



## The DBYD Difference

April 2009

### ABOUT DBYD

The attorneys at DBYD have been successfully representing individuals, businesses, insurers and governmental entities in the Greater Philadelphia region for over 30 years

We are big enough to handle all of your legal needs, but concentrated enough to maintain the personal one-to-one relationship so critical to helping you achieve your individual goals.

### CONTACT DBYD

Dischell, Bartle, Yanoff & Dooley  
1800 Pennbrook Parkway  
Suite 200  
Lansdale, PA 19466  
Phone: 215-362-2474  
Fax: 215-662-6722  
[www.dbyd.com](http://www.dbyd.com)

## Attorney Insights Special Education Law



**Brian Jason Ford**  
[bjford@dbyd.com](mailto:bjford@dbyd.com)

### NEWS FROM THE FRONT:

This special report includes a  
**Due Process Hearing Decision**  
in a case argued by DBYD

*By Brian Jason Ford, Esquire*  
[bjford@dbyd.com](mailto:bjford@dbyd.com)

## NEWS FROM THE FRONT:

This special report includes a Due Process Hearing Decision in a case argued by DBYD

*By Brian Jason Ford, Esquire*

bjford@dbyd.com

Later this month, the Supreme Court will hear *Forrest Grove School District v. T.A.* and the Third Circuit will likely issue a decision in *Layshock v. Hermitage School District*. Both of those cases will be big news, and I'll provide a complete analysis then. For now, here is a redacted Decision and Order from a case that I recently argued in a Pennsylvania Due Process Hearing. Please note that the appeals deadline has not expired, so there is a chance that a judge may reconsider the Hearing Officer's decision. Nevertheless, this case addresses a very interesting (and still unresolved) issue in the Third Circuit: to what extent does a school district's general obligation to educate a student in the least restrictive environment extend to transportation? This case also addresses burdens of proof and the admission of hearsay evidence in Pennsylvania administrative proceedings. An official copy will be posted on ODR's website in the coming months.

The professional rules that govern attorneys in Pennsylvania obligate me to tell you that I cannot guarantee the same results in any similar case. In short, there is no such thing as a slam dunk.

At points the Hearing Officer refers to things like "P-4" or "NT 234-239." P-# refers to exhibits offered by the Parents, D-# refers to exhibits offered by the District, and NT #-# refers to the hearing transcript (or Notes of Testimony). Also, for attorneys who do not typically practice in this field, the IDELR is the Individuals with Disabilities Education Law Report.

The Decision follows:

Pennsylvania Special Education Hearing Officer  
DUE PROCESS HEARING  
DECISION

Date of Hearing: February 10, 2009

Background

[STUDENT] is a thirteen year, nine months old eligible 7th grade student who is enrolled in the [SCHOOL DISTRICT]. [STUDENT] has a severe seizure disorder and has daily seizures such that throughout the school day he is provided with a one-to-one aide who is a nurse. The issue in this hearing involves afternoon transportation services. The District has offered [STUDENT] school-to-home transportation on the small school bus (hereinafter small school bus) which he rides to school in the morning. However, [STUDENT] and his parents, Mr. and Mrs. [REDACTED], (hereinafter Parents) want him to ride home on the District's large school bus (hereinafter large school bus) instead of on the small school bus.

The hearing was convened for one session, with the intent to reconvene by teleconference at the convenience of [STUDENT's] treating physician who was to testify for the Parents. The Parents ultimately decided not to call the physician as a witness, so the record was closed when Closing Arguments were received.

Prior to the hearing the District objected to the admission of one of the Parents' exhibits (P-4). Because [STUDENT's] physician, the author of the document, was scheduled to testify the hearing officer admitted the document. Upon learning, well after the conclusion of the first hearing session, that this witness would not be

available for examination and cross examination, the District renewed its objection to the document. The hearing officer must agree with the District, and therefore is removing the exhibit P-4 from the official record of this hearing. Had it remained as an admitted exhibit, this hearing officer would have been inclined to give it little weight as the physician was not available for examination or cross-examination as to his specific knowledge of the conditions on the large school bus and as to what if anything had changed since his correspondence of [REDACTED] wherein he prescribed home schooling due to the frequency of [STUDENT's] seizures.

#### Issue

Must the District allow [STUDENT] to ride home on the District school bus (large school bus) as opposed to the transportation (small school bus) currently offered by the District?

