PENNSYLVANIA

Special Education Hearing Officer

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DECISION

Student
Date of Birth: xx/xx/xx
ODR File No.: 7020/06-07 AS

Dates of Hearing:
November 28, 29 and December 13, 2006

Closed Hearing

Parties to the Hearing:	Representatives:
Mr.	*Pro Se*
North Penn School District 401 East Hancock Street Lansdale, PA 19446	Mark Fitzgerald, Esquire Sweet Stevens Tucker & Katz LLP 331 Butler Avenue, P.O. Box 5069 New Britain, PA 18901
Dates Transcript Received:	December 11 and December 18, 2006
Record Closed:	December 18, 2006
Date of Decision:	January 2, 2007
Hearing Officer:	Rosemary E. Mullaly

I. Background and Procedural History

A. Background

The Student ("the Student") is a xx-year-old resident of North Penn School District (the "District") classified as a student with emotional disturbance. The Student's emotional support program is implemented in an out-of-district full-time emotional support program in the [redacted] Elementary School located within the Upper Dublin School District. His parent sought placement of the Student in the District-run after-care program, but the District rejected his request because it felt that, even with reasonable accommodations, the Student could not be maintained in this program based upon the severity of his disability. Thereafter, the Parent requested that the Student be transported to an out-of-district after-school private child-care provider. This request was also denied because the District's policy for transportation to day care requires that the specific provider designated by a parent be located along the District's "currently established" bus routes. Proceeding *pro se* under both the Individuals with Disabilities Education Act ("IDEA") and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), the Parent alleges that the District violated the Student's rights by failing to offer appropriate accommodations for the Student to attend the District-run after-care program and by failing to offer appropriate related service of transportation and appropriate accommodations to its policy of only transporting students to private childcare providers along currently established bus routes.[1] The parent seeks placement in the District-run after-care program or, in the alternative, transportation of the Student to an out-of-District private child-care provider.

The District asserts that the hearing officer lacks jurisdiction to address the issue of placement in the District-run after-care program because the Parent has failed to demonstrate that the after-care program is a necessary component of the Student's IEP, therefore it is solely a discrimination claim over which the hearing officer does not have jurisdiction. In the alternative, the District asserts that it was justified in denying the Student admission to its after-care program based upon the severity of the Student's disability and its inability to provide accommodations without changing the nature of its program. Finally, the District asserts that it may apply its facially neutral transportation without violating the law because the parent's request does not have a connection to the student's program and placement in the emotional support classroom but is instead based upon the parent's convenience.

B. Procedural History

The Office for Dispute Resolution received the Parent's hearing request in this matter on October 10, 2006. The parties waived the resolution meeting and evidenced this waiver by executing a joint written statement contained in the record as Hearing Officer Exhibit 2. The three-session hearing took place on November 28, 29 and December 13, 2006. The parties compiled a joint set of hearing exhibits (reference to which shall be designated hereinafter as "Exh.-"). The hearing officer received the final hearing session transcript and the parties' written closing statements on December 18, 2006 whereupon the record was closed. An brief extension of the timeline for compiling the record in this matter was granted in order to issue a subpoena and obtain the testimony of a nonparty rebuttal witness. A national postal holiday as well as a National Day of Mourning similarly resulted in a brief delay in forwarding the decision via certified mail to the parties.

[1] In his due process request, the parent originally asserted a claim that the Student's current IEP was not being implemented related to the provision of the services of a one-on-one aide. At the first session of the hearing, the parent withdrew this claim since the issue had been resolved without need for the hearing officer's involvement.

II. Stipulations and Findings of Fact

A. Stipulations

1. The Student's birthday is xx/xx/xx.

2. The Student is a resident of North Penn School District.

3. The Student is eligible for services as a student with disabilities.

(N.T. 335).

B. Findings of Fact

1. The Student was placed in an out-of-district full-time emotional support program because the District did not have an appropriate in-district educational program. (Exh.-4 at 1, 17; Exh.-6 at 2019; N.T. 62, 139-140, 154).

2. The Student does not require an after-care program as a component of a free appropriate public education. (Exh.-4 at 1-2; N.T. 60-61, 65-66, 71-72, 162).

