

*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 Due Process Hearing Officer**

### **Final Decision and Order**

#### **Closed Hearing**

**ODR No. 27500-23-23**

**Child's Name:**

E.I.

**Date of Birth:**

[redacted]

**Parents:**

[redacted]

**Counsel for Parents**

Benjamin Hinerfeld, Esq.  
1528 Walnut St., Suite 1100  
Philadelphia, PA19102

**Local Education Agency:**

Philadelphia City School District  
440 N. Broad St., Suite 313  
Philadelphia, PA 19130

**Counsel for LEA**

Emily M. Beck, Esq.  
Wisler Pearlstine, LLP  
460 Norristown Road, Suite 110  
Blue Bell, Pennsylvania 19422-2323

**Hearing Officer:**

Joy Waters Fleming, Esq.

**Date of Decision:**

March 27, 2023

## **INFORMATION AND PROCEDURAL HISTORY**

The student in this matter (Student)<sup>1</sup> is a [redacted] student in the (District) who is eligible for special education under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act as a child with Autism.<sup>2</sup> The Parent filed this due process Complaint on the grounds that the District denied Student a FAPE when it failed to transport the Student to and from school for a period of time during the 2022-2023 school year.

Although oral opening statements and written closing arguments were submitted, counsel for the respective parties agreed to detailed factual stipulations, reproduced below, that obviated the need for an evidentiary hearing. As relief, the Parent sought compensatory education for the missed instructional time of the Student as well as monetary damages for lost wages.

For the following reasons, the relief requested by the Parent is denied.

## **ISSUES**

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<sup>1</sup> In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision, and will be redacted from the cover page prior to posting on the website of the Office for Dispute Resolution.

<sup>2</sup> 20 U.S.C. §§ 1400 – 1482. The implementing federal regulations are found at 34 C.F.R. §§ 300.1 – 300.818, and the state regulations are found at 22 Pa. Code §§ 14.101 – 14.163. The federal regulations implementing Section 504 are set forth in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).

1. Whether the District denied the Student a FAPE under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, when it failed to provide transportation to Private School from January 3, 2023, through February 14, 2023?
2. Whether the District denied the Student a FAPE under the IDEA and Section 504 when late transportation was provided on November 14, 2022; November 17, 2002; January 24, 2023; and February 8, 2023?
3. Whether the District engaged in conduct that was deliberately indifferent to the Student in violation of the law when it provided late or no transportation to Private School?
4. If FAPE denial is found, what, if any remedy is appropriate?

### **FINDINGS OF FACTS<sup>3</sup>**

1. The Student [redacted] is a child with a disability residing in the District.
2. [Redacted] is Student's Parent.
3. Student is eligible for special education and related services under the category of Autism.
4. Student is nonverbal.
5. The District is a Local Education Agency under the Individuals with Disabilities Education Act and a recipient of federal funds for purposes of Section 504 of the Rehabilitation Act of 1973.

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<sup>3</sup> All findings of fact are joint stipulations submitted by counsel.

6. The Parent requested transportation for Student to the Private School, a parent-procured placement, for the 2022-2023 school year.

7. Student requires a 1:1 aide during transportation.

8. The Private School day lasts six hours, from 8:45 AM until 3:00 PM, with dismissal beginning at approximately 2:50 PM.

9. Between the start of the District's 2022-2023 school year and the end of the 2022 calendar year, the District provided Student with transportation, with a 1:1 aide, through [redacted] (the transportation) a private, third-party transportation company.

10. The transportation emailed the District on December 29, 2022, when its offices were closed for winter break, and advised that Student's assigned route would be without a driver when school resumed after break.

11. On Monday, January 2, 2023, the transportation notified the Parent that it would no longer provide transportation for Student due to staffing shortages.

12. The transportation's email of December 29, 2022, was received and responded to by the District's Director of Transportation on January 3, 2023, the day the District reopened after break, at 8:25 AM. The Director advised the transportation that the District would be working to reassign Student's route to another vendor.

13. Beginning on Tuesday, January 3, 2023, transportation stopped providing Student transportation.

14. On twenty-two (22) school days (between January 3, 2023 and February 14, 2023), The Parent drove Student to and from the Private School twice daily (88 one-way trips).