#### Findings of Fact

1. [STUDENT] is a thirteen year old seventh grader in the District's middle school. He is classified as having an Other Health Impairment, due to his epilepsy. (NT 30; P-6)
2. [STUDENT] had a fractured skull at age one and seizures started about a year later. He had brain resection surgeries in [REDACTED] to reduce the frequency of his seizures. (NT 30-31, 81-82)
3. [STUDENT's] baseline neural activity is focal seizure activity. His face twitches "pretty much nonstop". (NT 90-91)
4. [STUDENT] has many seizures daily in addition to the focal seizure activity baseline. Many of his seizures occur when he is sleeping at night, in bed in the morning, or as soon as he has something to eat in the morning. [STUDENT] has major seizures every morning before he gets out of bed. (NT 53-54, 56, 89, 90-91)
5. Depending on the frequency and severity of the morning seizures, [STUDENT's] mother may medicate him, drive him to school herself rather than let him be transported on the small school bus, or keep him home from school. [STUDENT's] morning seizures are good predictors on most days of how the rest of his day will be. (NT 32, 57, 86-89,106)
6. [STUDENT] misses a great deal of school because of his seizures. As of the date of the hearing he had 36 absences in the 2008-2009 school year. From December 3, 2008 until the date of the hearing February 10, 2009 [STUDENT] was in school a total of 19 days, one week (presumably 5 days) of which was for an allergic reaction that was separate from his seizure disorder. (NT 31, 90, 208-209; S-5)
7. He receives Phenobarbital, Diazepam, Trileptal, and Rufinamide (Banzel) on a daily basis. If he has had three seizures in the morning his mother also medicates him with Klonopin which does not make him tired. (NT 59, 80, 86-87)
8. Diastat is a medication that is used as needed to treat more serious or major seizures, i.e., cluster seizures or seizures over five minutes. The liquid medication is administered via rectal insertion. (NT 49-50)
9. The morning seizures tend to be the more major seizures, tonic seizures or convulsion seizures. During a major seizure [STUDENT] starts by making repetitive mouth movements/sounds, he shakes, clenches on the right side and then his arm or leg may swing out or stiffen. These types of seizures can last a minute to several minutes. When he has a seizure such as this his mother holds him. (NT 54-55, 93)
10. Other daily seizures [STUDENT] has involve his just shaking for a minute with his head nodding; these seizures last a minute or two, do not turn into convulsions and he is fine right afterwards. (NT 56, 94-96)
11. [STUDENT] experiences an aura before his seizures, and he will say that he has a headache (his term for when he feels a seizure coming on) and then hug the person helping him. The mother testified that the family doesn't "say 'seizure' in our house. We call them headaches". (NT 56, 91, 232)
12. As per his IEP, to accommodate his morning seizures, [STUDENT's] school day starts later than the

rest of the students; the small school bus picks him up at 9:30 am. (NT 31-32)