3. The District-run after-care program provides all school-aged resident students attending District schools with childcare at parental cost from the close of school until 6 p.m. without the need to be transported off-site because each of the District's the thirteen elementary schools host the program. Because this program is available within each of the District's thirteen elementary schools, it is conveniently located for parent pick-up. (Exh.-7; N.T. 347-348, 349).

4. The School District refused and continues to refuse to allow the Student to access its after-care program because it concluded that was no reasonable accommodation could be put in place that would make the program accessible to the Student . (Exh.-13, at 2; Exh.-28; N.T. 142-43, 152-53, 156-57, 192, 207-08. 210, 228, 252, 286, 287, 303, 308-310, 313, 339).

5. The District has a transportation policy for public and nonpublic students that expands bus services beyond round-trip transportation to school from a student's residence to include transportation to day-care centers and babysitter locations. The same policy applies without modification to all regular education, special education and nonpublic school students. Transportation to these providers is only provided if they are located within the District and along currently established District bus routes. No special route changes are made for day care or babysitter arrangements except for one student whose IEP so provides for transportation to an out-of-district day care center. (Exh.-7; N.T. 364, 366).

6. The District refused and continues to refuse to offer the Student any accommodations to its transportation policy related to transportation to an out-of-district child-care. (N.T. 66, 67, 69, 171, 172, 175, 212).

7. The Student's parent does not have access to childcare along established bus routes. (N.T. 64, 68-69, 70-72, 73-74).

8. On or about October 9, 2006, the Student started attending an after-care program run by the [redacted] YMCA located at the Elementary School where his full-time emotional support program is currently being implemented. The Student requires only minimal accommodations to the program in order to access after-care services. (N.T. 489, 490-92, 500).

9. Neither the Student's out-of-district placement nor his current after-care program is conveniently located to the Parent's home. (N.T. 64, 68-69,70-72, 73-74).

10. The District is in the process of reevaluating the Student and is investigating alternative placements outside of the Elementary School. (N.T. 73-74, 188-189).

III. Issues Presented

A. Did the District violate the Student's rights as an eligible student under the IDEA or as a qualified handicapped student under Section 504 of the Rehabilitation Act of 1973 for failure to provide reasonable accommodations for the Student to access its after-care program?

B. Whether the District violated the Student's rights under the IDEA or Section 504 of the Rehabilitation Act when it refused to provide transportation to an out-of-district child-care provider?

IV. Discussion and Conclusions of Law

Burden of Persuasion

The United States Supreme Court explained the concept of burden of proof in *Addington v. Texas*, 441 U.S. 418, 423 (1979) (citation omitted) stating

> The function of a [burden] of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

In administrative and judicial proceedings under the both the IDEA and Section 504,[2] the party bearing the burden of persuasion must prove its case by the "preponderance of the evidence." *See* 20 U.S.C. § 1415(i)(2)(C)(iii). The term "preponderance of evidence" is defined as "evidence that is of greater weight or more convincing than the evidence that is offered in opposition to it." *Black's Law Dictionary* (Fifth Edition), at 1064. The burden of persuasion in "an administrative hearing challenging and IEP is properly placed upon the party seeking relief." *Schaffer v. Weast*, 546 U.S __,

[2] 34 C.F.R. § 104.36 provides that "[c]ompliance with the procedural safeguards of Section 615 of the Handicapped Act is one means of meeting the procedural safeguards provided under Section 504.

__, 126 S.Ct. 528, 537 (2005). While it does not specifically so find, the holding in *Schaffer* is highly persuasive that this burden would apply to claims under Section 504 as well.[3]

A. Did the District violate the Student's rights as an eligible student under the IDEA or as a qualified handicapped student under Section 504 of the Rehabilitation Act of 1973 for failure to provide reasonable accommodations for the Student to access its after-care program?

1. IDEA Claim

In order to establish a claim under the IDEA, the Parent must demonstrate that the District's after-care program was a necessary component of a free appropriate public education. The IDEA defines a free appropriate public education ("FAPE") as special education and related services that

(a) are provided at public expense, under public supervision and direction and without charge;
(b) meet the standards of the State educational agency;
(c) include preschool, elementary school or secondary school education in the State involved ; and
(d) are provided in conformity with an individualized education program (IEP) under Sec. 614(d).

