "delivery of early intervention services for all eligible young children … ." 11 Pa. Stat. 875-304(a)(1). This section provides that DOE "may" provide such services in a given case through an agreement (known by the acronym "MAWA") with local governmental or private agencies. 11 Pa. Stat. 875-304(a)(3). The Act specifically provides that transportation services provided to eligible young children by school districts or intermediate units may be funded through section 2541 of the Public School Code of 1949, 24 P.S. §25-2541(b)(3)(providing funding as approved by DOE to districts providing transportation for children with disabilities).

Pennsylvania law also provides that either the school district of residence or the local intermediate unit must provide transportation to an eligible young child. :

> Any exceptional child … may be furnished with free transportation by the school district. … If free transportation or board and lodging is not furnished for any exceptional child or any eligible young child … who, by reason thereof, is unable to attend the class or center for which he is qualified, the intermediate unit shall provide the transportation necessary.

24 Pa. Stat. Ann. § 13-1374. Thus, Pennsylvania statutes provide for at least two authorized funding streams to provide transportation for eligible young children. DOE can provide transportation as part of its early childhood funding through a MAWA or other arrangement.[3] Alternatively, the Public School Code provides that either a school district or an intermediate unit must provide such service to an eligible young child.

FINDINGS OF FACT

1. Student attained age 3 on [redacted date of birth]. Student is diagnosed with autism and delays in cognitive, social and emotional, adaptive, physical, and communication development. (Stip. 1.)[4]

2. Student displays physical conditions including hypertonia of muscles and sensitive skin. It is contrary to Student's medical needs and treatment for these conditions to allow Student to sit in a vehicle for more than 45 minutes. This causes Student's muscles to stiffen and, due to Student's incontinence, risks diaper rashes causing significant discomfort. (J 4, 5, 20, 21, 23.)

3. The EI Program provides special education and related services to preschool-age children with disabilities who reside within the District, including Student. It does so under the terms of a grant agreement with DOE. The grant agreement format has replaced and constitutes the current-day Mutually Agreed-upon Written Arrangement (MAWA) between DOE and the EI Program as provided for in the Early Intervention Services System Act, 11 Pa. Stat. 875. (Stip. 2.)

4. Neither the Commonwealth of Pennsylvania nor the District's local governmental entity offers universal, free preschool programing, and neither offers free transportation to enable preschool- age children to attend preschool, early learning, or daycare programs, except that, in general, the District provides transportation for eligible young children who require that related service to attend their Early Intervention program. (Stip. 3.)

5. The EI Program assumes that a parent will transport or provide for the transportation

[3] Parents argue that DOE is mandated to enter into contracts in order to delegate its responsibility for transportation as a related service. I do not so conclude based upon my reading of the statute; however, I need not reach that question in view of my disposition of this matter.

[4] Stipulated facts are cited "Stip. #." Findings based upon exhibits are cited to the exhibits J 1 through 28 admitted into evidence by stipulation.

of their children to preschool as parents of nondisabled children necessarily do, unless parents indicate that they will not or cannot do so, in which case the EI Program lists transportation as a related service in the IEP. (Stip. 4.)

6. When transportation is identified in the IEP as a related service, the EI Program or its subcontracted service provider forwards a copy of the IEP and Notice of Recommended Educational Placement (NOREP) to the responsible transportation coordinator at the District in order for the District to arrange and provide transportation to the child. (Stip. 5.)

7. The grant agreement between the EI Program and DOE does not authorize the EI Program to provide transportation, as a related service or otherwise, and the EI Program is neither a school district nor an intermediate unit. In fact, the agreement expressly states that the EI Program has no duty to provide transportation. (Stip. 6.)

8. No written arrangement pursuant to 11 P.S. *§* 875 exists between DOE and any other entity concerning the provision of Early Intervention programs and related services, including transportation, to eligible young children within the borders of the District. (Stip. 7.)

9. In this case, the program recommended for Student initially, and the program in which Student participates at this time, is an autistic support classroom located in a center operated by an EI Program subcontractor (Center). (Stip. 8.)

10. Parents informed the EI Program that Student would require transportation to access Student's program at Center and the EI Program added transportation as a related service by issuing a NOREP on September 9, 2016, which was signed by parents on September 17, 2016. The EI Program then notified the District and transportation services began for Student as of September 25, 2016. (Stip. 9.)