15. Each one-way trip took 20-50 minutes depending on traffic.

16. Each one-way trip was 7-8 miles depending on the route.

17. Student was late to school on the follow dates: 11/14/22, 11/17/22, 1/24/23, 2/8/23, and missed a total of 4 1/2 hours of instruction.

18. Between January 3, 2023, and February 14, 2023, the Parent missed four overtime shifts because she had to drive Student to and from the Private School. She lost \$442.80 in earnings on each of her four missed shifts.

19. Due to work commitments, the Parent could not drive Student to or from the Private School on Fridays in January and early February 2023.

20. Lacking any transportation, Student missed school on five consecutive Fridays in January and February 2023.

21. On January 19, 2023, the Parent filed this Due Process action.

22. On or about Tuesday, January 24, 2023, the District engaged a new company, [redacted] Cab Company (Cab Company), to take Student to and from the Private School.

23. On the morning of Tuesday, February 7, 2023, Student's cab arrived without a 1:1 aide. The Parent reluctantly allowed Student to ride in the cab to the Private School, but picked the Student up from school that afternoon rather than allow the Student to ride again without an aide.

24. On Wednesday, February 8, 2023, Student was more than an hour late for school.

25. On February 9, 2023, the District engaged [redacted] Car Care (Car Care) to drive Student to and from the Private School, starting on February 15, 2023.

26. Car Care has transported Student to and from the Private School appropriately (with a 1:1 aide) during the period February 14-15, 19-28, 2023.

## **DISCUSSION AND CONCLUSION OF LAW**

### **Applicable Legal Principles**

#### **The Burden of Proof**

The burden of proof consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this particular case, the Parent is the party seeking relief and must bear the burden of persuasion.

#### **Witness Credibility**

A special education hearing officer, who has the role of fact-finder, is also tasked with the responsibility to make credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); see also *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). In this case, counsel requested a resolution based on the stipulated findings of fact. Counsel declined to offer testimony.

## **Free Appropriate Public Education (FAPE)**

The IDEA requires the states to provide a "free appropriate public education" to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be "'calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child's individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court's first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982). In *Rowley*, the Court found that an LEA satisfies its FAPE obligation to a child with a disability when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id.* at 3015. Third Circuit consistently interpreted *Rowley* to mean that the "benefits" to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child's potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Endrew F.* decision is no different. A

school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. *See, Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit. *See Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). *See also Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995).

## **Transportation**

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 special education and related services). Related services include transportation. 34 C.F.R. §300.34 . 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. *Andrew F.* 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.

## **General Section 504 Principles**

Section 504 of the Rehabilitation Act of 1973 requires schools to provide a free appropriate public education to each qualified individual with a disability. Under Section 504, "an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as



adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of" the related subsections of that chapter, 34 C.F.R. §§ 104.34, 104.35, and 104.36. 34 C.F.R. § 104.33(b). The obligation to provide FAPE is substantively the same under Section 504 and the IDEA. *Ridgewood, supra*, 172 F.3d at 253; *see also Lower Merion School District v. Doe*, 878 A.2d 925 (Pa. Commw. 2005).

In order to establish a violation of § 504 of the Rehabilitation Act, the filing party must prove :

1. They are "disabled" as defined by the Act;
- 2.They are "otherwise qualified" to participate in school activities;
3. The school or the board of education receives federal financial assistance; and
4. They were excluded from participation in, denied the benefits of, or subject to discrimination at the school.

By contrast, intentional discrimination under Section 504 requires a showing of deliberate indifference, which may be met by establishing "both (1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge." *S.H. v. Lower Merion School District*, 729 F.3d 248, 265 (3d Cir. 2013). However, "deliberate choice, rather than negligence or bureaucratic inaction," is necessary to support such a claim. *Id.* at 263.

## **Parent's Claims**

The first issue raised by the Parent is whether the District denied Student a FAPE for its failure to provide consistent transportation, with a one-to-one aide, to and from the Private School. Through its written closing, the District countered that the Private School had the responsibility to implement the IEP, and previously provided transportation occurred under the provisions of the Pennsylvania School Code and not as a related service; therefore, no FAPE denial occurred. Based upon the stipulated record, I conclude that Parent has failed to establish that the District denied Student a FAPE.