See 20 U.S.C Sec. 1402(9) and 34 C.R.F. §300.13. A free appropriate public education must be made available to all children with disabilities between the ages of 3 and 21. *See* 20 U.S.C. § 1412(a)(1)(A).

Each child with a disability is entitled to an individualized education program - which among others things - includes a statement of the special education and related services and supplementary aids and services to be provided to the child and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining the annuals goals, to be involved in and make progress in the general curriculum and to participate in extracurricular and other nonacademic activities, and to be educated and participate with other children with disabilities and nondisabled children; an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(V).

The IDEA defines the term "child with a disability" as a child

(1) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments,(including blindness), serious emotional disturbance (referred to in this title as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; AND
(2) who, by reason thereof, needs special education and related services.

[3] The *Schaffer v. Weast* court notes that the default rule – that the party seeking relief bears the burden of persuasion regarding the essential aspects of their claims – has been applied to statutes whose language closely tracks Section 504, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. S § 2000e-2 et seq., *see St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993); and the Americans with Disabilities Act, *see Cleveland v. Policy Management Systems Corp*., 526 U.S. 795, 806 (1999). *Schaffer*, at 537. It further notes that "[d]decisions that place the entire burden of persuasion on the opposing party at the outset of a proceedings are extremely rare. Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." *Id.*

20 U.S.C. § 1402(3). The IDEA defines *special education* as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. S 1402(29). The IDEA implementing regulations defines "specially-designed instruction" as "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology or delivery of instruction (i) to address the unique needs of the child that result from the child's disability; and (ii) to ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.26(b)(3).

The IDEA defines "related services" as "transportation, and such developmental, corrective and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) *as may be required to assist a child with a disability to benefit from special education*, and includes the early identification and assessment of disabling conditions in children.. *See* 20 U.S.C.§ 1402(26)(A) (emphasis added).

In *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district's efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-207.

The parties have stipulation that the Student is an eligible a child with a disability. But at no point has the Parent suggested nor proffered has any evidence which supports a conclusion that the District's after-care program rises to the level of special education and related services. At hearing, the Parent did testify that he enrolled

> [the Student] in the [redacted] Y after-school program that is held at the Elementary School as a temporary fix, to mitigate the problem. The Elementary School staff were not happy with that, but [the Student] has done okay at the Y; though , again, it's not at all designed for special needs students. He doesn't have a TSS worker with him. He's done okay, though. This is far less than ideal. I've tried to get a babysitter for special needs kids. I have contacted [redacted] College, the special education program, a parental support group for kids with autistic disorders, and asking about babysitters for kids with PDD, as [the Student] has -- it's a combination of PDD and ADHD -- and there has been no one -- this is nothing specific to [the Student], this is just someone to sit for someone who has mental health disabilities, particularly pervasive developmental disorder and ADHD. Again, it's hard to get a babysitter just for a couple hours each day.

(N.T. 71-72). While it references special needs supports for after-care, it does not suggest an extended day program is a necessary component of a FAPE. Moreover, the parent approved an NOREP in August 2006 which did not include an after-care program. (Exh.-4). In neither his due process hearing request nor his opening statement he did not raise the inappropriateness of the District's IEP because it lacked an extended day or after-care component. (Exh.-8, at 3-5; N.T. 35-37). Therefore, the Parent has not met the *Schaeffer* burden of proof to establish a claim that the Student's IEP was inappropriate

because it did not include participation in this program nor did he comply with the issue notice requirements contained in 20 U.S.C. § 1415(f)(3)(B)..

2. Section 504

i. Discrimination-Based Claim

Before addressing the substantive nature of the parent's Section 504-based claim related to the District's exclusion of the Student from its after-care program, the hearing officer's jurisdiction over this claim must first be established. Because no legal authority was proffered by the District in support of its objection regarding the scope of a special education hearing officer's jurisdiction over Section 504 discrimination-based claims and the hearing officer did not discover any caselaw or administrative guidance after research of this topic, it was necessary to rely solely upon the regulatory language contained in 22 Pa. Code Chapter 15 to determine whether the procedural safeguards which apply to IDEA disputes similarly apply to Section 504 discrimination disputes which do not involve a denial of a free appropriate public education. The language of the Chapter 15 regulations is frequently convoluted and seemingly contradictory, but what could be gleaned from the language contained therein is that these regulations provide for different procedural safeguards for Section 504 FAPE-based and non-FAPE based discrimination claims.