11. Beginning in early October, Student's rides often were too long, and there were instances of Student contracting diaper rashes from sitting in a soiled diaper for excessive amounts of time. (J 10, 12, 13, 14 16.)

12. Parents attempted to utilize District transportation contacts given them by the EI Program, to no avail. (J 16, 18, 19.)

13. On November 8, Parents reached out to the EI Program's coordinator of services as Student's local education agency. An IEP team meeting was arranged within twenty days, but the coordinator advised Parents that they might not be able to change the deficient transportation services and might have to transport Student themselves. (J 15, 16.)

14. In November 2016, having been made aware of the problems with Student's transportation, the District requested medical documentation that the bus rides were

inappropriately long for Student. Parents obtained such documentation on December 1, 2016 and December 8, 2016. (J 4, 5, 19 p. 9.)

15. On December 19, the EI Program offered to limit Student's rides to 45 minutes maximum and on December 21, it offered that the District would provide a taxi cab to transport Student instead of the bus, thus reducing the number of stops along the way to Student's daily EI program at the Center. Parents consented to this change in service by signing a NOREP on December 28, 2016. (J 23.)

16. The District provided a cab for Student on January 3, 2017, and Student rode the cab until January 5. Parents asked to place Student back on the bus until a meeting could be arranged to deal with their concerns about the first cab company's service. The District changed cab companies and the new cab company made the cab available on February 21, 2017. The meeting was scheduled for March 2017. (J 24, 25.)

17. Repeatedly during the period from September 25, 2016 to March 17, 2017, the District-provided transportation service for Student was excessively long and occasionally it jeopardized Student's physical health. (J 4, 5, 12, 13, 14, 15, 19, 20, 21, 22, 23, 26.)

18. Repeatedly during the period from September 25, 2016 to March 17, 2017, the District-provided transportation service for Student arrived late, sometimes more than an hour late. This caused Student to miss services scheduled for Student at the Center. (J 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 26.)

19. Transportation as implemented by the District through March 17, 2017 caused some dysregulation that delayed Student's access to instruction. The parties have entered into an agreement to compensate Student and Parents for lost educational opportunity up to March 17, 2017. (Stip. 10.)

20. On four occasions in November of 2016 and in January and February of 2017, the EI Program Executive Director of Early Childhood and Education, and the EI Program Director of Service Delivery, contacted or met with the Director of the Bureau of Early Intervention within the Office of Child Development and Early Learning at DOE, or with the Chief of the Division of Operations and Monitoring-East within the Office of Child Development and Early Learning at DOE, or both, to discuss ongoing problems with transportation, among other issues, including problems with bus runs of more than an hour one way and delayed arrival at program sites. Student and the involvement of Parents' counsel on Student's behalf were discussed in particular during the January meetings. (Stip. 11; J 26.)

21. After February 2017, transportation services continued to arrive late on some days, causing Student to miss instruction. The length of rides was reduced to an appropriate level, and the frequency of lateness was reduced significantly. (Stip. 12; J 11, 25, 26, 28.)

22. On May 16, 2017, Parents and the District agreed to an earlier pickup time for Student in the morning to attempt to address ongoing instances of lateness that had occurred

since March 17, 2017. (Stip. 12.)

23. In June of this year, Student's transportation arrived late twice. Once, Parents had concerns about the appropriate use of the harness on the car seat provided. (J 28.)

24. Generally, excessive ride duration and transportation delays for eligible young children in the District could be caused by multiple contributing factors such as the distance between a Student's home and school, traffic within the city, as well as the number of Students on a particular bus route. (Stip. 13.)

CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.[5] In Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[6] that the moving party is entitled to the relief requested in the Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006).

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called "equipoise". On the other hand, whenever the evidence is preponderant (i.e., there is weightier

[5] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

[6] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. See, Comm. v. Williams, 532 Pa. 265, 284-286 (1992). Weight is based upon the persuasiveness of the evidence, not simply quantity. Comm. v. Walsh, 2013 Pa. Commw. Unpub. LEXIS 164.

evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents' claim, or if the evidence is in "equipoise", the Parents cannot prevail under the IDEA.