In the Complaint, the Parent alleged consistent, dependable transportation to and from school did not occur, although a related service in the Student's IEP. The District did not submit an Answer to the Complaint.<sup>4</sup> Although the Complaint alleged enrollment in the Private School occurred through an agreement with the District, the jointly submitted factual stipulations indicated the Student attended a "parent procured" placement without additional detail regarding the placement circumstances, educational programming and financial obligations of the respective parties. I must defer to the factually minimal post-Complaint stipulations to resolve this matter.

The facts are clear that this District transported this eligible Student to and from the Private School accompanied by an aide from the first day of the 2022-2023 school year until the end of December 2022. After the District provided transportation stopped, the Parent drove the Student to and from school for twenty-two days in January and February. During this same period, the Student missed five days because the Parent could not take the Student to school. The Student was also late for school for four days between November and February. Equally clear, the transportation

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<sup>4</sup> 34 C.F.R. §300.508

ended not because the District asserted it did not have that responsibility but halted because of difficulty finding a vendor. Transportation resumed through a third vendor, a car service, mid-way through February 2023, before this due process commenced and hopefully has continued.

The circumstances that preceded this child's placement in the Private School are unclear. The "parent procured" placement, as stipulated, may or may not be the unilateral parental placement implied by the District in its written closing statement.<sup>5</sup> I cannot satisfactorily determine whether a disagreement about FAPE resulted in this Parent finding (procuring) a suitable private school with District assent and funding or different circumstances resulted in this placement. The placement circumstances dictate the obligations of the respective parties for purposes of determining whether a denial of FAPE occurred. <sup>6</sup> Without more information, this Student's status as FAPE eligible does not automatically equate to an IDEA obligation by this District to transport to and from school.

Based on the facts presented, I am unable to determine that the District's transportation of this eligible Student arose purely through an obligation to provide FAPE-mandated services or only through requirements under state law. Additionally, the stipulations did not offer information about whether an IEP or services agreement existed, attendant programming expectations, nor the source of the "required" one-to-one aide. Although the

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<sup>5</sup> The stipulations indicated the Student attended a "parentally procured" placement without additional detail; however, the Complaint alleged enrollment was through an agreement with the District. There is no mention of a one to one aide in the Complaint.

<sup>6</sup> See, 34 C.F.R. 300.14 (LEA not required to pay for the cost of education, including special education and **related services**, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility). (Emphasis added)

IDEA does not mandate that a school district provide transportation from home to school for parentally placed students in a private school, under Pennsylvania law, this District was required to provide transportation services to all students, including this one, parentally placed in a private school, which it did.<sup>7</sup> However, I cannot conclude that this Student was entitled to District supplied transportation as a mandated related service. As such, the Parent has not met their burden of proof that the District denied Student a FAPE.

The next issue is whether the District acted with deliberate indifference when it failed to provide consistent transportation to the Student. There is insufficient information that the District's delay in securing replacement transportation was a product of any deliberate choice. The Parent contends that on January 3, the District received notification of the cessation of Student's transportation from the first vendor but did not engage the second vendor until January 24, after the due process Complaint was filed. According to the Parent, this demonstrated a deliberate indifference by the District that a protected right was being violated. I disagree. After the original vendor notified the District that it would be unable to service the Student's transportation route, the Director of Transportation advised that the District would work to reassign the Student's route. Although replacement transportation was not immediately secured, there is no indication that the District failed to take immediate action to resolve this issue. Although a few weeks elapsed before it was successful, the stipulated facts do not address the District's efforts or lack thereof to lead to the conclusion that its actions were deliberate and resultant delay unreasonable.

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<sup>7</sup> 24 Pa. Stat. Ann. § 13-1361.

On the contrary, after the District's initial transportation vendor abruptly stopped providing services, in an attempt to remedy the issue, the District engaged the services of a cab company. After the cab arrived without the Student's one-to-one, the District took immediate action and engaged the services of a car service the next day. I am unable to conclude that the Parent has met the burden of establishing the District acted with deliberate indifference toward this Student in violation of Section 504.

The Parent has not established the District denied Student a FAPE or acted with deliberate indifference. Accordingly, no relief is due.

## **ORDER**

AND NOW, this 27th day of March 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows.

1. The District did not deny Student a free appropriate public education.
2. The District did not act with deliberate indifference under Section 504.
3. Nothing in this Order should be read to preclude the parties from mutually agreeing to alter any of its terms.

It is FURTHER ORDERED that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

Joy Waters Fleming, Esq.

Joy Waters Fleming, Esq.  
Special Education Hearing Officer

March 27, 2023