The fair-reaching stated purpose of the Chapter 15 regulations is to address "a school district's responsibility to comply with 34 CFR Part 104 (relating to nondiscrimination on the basis of handicap in programs and activities receiving or benefiting from federal financial assistance) and [to implement] the statutory and regulatory requirements of Section 504." *See* 22 Pa. Code § 15.1. The definition of "protected handicapped student" contained in Chapter 15 is quite limiting in scope in that it all but excludes from its definition Chapter 14 eligible students: specifically,

> [a] student who meets the following conditions:
> (i) Is of an age at which public education is offered in that school district;
> (ii) Has a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student's school program;
> (iii) Is not eligible as defined by Chapter 14 (relating to special education services and programs) or who is eligible but is raising a claim of discrimination under § 15.10."

See 22 Pa. Code § 15.2. Section 15.7 of the regulations provides that "if the parents and the school district cannot agree as to the related aids, services and accommodations that should or should no longer be provided to the protected handicapped student, either party may use the procedural safeguards system under § 15.8 (relating to procedural safeguards) to resolve the dispute. *See* 22 Pa. Code § 15.7(b).

Chapter 15 defines discrimination claims as claims involving denial of access, equal treatment or discrimination based on handicap. *See* 22 Pa. Code § 15.10. Section 15.10 further provides that "an eligible or noneligible student under Chapter 14 may use the procedures for requesting assistance under § 15.8(a) to raise discrimination claims. A student filing a discrimination-based claim need not exhaust the procedures in this chapter prior to initiating a court action under Section 504." *See* 22 Pa. Code § 15.10. The other "procedures" referenced in Section 15.10 that are contained in Chapter 15 include parental request for assistance, request for resolution, informal conference, and formal due process hearing governed by Chapter 14.64(a)-(l), (n), and (o) (relating to impartial due process hearings). *See* 22 Pa. Code § 15.8 (b)-(d). The current version of the Chapter 15 regulations

references the predecessor to the now-revised version of the Chapter 14 regulations relating to impartial due process hearings. Comparing both versions of these regulations which address the issues for which a parent can seek an impartial due process hearing (Section 14.64(a) with 14.162 (b)), however, demonstrates that impartial hearings are only available to address disputes concerning identification, evaluation or education placement or the provision of a free appropriate public education. *Compare* 22 Pa. Code § 14.64(a) (PDE 1998) and 22 Pa. Code §14.162(b) (PDE 2001).

A careful analysis of the above referenced sections of the Chapter 15 regulations suggests that for claims related to denial of access, equal treatment or discrimination based on handicap, the Parent does not have the option of an impartial due process hearing. Notwithstanding the fact that the purpose of the Chapter 15 regulations is to assure compliance with and implementation of 34 CFR Part 104 - which specifically addresses both a district's obligation to provide a free appropriate public education *and* to provide access to its programs and activities receiving or benefiting from federal financial assistance, the regulations establish a different process for resolving disputes involving these claims. Moreover, the specific language of the regulations provides for access to the procedural safeguards contained only at Section 15.8(a) for claims based solely on discrimination. While Section 15.7 does reference the parent's right to use the procedural safeguards contained in 15.8 generally, because the regulation governing the impartial due process hearings referenced in 15.8 (d) specifically limits claims to those concerning identification, evaluation or education placement or the provision of a free appropriate public education, access to an impartial due process hearing solely for discrimination claims based is not provided by Chapter 15.