THE MATTER IS NOT MOOT

The District and DOE argue that the matter is moot because, during the course of the controversy and in negotiations while the due process request was pending, all parties agreed to settle Parents' claims regarding inappropriate transportation services provided prior to March 17, 2017. Parents, the EI program and the District made several adjustments to the transportation services to reduce the duration of rides and the late arrivals. Thus, DOE and the District argue, the deficiencies in Student's transportation services have been eliminated, at least to a reasonable degree – to the point at which Student is receiving the related service designated in Student's IEP to a substantial extent. In short, there is no longer anything to remedy here.

Yet the history of remediation in this matter is concerning, because of the length of time that it took to remedy deficiencies, some of which raised concerns for Student's health and safety. The record depicts a tale of Parental efforts to resolve an apparently intractable administrative process that provided inappropriate transportation services for Student. It shows that, despite Parents' vigorous efforts, it took months to resolve the problems, and Student even now arrives late for program on some days.

Transportation services started as of September 25, 2016. Almost immediately, it appeared that often Student's rides were too long, and there were incidents of Student contracting diaper rashes from sitting in a soiled diaper for excessive amounts of time. (J 10, 12, 13, 14 16.) Parents were given contact information in September, and again in December, for the bus service being used, but they were unable to move the District to address the problems. They reached out to the EI Program's early intervention services coordinator in November to ask for an IEP team meeting to try to resolve the problems with transportation. The administrator offered to set up a meeting within twenty days, but suggested to Parents that they might not be able to resolve the problems and that they might in the end choose to provide transportation themselves. The problems persisted through November, December, and January through March despite at least four meetings among the concerned agencies including meetings between representatives of the EI Program and DOE.

The District reassigned Student from the bus service to a taxicab service provided by the District in December 2016; Parents signed a NOREP with these changes on December 28, 2016. The District provided a cab for Student on January 3, 2017, and Student rode the cab until January 5, but Parents asked to place Student back on the bus until a meeting could be arranged to deal with their concerns about the first cab company's service. The District changed cab companies and the new cab company made the cab available on February 21, 2017. The meeting was scheduled for March 2017; certain claims of Parents were settled as of March 17, 2017. On May 16, 2017, Parents and the District agreed to an earlier pickup time to reduce the number of late arrivals that were still being experienced.

A controversy is not moot when it is capable of repetition yet evading review. Bd. of Educ. v. Rowley, 458 U.S. 176, 186 n. 9, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982); I.H. v. Cumberland Valley Sch. Dist., No. 1:11-CV-574, 2012 U.S. Dist. LEXIS 101056 (M.D. Pa. July 20, 2012).

The Courts have recognized that, even when there is a remedy available to parents (such as due process and appeal to federal court), a controversy that is remedied during the course of litigation may not be moot if there is reason to fear that the same problem may arise again, and the remedy may be too "ponderous" to address the recurring problem in a timely fashion. Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985)(procedural safeguards themselves are "ponderous"); P.V. v. Sch. Dist. of Phila., No. 2:11-cv-04027, 2011 U.S. Dist. LEXIS 125370 (E.D. Pa. Oct. 31, 2011)(special education claims are not moot where there is a reasonable expectation of repetition without a remedy available to resolve them in a timely fashion.) A special education claim is not moot where the alleged deprivation occurred over an extended period of time or the duration of the deprivation would be too short to allow remediation through adjudication. P.V., above.

As discussed above, the present case is a classic example of a controversy that is capable of repetition yet evading review. As exemplified in this record, Student's transportation services deprived Student of a FAPE for months, despite vigorous parental efforts to collaborate with the three agencies involved. Each instance of lateness, and each inappropriately lengthy ride, deprived Student of the benefit of services promised in Student's IEP. Yet, remedies took months to implement, after fits and starts, and so it is reasonable to anticipate that the relatively small deprivations on late days accumulated over time, with an as yet unmeasured effect on Student's progress on IEP goals. Student is still being brought late to program on occasion.