13. As per his IEP, [STUDENT] has a one-to-one aide sitting right across from him on the small school bus on the way to school, and during the entire school day up to and including when he enters his mother's car for the ride home. The aide is a Licensed Practical Nurse who is Board-Certified. (NT 32, 82-83, 102, 129, 165-168, 182; S-2)
14. The small school bus ride from home to school is about 20 minutes long. He is the only student on the small school bus in the morning. He sits in a seat across from his aide. (NT 32-33)
15. [STUDENT] has never had a seizure on the small school bus in the morning as his mother exercises the option of keeping him home for the day or driving him to school herself if his seizure activity is on the more severe end of the spectrum. (NT 33)
16. After an [REDACTED], 2006 meeting the Parents gave the school permission in writing to "conduct one conference call with us and [STUDENT's] surgeon's office" about four subjects, one of which was "Bus Protocol". (NT 46,48; P-5)
17. The neurologist who has been treating [STUDENT] since before his 2006 surgery wrote a letter on [REDACTED], 2006. The neurologist was not [STUDENT's] surgeon. The letter stated that there were no limitations on [STUDENT's] general activity, with the exception of contact sports. The physician approved an "adaptation for field trips" that had been "outlined by Ms. [NURSE]". Ms. [NURSE] was the elementary school nurse. (NT 45; P-3)
18. The "bus protocol" for field trips that the District had devised and that the neurologist approved was that a nurse would accompany [STUDENT] on the large school bus, with the mother following behind in a car to provide privacy in the event that he needed to be administered Diastat and to provide transportation home if he needed to leave before the trip was over. (P-5)
19. [STUDENT] took several trips to the District's high school planetarium in elementary school using the protocol, and one trip to the New Jersey Aquarium, and never had an incident related to his epilepsy on the field trip bus. (NT 50-51)
20. However, on [REDACTED], 2008 the neurologist wrote of [STUDENT] that "Due to the frequency of his seizures I am recommending that he be home schooled until the end of this school year". [STUDENT] was able to return to school in September 2008. (NT 64, 152; P-3)
21. [STUDENT's] Health Care Plan provides that if [STUDENT] has seizures of a certain severity ("several seizures, a seizure of any duration, or how [STUDENT] says he feels") and can not continue for that day in school his mother will pick him up from school. It also provides that mother will pick him up if he has a seizure at 2 o'clock (or after). (NT 75, 94; S-4)
22. His mother has had to pick him up from school "several" times. She hesitated to specify the number but said that this school year she has picked him up ten times or fewer at lunchtime or early afternoon. The current nurse/aide recalls that a parent has picked him up after a seizure two or three times since she started on the case on December 3, 2008. (NT 73-74, 191)
23. On October 25, 2008 the Parents wrote giving the school permission to speak with "[STUDENT's] physicians (locally and from NYU)" regarding his condition and "any information that is relevant to the provision of a safe and appropriate environment" in five specific areas, one of which was "bus protocol for field trips". (NT 48; P-5)
24. According to a Seizure Observation Record and what appear to be Nurse's Card notes, [STUDENT] had seizures in school on 9-3-08 (2 seizures), 9-9-08, 9-10-08 (mother reported 14 seizures in past 24 hours), 9-15-08, 9-17-08, 9-26-08 (with gagging and vomiting), 9-27-08, 10-2-08, 10-3-08, 10-16-08 (3 seizures), 12-3-08, 12-17-08, 1-13-09 (2 seizures). According to the nurse/aide [STUDENT] has had seven seizures since she assumed her duties, indicating therefore that there were 3 more seizures between 1-14-09 and one of these three, the one most recent in time to the date of the due process hearing, was in gym class and was the most severe the current nurse/aide witnessed. (NT 197-201, 204-205; S-6)
25. Since the nurse/aide has been working with [STUDENT] (December 3, 2008) he has had two major seizures in school, the recent one in the gym and one before that in history class which meets after lunch, around 12:30 or 1:00 pm. (NT 183)