In that no other authority could be found to flesh out the jurisdiction of the hearing officer related to this issue, the Parents claim for relief related to the after-care program will be limited to whether or not it is a violation of a free appropriate public education under Section 504. Nothing about the instant hearing officer's lack of jurisdiction to rule upon the discrimination-based after-care issue should be considered a decision on the merits of his claims or in any way inhibit or delay the parent from reinitiating already asserted claims or seeking whatever recourse or remedies that may be available before any other agency or forum.

ii. FAPE-Based Claim

For a different reason than stated above, the Parent's Section 504 FAPE-based claim related to the after-care program is similarly not subject to the jurisdiction of the hearing officer because the Student in this circumstance is not considered "a protected handicapped student" as defined by Section 15.2 because the Student is eligible as defined by Chapter 14 (relating to special education services and programs) and this is a FAPE based-claim and not a claim of discrimination under § 15.10. Therefore the Parent cannot access any of the procedural safeguard contained in Section 15.8 – including a formal hearing - to resolve Chapter 15 FAPE-based claim.[4]

[4] If the hearing officer were called upon to render a substantive decision on this issue, however, for the same reason as articulated above regarding failure to establish or meet his burden of proof under the IDEA, the Parent would similar fail to establish a FAPE-based Section 504 claim.

B. Whether the District violated the Student's rights under the IDEA or Section 504 of the Rehabilitation Act when it refused to provide transportation to an out-of-district child-care provider?

1. IDEA

The Parent asserts that the transportation service contained in the Student's IEP is inappropriate in that it does not provide for him to be transported to a private after-care program. The hearing officer outright rejects the District's assertion that the issue of transportation was not raised as a resolution to this matter. In support of its assertion, the District references the paperwork the District completed and forwarded to the Office for Dispute Resolution which specifically states the Parents position that "He wants the district to transport his son to the child-care in Upper Dublin." (Exh.-8).

Reference to the regulations implementing the IDEA minimally flesh out the scope of the related service of transportation. Specifically, 20 U.S.C. Section 1402(3) (A) of the IDEA defines "related services" as "transportation, and such developmental, corrective and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) *as may be required to assist a child with a disability to benefit from special education*, and includes the early identification and assessment of disabling conditions in children.. 20 U.S.C. Section 1402(26)(A) (emphasis added).[5] The IDEA implementing regulations explain that "transportation includes—(i) travel to and from school and between schools; (ii) travel in and around school buildings; and (iii) specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with disability." 34 C.F.R. § 300.34(c)(16).

In *Alamo Heights Independent School Dist. v. State Bd. of Educ*., 790 F.2d 1153 (5th Cir. 1986), the Fifth Circuit addressed a similar transportation issue as that presented to the hearing officer. In *Alamo Heights* the only caretaker the parent could find for the student resided a mile outside the district boundary and the school district refused to provide transportation. 790 F.2d at 1156. In finding that the district was required to provided the transportation, the court reasoned:

> Section 1401(a)(17) of Title 20 specifically provides: "The term 'related services' means transportation, and such . . . other supportive services . . . as may be required to assist a

[5] The IDEA implementing regulations similarly define "related services" as "*transportation and such developmental, corrective and other supportive services as are required to assist a child with a disability to benefit from special education*, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabling conditions in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools and parent counseling and training. 34 C.F.R. § 300.34(a). The only exception to what constitutes a "related service" contained within the regulations are services that apply to children with surgically implanted devices, including cochlear implants. 34 C.F.R. § 300.34 (b) (emphasis added).

> handicapped child to benefit from special education." 20 U.S.C. Section 1401 (a)(17). The Act does not further define "transportation." The parties have not cited, nor can this court find, any case law directly addressing the out-of-district dimensions of this transportation issue. A district court in *Pinkerton v. Moye*, 509 F. Supp. 107 (W.D. Va. 1981). however, was faced with an analogous situation. In *Pinkerton*, the services required by the handicapped child were not available in her home school district, although they were available in a neighboring school district. The court refused to require the home school district to furnish the special services, finding that the provision of services to the child through adjacent school district was sufficient under the Act. But the court also found that, given the child's "special situation," it would be "appropriate" to require the school board to reimburse the child's parent if the parent decided to obtain alternative transportation to the neighboring school that would be more direct and accommodating than that provided by the home school district. *Id.* at 109
>
> This analysis suggests that the "transportation" required as a "related service" under the Act is not arbitrarily limited by the geographic boundaries of the school district so long as it is required for the special circumstances of the handicapped child and is reasonable when all of the facts are considered. The district court implicitly found Mrs. [redacted] request for one-mile out-of-district transportation for [her son] reasonable. The School District has not argued that the transportation would in any way create a burden, much less an unfair burden, on the School District or on other children being transported. There is neither evidence nor argument that going a mile out of the district boundaries would create any substantial additional expense, disrupt efficient planning of school bus routes, entail additional time to transport other children, or in any other way inconvenience other children on the bus route. Instead, the School District has merely insisted that, although "generic" transportation is defined as a related service required to enable a handicapped child to benefit from special education, out-of-district transportation, because it is out-of-district, is not. We cannot agree. n16 723 F.2d 432, 439 (5th Cir. 1984); *see also Marvin H. v. Student Indep. Sch. Dist.*, 714 F.2d 1348, 1353 (5th Cir. 1983); *Stacey G. v. Pasadena Indep. Sch. Dist.*, 695 F.2d 949, 954 (5th Cir. 1983). Unless the transportation request is shown to be unreasonable, the Act requires that such transportation be provided as a related service.