Moreover, there is no clear mechanism to resolve transportation issues. The record shows that the existing allocation of responsibility does not provide parents with a reliable method to resolve problems, as Parents' complaints of November 2016 were still being addressed by changes in the transportation schedule in May 2017 to reduce, but not eliminate, late arrivals. In short, I

conclude that this matter is not moot, because it is reasonable to anticipate recurring problems with the transportation provided by the District for Student, and existing mechanisms cannot assure that Parents will be able to obtain appropriate remedies within a reasonable time if such problems recur.

DOE IS RESPONSIBLE PRIMARILY TO ENSURE THAT STUDENT RECEIVES A FAPE

Under the IDEA, it is the state educational agency that is ultimately responsible for the provision of a FAPE to Student. The IDEA requires that the state educational agency ensure that the requirements of the IDEA are met. 20 U.S.C. §1412(a)(11)(A)(i); 34 C.F.R. §300.149(a)(1). The state agency may provide services directly or through contracted agencies. 34 C.F.R. §300.154(a). If a delegated agency fails to provide special education "and related services" that are necessary to ensure a child's receipt of a FAPE, the state agency must step in to ensure that the child receives appropriate services. 20 U.S.C. §1413(g)(1)(B); 34 C.F.R. §300.154(a), (b)(1). The state agency must provide any special education or related service that a responsible local education agency fails to provide. 34 C.F.R. §300.227(a)(1).

The U.S. Court of Appeals for the Third Circuit has interpreted these statutory and regulatory provisions to require that each state establish a centralized locus of responsibility for the provision of special education and related services. Kruelle v. New Castle Cty. Sch. Dist., 642 F.2d 687, 697 (3d Cir. 1981)(noting federal requirement of a central point of accountability" and a "single line of responsibility".) While state officials retain the discretion to determine what agencies will provide a FAPE and how they will do so, the IDEA provides that the state educational agency remain responsible to ensure appropriate implementation of promised special education services. Ibid. Thus, under federal law the State Education Agency is ultimately responsible for the provision of a FAPE to all of the state's students. Charlene R. v. Solomon Charter Sch., 63 F. Supp. 3d 510, 515-516 (E.D. Pa. 2014).

As noted above, state law vests the same degree of responsibility in the DOE as the state educational agency. 11 Pa. Stat. 875-304(a)(1). That a separate state law provides for transportation of exceptional children by school districts or intermediate units does not expressly detract from the responsibility of DOE to ensure that such agencies are delivering appropriate services, when such services are related services under an early childhood IEP. I find no basis in the School Code to imply any limit to DOE responsibility for such services.

Thus, I conclude that DOE is primarily responsible for ensuring that Student's special education and related services are delivered appropriately. Nothing in this record indicates that the Department has delegated this responsibility with regard to transportation. DOE has delegated most of its responsibilities for the provision of a FAPE to the EI Program, but it has not delegated responsibility for providing transportation to the EI Program, as the record shows. Moreover, the record also shows that DOE has not entered into any arrangement with the District by which it delegates its responsibility to ensure the appropriateness of transportation as a related service.

Rather, DOE appears to have been content to rely upon the District's statutory responsibilities under Pennsylvania statutes, as well as the District's voluntary assumption of those responsibilities. I see no need to question or disagree with DOE's determination in this regard.

Yet this approach by DOE does not relieve it of its federal and state-law responsibility with regard to transportation when transportation is a related service. Not having delegated its responsibility to ensure the provision of transportation as part of a FAPE, DOE remains responsible to provide or ensure the provision of appropriate transportation to Student.

In the matter at hand, the District has failed to ensure the provision of appropriate services. In the absence of an active and direct intervention by DOE, the EI Program, the District and Parents spent the better part of a school term discussing, planning and altering the transportation related

service for Student to prevent loss of educational program time, inappropriately lengthy rides, and occasional mistakes that raised significant health and safety concerns. While these efforts and the inordinate accompanying delays bore significant fruit, the problem is not completely remedied in terms of late arrivals, and there is reason to anticipate future crises that will once again thrust the local parties into protracted remedial processes, while exposing a three-year-old child to loss of services or possibly worse. I conclude that this situation requires DOE to step in more directly to ensure appropriate services in view of the local provider agency's – the District's – foreseeable inability to provide appropriate services consistently in future as required by Student's IEP. 20 U.S.C. §1413(g)(1)(B); 34 C.F.R. §300.227(a)(1).