26. In gym [STUDENT] was very red in the face indicating that he was overheated. Overheat something that "absolutely" can trigger a seizure for [STUDENT]. (NT 96-97)
27. [STUDENT] experiences more seizures when he is tired or when he is stressed. (NT 97)
28. [STUDENT'S] seizures in school tend to occur at or around lunchtime or after (between 11:00 and 2:00). Of about seven seizures since December 3rd, three have been in the cafeteria. These seizures have lasted about a minute to a minute and a half. His seizures can start out as one kind of seizure and then go into another type. (NT 97-98, 154, 173, 184, 187, 190, 192-193)
29. When [STUDENT] has a seizure in school he is already sitting, or is "sat on the ground or laid down", his arms are rubbed, he is spoken to quietly and watched until he comes out of it. Seizures are timed and his condition is assessed post-seizure. (NT 92, 110, 169-170; S-6)
30. Post-seizure behavior can range from falling asleep to reorienting quickly. (NT 170-171)
31. If he rode the large school bus, [STUDENT] would board the bus on the side of the school where the large school buses line up. If he rode the small school bus he would board the bus on the side of the school where the students who walk home and the students who are picked up in private cars exit the school. The boarding area for the small school bus is the same area where he is dropped off in the morning and from where his mother picks him up in the afternoon. (NT 83-84, 149-150)
32. The nurse/aide believes that the District's offer of the small school bus is appropriate. There is "a lot of room" on the small school bus, with wider walkways in the aisles, wider seats and fewer riders. The nurse/aide believes that if [STUDENT] were to have a seizure on the small school bus it would be much easier for her to handle it. It would not be difficult to administer the Diastat because there are many fewer students, there are empty seats and there is room in the back of the bus if needed. (NT 176, 178)
33. The school nurse, who was the "bus nurse" for ESY believes that the small school bus is appropriate for [STUDENT] because the seats are wider, the seats are higher in the back, there is a bigger aisle, and there are fewer seats in the back with a space for a wheelchair. The small school bus allows for a wider area if he should be flailing. The small bus would be more easily pulled over for safety reasons if the nurse gets out of her seat to assist [STUDENT] because someone cannot be in the aisle while the bus is moving. (NT 244-245)
34. The District is concerned about [STUDENT's] safety on the large school bus in terms of the distance of the large school bus route compared to the small school bus route, the student numbers (55-60 and upwards to 70 students) contributing to the noise factor, the space factor and the heat factor at certain times of the year on the large school bus, the narrower aisles on the large school bus, and the lack of air-conditioning on the large school bus. (NT 118, 124-127, 148, 154, 162)
35. The District is also concerned about the safety of [STUDENT] and the other students on the large school bus. If [STUDENT] should have a severe seizure on the bus and/or if he needed to receive a rectal dose of Diastat, the bus would likely have to be pulled over. The bus would be pulled over in case [STUDENT] started to move around a lot, or flail, or stand. Since the current nurse/aide has been working with [STUDENT] there have been a few seizures when [STUDENT] was moving his arms about. The nurse/aide would likely be standing trying to treat him. It would be much easier for the small school bus to find an appropriate place to pull over safely than for the large school bus to find a safe place to pull over. (NT 133, 154, 158-159, 176-177, 206, 210-212, 242)
36. In order for the nurse/aide to assist with [STUDENT's] less severe seizures on the bus she would have to be seated in the same seat next to him. (NT 161)
37. The nurse/aide believes that the large school bus preferred by [STUDENT] and the Parents is not appropriate because the number of students, their backpacks, the loud noise and other things going on would make his seizures very difficult to treat. If the bus were moving the nurse/aide could fall or [STUDENT] could fall. Additionally if he needed Diastat it would be very difficult to administer it in the large school bus. (NT 177-178)
38. The school nurse also believes that the large school bus preferred by [STUDENT] and the Parents is inappropriate because seventh, eighth and ninth graders who are not in his class are all on the large school bus, many of the students would not know [STUDENT], middle school students can be "horrendously cruel" and loud and noisy and it would be difficult for the driver to control the bus if the

students were making inappropriate remarks about [STUDENT's] seizures, his aide's response, Diastat treatment. (NT 246-247)

39. The school nurse noted that even if [STUDENT] were in the large school bus, having his nurse/aide sitting right beside him would preclude peer interaction, and if she were not sitting right near him she would either not hear him if he were in distress or would have difficulty climbing over backpacks, sports gear, and instruments that would be in the aisle to reach him. (NT 247)
40. The school nurse is concerned about [STUDENT's] space needs as he grows bigger and about his dignity if he had to receive Diastat. She is of the strong opinion that even if the large school bus were air-conditioned, if the seats were wider, if it were not overcrowded, hot and noisy it still would not be appropriate because there isn't as much room available to provide privacy and dignity. (NT 251)
41. The school nurse is of the opinion that at age 13 [STUDENT's] opinion about what might be best for him, and that it wouldn't matter if he received Diastat on the bus is not necessarily what is best for him. She testified that in her experience with middle schoolers it would only take one uncouth youth who may not be in [STUDENT's] grade and is not his peer making statements about it to cause a huge source of embarrassment to [STUDENT]. (NT 252)
42. The school nurse noted that in school if [STUDENT] needed Diastat it would be possible to clear out a whole area and put the other students elsewhere, but it would be unsafe to clear the whole bus of students. If a seizure lasted four minutes it would be time to prepare to administer the Diastat and remove the other students from the area so that at the five minute mark it could be privately and safely administered. (NT 253, 256-257)
43. In IEP meetings on March 1, 2007 and on August 27, 2008 the District offered to transport [STUDENT] home on the small school bus, but the Parents emphatically rejected this offer. (NT 38-39, 42-44)
44. Mother testified the Parents rejected the District's offer because [STUDENT] ".. .has enough trouble. He has a problem. I wasn't having him walk out there in front of all the kids and get in the special education bus. He was extremely upset about that." The mother maintains that [STUDENT] would be embarrassed to ride the small school bus home in the afternoon because "he feels normal. He thinks riding the special education bus makes him different". (NT 39, 105, 108-109)
45. The mother told [STUDENT] that she would drive him home every day instead of his taking the small school bus. The mother has driven [STUDENT] home every day this school year. [STUDENT] asks every day if he can ride the large school bus. He wants to ride the large school bus with his friends. (NT 39, 41, 107, 150)
46. [STUDENT's] Parents maintain that [STUDENT] is very comfortable about his seizure disorder and has spoken to his class about it in elementary school and in middle school. (NT 85)
47. [STUDENT] does not complain to his nurse/aide about riding the small school bus in the morning going to school and has never expressed to his nurse/aide any embarrassment about taking the small school bus. (NT 167-168)
48. [STUDENT] went to the [REDACTED] summer camp last summer; his parents drove him to and from camp. (NT 58)
49. Diastat has not had to be administered in school to date. (NT 60, 183-184)
50. The Parents offered the school a "privacy sheet" to hold in front of [STUDENT] if Diastat needs to be administered. (NT 61)
51. Although it is rectally administered, the Parents believe that the privacy sheet is "not for [STUDENT's] sake because he doesn't mind" but was offered "if the school is worried that someone else might see". (NT 61)
52. The Parents maintain that "in [STUDENT's] eyes there is no difference of him getting Diastat on the bus in front of the kids versus in gym or in the cafeteria in front of the other kids". (NT 109)
53. [STUDENT] has not yet reached puberty. (NT 110)