Alamo Heights, 790 F.2d at 1159-60.[6] The District's own actions with regard to this Student present a far more compelling set of facts than those presented to the Fifth Circuit in the *Alamo Heights* – specifically, the District refused the Student admission to its own after-care with out any hope of admission and he was already out-of-district for the implementation of his educational program.

a. Impact of Additional Information

While the hearing officer has not rendered a decision regarding the District's refusal to allow the Student access to its after-care program has been made, it seems unlikely that it will be changing its decision voluntarily. Its decision had been wholly unchanged by information provided by either the Parent or the Student's current after-care program. Specifically, as it relates to Parent provided information, the District appears have rejected the Parent's assertions that information the District relied upon in its decision making is inaccurate or unverifiable and that the Student's current living

[6] The federal district court for the Eastern District of Pennsylvania has, as recently at 2002, relied upon the finding of *Alamo Heights* regarding the nature of the right to the related service of transportation. *See Susavage v. Bucks County Intermediate Unit*, 2002 U.S. Dist. LEXIS 1274, at 35 (Docket No. CV 00-6217, January 22, 2002).

arrangements and supports have improved the Student's behaviors. (N.T. 58-59, 75-78, 93). As it relates to the current program, information at the hearing demonstrates that it has four staff members and thirty-five students and takes place in three locations on the premises of a regular elementary school - a classroom, the gym, and the playground outside. Each of the employees has an associate degree in early childhood education and expertise in child-care. Since the beginning of the Student's participation he was involved in two incidents that were not significant enough to merit a written behavioral report. One included running out of a classroom and the other related to tackling another student during a football game. The Student requires only minimal accommodations to the program in order to access his current after-care services. (N.T. 489, 490-92, 500). This program is not markedly different from what could be made available in the District's own program. (N.T. 266-261, 289-90, 303).

While it may or may not be considered additional evidence that the District should consider or, for that matter, in the end make a difference when the issue of access to the after-care program is decided, it is of note that when the District decided that no reasonable accommodation to its after-care program can make it accessible for the Student the District inaccurately used the after-care program budget as the lodestar for ascertaining whether certain accommodations constituted a financial burden. (N.T. 281-82, 347*).* For purposes of what is reasonable its analysis should have been based upon the entire District's budget not just the $2 million after-care program budget. Section 104.3(k) of the Section 504 implementing regulations

> (1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
>
> (2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or
>
> (ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system..... 34 C.R.F. § 104.3(k).[7]

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[7] See Federal Register, Volume 65, No. 219 (Nov. 13, 2000), at 68050-60051, The Legislative History of the 2000 Amendments to the Section 504 implementing regulations confirms this clearly established principle:

> The Department's civil rights regulations, when originally issued and implemented, were interpreted by the Department to mean that acceptance of Federal assistance by a school resulted in broad institutional coverage. In *Grove City College v. Bell*, 465 U.S. 555 (1984) (*Grove City College*), the Supreme Court held, in a Title IX case, that if the Department provided student financial assistance to a college, the Department had jurisdiction to ensure Title IX compliance in the specific program receiving or benefiting from the assistance, in this case, the student financial aid program, but that the Federal student financial assistance would not provide jurisdiction over the entire institution. Following the Supreme Court's decision in *Grove City College*, the Department did change its interpretation, but not the language, of these regulations to be consistent with the Court's restrictive, ``program specific'' definition of ``program or activity'' or ``program.'' Since Title IX was patterned after Title VI, *Grove City College* significantly narrowed the scope of jurisdiction of Title VI and two other statutes based on it: the Age Discrimination Act and Section 504. See S. Rep. No. 100-64, 100th Cong., 1st Sess. 2-3, 11-16 (1987).
>
> Then, in 1988, the CRRA was enacted to ``restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered'' (20