DOE MUST ENSURE THAT STUDENT RECEIVES TRANSPORTATION THAT SUPPORTS THE PROVISION OF A FAPE

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), 20 U.S.C. §1401(9). 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 individualized education program (IEP). 20 U.S.C. §1401(9). Thus, school districts must provide educational and related services through an IEP that is "reasonably calculated" to enable the child to receive appropriate services in light of the child's individual circumstances. Endrew F. v. Douglas County Sch. Dist., RE-1, __ U.S. __, 197 L.Ed.2d 335, 137 S. Ct. 988, 999 (2017).

Pursuant to its obligation to offer and provide Student with a FAPE, the state must ensure that a student receives both specially designed instruction and related services that meet the above standards. 34 C.F.R. §300.17 (defining FAPE to consist of both special education and related services). Related services include transportation. 34 C.F.R. §300.34 (defining related services to

include transportation). Transportation as a related service includes provision of specialized equipment if required. 34 C.F.R. §300.17(c)(16)(iii). It must be provided in conformity with the child's IEP. 34 C.F.R. §300.17(d).

As noted above, the IEP – and thus the promise of related services including transportation - must be reasonably calculated to provide Student with progress appropriate in light of the child's circumstances. Endrew F., above at __ U.S. __, 197 L.Ed.2d 335, 137 S. Ct. 988, 999 (2017). Therefore, when provided as a related service to an eligible young child, transportation must remove a barrier to the child's receipt of FAPE. Conversely, it cannot be appropriate if it creates or permits a barrier to the child's educational progress; such a deficient service would be the antithesis of FAPE. In this matter, then, the state is obligated under the IDEA to provide transportation services in such a way as to enable Student to receive a FAPE.

DOE argues that it is doing just that. It argues that it has attended meetings with the IE Program and the District to address problems with transportation services provided by the District, and has encouraged the IE Program to coordinate with the District to resolve transportation problems. In addition, it notes that the State Complaint Procedures established pursuant to 34 C.F.R. §300.151-153 provide an avenue for Parents to request an investigation into inappropriate transportation services provided by the District.

On this record, I conclude that Parents have proved by a preponderance of the evidence that the DOE response to difficulties with Student's transportation was not reasonably calculated to provide Student with appropriate transportation related services through the District. The record shows that the available DOE oversight has failed to resolve complaints of lateness, overlong ride times and occasional safety concerns within a reasonable amount of time. While these problems were being addressed through agency telephone calls and meetings, not all of which included

DOE, Student was deprived of valuable and necessary program time, and caused to experience unnecessary discomfort and risk to health. The State Complaint Procedures, by DOE's own admission, can require up to 90 days to engender remedial action. I conclude, on the record before me, that the available recourse is not appropriate to enable Parents to address Student's transportation needs should the District fail to provide appropriate transportation service.[7]

THE IE PROGRAM AND THE DISTRICT ARE NOT DELEGEES RESPONSIBLE TO ENSURE APPROPRIATE TRANSPORTATION SERVICES ON BEHALF OF THE DOE

As discussed above, DOE has not delegated its responsibility to ensure appropriate provision of the related service of transportation to either the District or the EI Program. Consequently, within the bounds of the issues presented to me, I conclude that they are not responsible to ensure appropriate provision of services.

This is not to say that, having undertaken to provide such services, the District bears no legal responsibility under laws other than the IDEA. My jurisdiction is to determine who is responsible for FAPE, and nothing else.

Similarly, I do not mean to delineate the responsibility of the EI Program to deliver an IEP for Student that appropriately provides for related services including transportation. My conclusion is limited to determining that the EI Program does not have the responsibility of the DOE to ensure appropriate provision of transportation by the District or any other provider not under contract with the EI Program.

[7] District counsel assures the hearing officer that Parents now have special access to District transportation coordinators and that this system of communication is currently working well. I conclude that the record does not reflect that these measures are sufficient. In the overall context of divided responsibility for Student's transportation, and given the history of this matter, the District's efforts do not provide sufficient assurance of consistent provision of appropriate services in the future. While I will order DOE to provide similar contact persons for Parents, I do not diminish either the District's expressed willingness to make Student's transportation appropriate or its belief in the efficacy of the measures taken. Although I will order DOE to provide the capacity to intervene directly, and to do so whenever necessary, I do not suggest that the existing relationships between Parents and District coordinators should be abandoned or devalued.