In November 2005 the U.S. Supreme Court held that, in an administrative hearing, the burden of persuasion in cases brought under the IDEA is properly placed upon the party seeking relief. Schaffer v. West, 126 S. Ct. 528, 537 (2005). The Third Circuit addressed this matter as well more recently. L.E. v. Ramsey Board of Education, 435 F.3d. 384; 2006 U.S. App. LEXIS 1582, at 14-18 (3d Cir. 2006). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. This burden remains on that party throughout the case. Jaffess v. Council Rock School District, 2006 WL 3097939 (E.D. Pa. October 26, 2006). As the Parents asked for this hearing, the Parents bear the burden of persuasion. However, application of the burden of persuasion does not enter into play unless the evidence is in equipoise, that is, unless the evidence is equally balanced so as to create a 50/50 ratio. Although in this case the evidence was not in equipoise, as the facts overwhelmingly supported the District's position, this hearing officer nevertheless found the case to be quite difficult because of her admiration of the Parents' enduring efforts to care for their child and of [STUDENT's] grace in dealing with his disability.

Special education issues are governed by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA" or "IDEA 2004" or "IDEA"), which took effect on July 1, 2005, and amends the Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. § 1400 *et seq.* (as amended, 2004).

'Special education' is defined as specially designed instruction... to meet the unique needs of a child with a disability. 'Specially designed instruction' means adapting, as appropriate to the needs of an eligible child... the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child's disability and 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

The FAPE requirement under Section 504, unlike under the IDEA, is defined to require a comparison between the manner in which the needs of disabled and non-disabled children are met, and focuses on the "design" of a child's "educational program". Mark H. v. Paul Lemahieu, 513 F.3d 922, 933. As defined by the regulations, a Section 504 FAPE requires education and services "designed to meet individual educational needs of handicapped persons as adequately as the needs of non handicapped persons are met." 34 C.F.R. §104.33(b)(1). (*Emphasis added*)

This case revolves around the question of whether or not the transportation offered to [STUDENT] by the District is appropriate and delivered in the least restrictive environment that is appropriate for his situation. A District's obligation to provide FAPE includes transportation services in some cases, but not in all cases. FAPE is defined as "special education and related services" provided according to the IEP. 20 U.S.C. § 1401(9); 34 C.F.R. §300.17. The term "related services" is further defined at 34 C.F.R. §300.34(a):

Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education ...

The United States Supreme Court has made it clear that districts are required to provide only those services that are necessary to enable the child to benefit from education. In Irving Independent School District v. Tatro, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed. 2d 664 (1984), the Court stated that "only those services necessary to aid a handicapped child to benefit from special education must be provided ..." Thus, a child with a disability is entitled to transportation only if transportation is required to help that child benefit from Student's or her special education as set forth in the IEP. In the instant matter [STUDENT's] IEP team has deemed transportation services necessary and has incorporated them into the IEP.