U.S.C. 1687 note 1.) Congress enacted the CRRA in order to remedy what it perceived to be a serious narrowing by the Supreme Court of a longstanding administrative interpretation of the coverage of the regulations. At that time, the Department reinstated its broad interpretation to be consistent with the CRRA, again without changing the language of the regulations. It was and remains the Department's consistent interpretation that--with regard to the differences between the interpretation of the regulations given by the Supreme Court in *Grove City College* and the language of the CRRA--the CRRA, which took effect upon enactment, superseded the *Grove City College* decision and, therefore, the regulations must be read in conformity with the CRRA.

This interpretation reflects the understanding of Congress, as expressed in the legislative history of the CRRA, that the statutory definition of ``program or activity'' or ``program'' would take effect immediately, by its own force, without the need for Federal agencies to amend their existing regulations (S. Rep. No. 100-64 at 32). The legislative history also evidences congressional concern about the Department's immediate need to address complaints and findings of discrimination in federally assisted schools under the CRRA definition of ``program or activity,'' citing examples to demonstrate why the CRRA was ``urgently'' needed (S. Rep. No. 100-64 at 11-16).

These regulatory amendments eliminate an issue recently raised by the Third Circuit Court of Appeals in *Cureton v. NCAA*, 198 F. 3d 107 (1999) (*Cureton*). That court determined that, because the Department did not amend its Title VI regulations after the CRRA amended Title VI, application of the Department's Title VI regulations to disparate impact discrimination claims is ``program specific'' (i.e., limited to specific programs in an institution affected by the Federal funds), rather than institution-wide (i.e., applicable to all of the operations of the institution regardless of the use of the Federal funds). The Department disagrees with the *Cureton* decision for the reasons described in this preamble. That decision would thwart clearly expressed congressional intent. In any event, the regulatory changes address the concerns raised by the Third Circuit in that the regulations track the statutory language and apply to both disparate impact discrimination and different treatment discrimination. (``Different treatment,'' i.e., intentional discrimination, refers to policies or practices that treat individuals differently based on their race, color, national origin, sex, disability, or age, as applicable. That different treatment is generally barred by the civil rights statutes and regulations. ``Disparate impact'' refers to criteria or methods of administration that have a significant disparate effect on individuals based on race, color, national origin, sex, disability, or age, as applicable. Those criteria or practices may constitute impermissible discrimination based on legal standards that include consideration of their educational necessity.)

The statutory definition, which is now incorporated into the regulations, addresses four broad categories of recipients: (1) State or local governmental entities. (2) Colleges, universities, other postsecondary educational institutions, public systems of higher education, local educational agencies (LEAs), systems of vocational education, and other school systems. (3) Private entities, such as corporations, partnerships, and sole proprietorships, including those whose principal business is providing education. (4) Entities that are established by a combination of two or more of the first three types of entities.

Under the first part of the definition, if State and local governmental entities receive financial assistance from the Department, the ``program or activity'' or ``program'' in which discrimination is prohibited includes all of the operations of any State or local department or agency to which the Federal assistance is extended. For example, if the Department provides financial assistance to a State educational agency, all of the agency's operations are subject to the nondiscrimination requirements of the regulations. In addition, ``program or activity'' or ``program'' also includes all of the operations of the entity of a State or local government that distributes the Federal assistance to another State or local governmental agency or department and all of the operations of the State or local governmental entity to which the financial assistance is extended. For example, if the Department provides financial assistance under Title I of the Elementary and Secondary Education Act to a State educational agency and the State educational agency distributes the financial assistance to a local educational agency, then all of the operations of the State educational agency are subject to the nondiscrimination requirements of the regulations, and all of the operations of the local educational agency are covered.