Notwithstanding the above, I also conclude that, to provide appropriate relief to Parents and Student, it is appropriate to reflect in my remedial order that Student and Parents continue to need these entities to cooperate with DOE and each other regarding Student's transportation.

COMPENSATORY EDUCATION

Compensatory education is an equitable remedy, designed to provide to the Student the educational services that should have been provided, but were not provided. Lester H. v. Gilhool, 916 F.2d 865 (3d Cir. 1990). In the Third Circuit, it is common to order the responsible educational agency to make up such services on an hour-by-hour basis; however, there is support also for a "make whole" approach. See generally, Ferren C. v. School Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010).

In this matter, the evidence is insufficient to prescribe a "make-whole" remedy, because there was no expert opinion testimony on what remedial and special education services would be needed in order to bring Student's academic, social and behavioral skills to the level at which they would have been found in the absence of the deprivation of FAPE discussed above. Therefore I will order DOE to provide additional compensatory education only for the program time that Student lost as a result of being transported late to program from March 17, 2017 to the date of this decision.

CONCLUSION

In sum, I find that the matter presents a kind of deprivation of FAPE that is capable of repetition yet evading review, and that the matter therefore is not moot. I conclude that DOE alone is ultimately responsible to ensure that Student receives appropriate transportation to the Center. I conclude that neither the EI Program nor the District has this responsibility. I conclude that Student

has been denied a FAPE by reason of late arrival to program between March 17, 2017 and the date of this decision. I order that DOE take the lead in resolving any transportation issues that may arise in the calendar year starting with the date of this decision. In addition, I order DOE to provide procedures that ensure that Parents can easily give notice to DOE if and when problems arise, and that any such notifications result in an immediate investigation and resolution of the problem by DOE. I order all three parties to participate in an IEP meeting to ensure that Student's transportation is appropriate in the next year. I order that DOE provide compensatory education services to Student to make up for time lost in program.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows:

1. Within ten days of the date of this Order, DOE shall designate one of its employees to receive all complaints from Parents concerning transportation of Student pursuant to Student's IEP for the remainder of the calendar year ending on July 17, 2018.

2. Within fifteen days of the date of this order, the individual designated by DOE shall immediately notify Parents of his or her identity and contact information. The designee shall advise Parents that he or she is available to parents at a minimum by telephone, text message and email message at all times. The designee shall be required and able to respond to any contact from Parents by the end of the next business day after receipt of Parents' message.

3. DOE shall authorize and empower its designee to ensure that the District immediately will make any changes in Student's transportation services that the designee deems appropriate to resolve any problems of inappropriate duration of Student's ride; late arrival to the Center or to any other program to which transportation is being provided pursuant to Student's IEP; and inappropriate safety equipment provided to Student for purposes of transportation.

4. Within sixty days of the date of this order, DOE shall coordinate with the IE Program to convene a meeting of the IEP team and representatives of DOE and the District, for the purpose of reviewing Student's transportation and making any revisions in procedures or services, other than those ordered herein, that DOE and Parents deem appropriate. The

team shall consider whether or not additional meetings are appropriate during the rest of the year ending on July 17, 2018, and shall proceed accordingly within its discretion.

5. DOE shall provide Student with compensatory education of one-quarter hour for every day on which Student arrived late for Student's program from March 17, 2017 to the date of this decision.

6. The educational services ordered above may take the form of any appropriate developmental, remedial or instructional services, product or device that furthers or supports the Student's education, as determined by Parents, and may be provided at any time, including after school hours, on weekends, or during summer months when convenient for Student or Parents. Such services may be provided to Student until Student reaches twenty-one years of age.

7. The services ordered above shall be provided by appropriately qualified, and appropriately Pennsylvania certified or licensed, professionals, selected by Parents.

8. The cost of any compensatory educational service may be limited to the current average market rate for privately retained professionals qualified to provide such service, within a fifty mile radius of the District's headquarters.

It is FURTHER ORDERED that any claims that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

William F. Culleton, Jr. Esq.

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WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

July 17, 2017