Federal Register: November 13, 2000 (Volume 65, Number 219), at 68050-68051

b. Out-of-District Placement

The District is already serving the Student outside of the district and at a location that is not as convenient to the Parent as a District school would be. The record demonstrates that during May and June 2006, the Parent stayed home from work in order to meet the Student when the bus dropped him off at 3:30 PM. In September 2006, there was no way to get the Student anyplace except an empty house, until the Student's case worker arranged to pick him up from school most days in September 2006 and bring the student to the parent's mother's house which is located within one mile of the Elementary School where his educational program is being implemented. This route was not considered as along an established bus route so the Parent's request for transportation there was denied. In October 2006, the parent had to start leaving work every day at two o'clock in order to pick the Student up at his three o'clock dismissal the time. The parent has been unsuccessful in finding someone who will provide child-care for the Student. There are very few providers located within the North Penn School District that provide after school care for school-age students. Fewer still who provide services for special needs children. (N.T. 64, 68-69, 70-72, 73-74).

In mid-October 2006, the parent was able to enroll the Student in an after-care program housed at Elementary School run by the YMCA, but the fact that the Student is currently in the YMCA program does not eliminate the need for the remedy requested by the Parent. First, the Parent does not believe this arrangement is ideal; second, it requires one hour round-trip transportation from his home to retrieve the Student at the end of the day (S-8, at 3); and third, because the District is in the process of reevaluating the Student, he may be reassigned to a new school in the near future.

As the record supports, the right to transportation afforded to students residing in the District is multi-faceted. It is not merely round-trip transportation to school from a student's residence within the district. Because every elementary schools within the District offers an at-parental-cost-District-run after school program, it provides for access to "a reasonably priced" program conveniently accessible to parents within the district without need for additional transportation to an off-site location. Moreover, the District provides all for pick up and drop off transportation to babysitters and day care centers along currently established routes. The record is similarly clear that based upon the severity of the student's disability, the District has placed the student in an out-of-district program located in Upper Dublin School District and has denied the student access to any and all locations of its after-care program. Not only has it not individualized its decision about the related service of transportation *as may be required to assist a child with a disability to benefit from special education* mandated by the Fifth Circuit in *Alamo Heights,* it has actually offered the Student a lesser quality of transportation service than it offers its non-disabled resident elementary school students. Based upon the foregoing, the District has violated the Student's rights under the IDEA by failing to offer appropriate related service of transportation as may be required to assist a child with a disability to benefit from special education.

2. *Section 504*

For the same reasons articulated in the analysis related to the IDEA, the parent's challenge to the District's failure to provide an appropriate related service of transportation is a FAPE based claim. This Section 504 claim is nonetheless not subject to the jurisdiction of the instant hearing officer because the Student in this circumstance is not considered "a protected handicapped student" under Section 15.2 because the Student is eligible as defined by Chapter 14 (relating to special education services and programs) and this is not a claim of discrimination under § 15.10. Therefore he cannot access any of the procedural safeguard contained in Section 15.8 – including a formal hearing - to resolve Chapter 15 FAPE-based claims. Recourse exists solely in the above provided Chapter 14 IDEA based review.

Credibility determination.

While there is a great deal of contradictory evidence that exists in the record regarding whether or not the Student can access the District's after-care program, the jurisdiction of the hearing officer precluded her from rendering a decision on this matter. It was therefore not necessary for purpose of this decision to make a credibility determination on this issue. The hearing officer, however, was required to render a decision on whether or not the Student required transportation to an out-of-district child-care as a part of a free appropriate public education. While several statements were made by District staff which suggested that it was not a required component of an appropriate program, the hearing officer concluded that these inaccurate statements were not issues of fact but conclusions of law which did not require a credibility determination in order to disregard them.

V. ORDER

AND NOW, this 2nd day of January 2007, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED that

The North Penn School District must reconvene an IEP team meeting to provide for modification to its transportation policy consistent with the holding of the *Alamo Heights Independent School District v. State Bd. of Education* related to provision of reasonable transportation outside of the District *as may be required to assist a child with a disability to benefit from special education* as long as the Student continues to be excluded from the District's after-care program and the parent is unable to access child-care for the Student within the District along established bus routes.

All other relief not contained in this order is specifically denied.

Dated: January 2, 2007

Rosemary E. Mullaly

Special Education Hearing Officer