Concluding the regulations were unclear as to whether the IDEA'S LRE mandate applied to transportation, in Ms. S. ex rel. L.S. v. Scarborough Sch. Committee, 42 IDELR 117 (D. Me. 2004) the U.S. District Court, District of Maine held that transportation on a regular education bus was the particular student's least restrictive environment but that mode of transportation did not then require a special "handing off arrangement which was available on the special education bus. However, in its opinion, not binding in this circuit but nevertheless

instructive, the court noted that "it is not at all clear that the 'least restrictive environment' requirement IDEA applies to transportation. It requires that, to the maximum extent appropriate, disabled children be 'educated with' children who are not disabled and that they be 'removed ... from the regular educational environment... only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.' 20 U.S.C. § 1412(a)(5)(A) (emphasis omitted). There is no sense in which a school bus may be considered to be a 'regular class,' nor is education the purpose of daily trips on the school bus". *Quoting Shawnee Mission Unified Sch. Dist.No. 512*, 102 LRP 2903 (Kansas State Educ. Agency, Mar. 29, 2000), at 2 the Maine court noted "There is, therefore, of necessity, a distinction between related services [in this case, transportation] and those services specifically designed to meet a child's needs as expressed through the goals stated in an IEP."

Assuming nevertheless the strictest interpretation of an LRE requirement regarding transportation, in deciding whether a student is offered FAPE, the least restrictive environment is but one factor to consider. Although under the former two-tier due process system an appeals panel wrote that "FAPE is not necessarily accomplished through strict adherence to least restrictive environment principles" [*In Re H.M.*, Spec. Ed. Opinion 1559 (2005)] this hearing officer holds that examining least restrictive environment principles is necessary in all cases, but that the principles must be understood to mean that a student is entitled to the least restrictive environment that is appropriate for the child. As such, this hearing officer is in agreement with the District, as stated in its closing argument, that "[w]hen proper LRE analysis is applied, school districts are obliged to offer the least restrictive of those appropriate placements. That analysis, however, contemplates several placement options that are otherwise appropriate. In this case, the Parents begin with the implicit assumption that the competing transportation options are equal or, minimally, that the demanded transportation is appropriate. This assumption is false. The transportation offered by the District is appropriate, but the transportation demanded by the Parents is not".

[STUDENT] has, by his mother's description, a severe seizure disorder that manifests on a daily basis (FF 4, 5, 9, 10) despite a medication regimen that includes four daily medications and two other medications prn (FF 7,8). The condition has required special accommodations including a late start time to his school day (FF 12), a one-to-one nurse/aide accompanying him at all times both in school and on the small school bus in the morning (FF 13), breaks in the school day when he is tired (S-6), leaving school when he requests to leave or leaving school because of certain types/frequencies of seizure activity (FF 22), and many excused absences (FF 6). His seizure activity was so frequent that in May 2008 his neurologist ordered home schooling for the remainder of the school year (FF 20).

On days when his mother does not transport him in the morning, the District transports [STUDENT] to school accompanied by a nurse/aide via a small school bus. The District has offered the same transportation option to [STUDENT] for his afternoon transport on days that he can remain in school until the normal end of the school day. As opposed to the large school bus, the small school bus in the afternoon affords [STUDENT] fewer student riders, a shorter ride time, wider seats with higher backs, more inner maneuvering space, air-conditioning and easier maneuvering in traffic (FF 32, 33) This transportation arrangement is judged by this hearing officer to be appropriate.

The large school bus presents with between 55 and 70 students along with their backpacks, their sports equipment and their musical instruments, a longer ride, narrower seats with lower backs, little if any inner maneuvering space, no air-conditioning and more difficulty maneuvering in traffic (FF 34, 35, 37, 38). This transportation arrangement is judged by this hearing officer to be inappropriate.

This hearing officer reaches her conclusions regarding appropriateness of the District's offered transportation and inappropriateness of the Parents' requested transportation on the facts presented, common sense, and the witnesses' credibility. Addressing this last factor, it is noted that hearing officers are empowered to judge the credibility of witnesses, weigh evidence and, accordingly, render a decision incorporating findings of fact,

discussion and conclusions of law. Thus, part of the responsibility of the hearing officer is to assign weight to the testimony and documentary evidence concerning a child's special education experience. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses". Blount v. Lancaster-Lebanon Intermediate Unit, 2003 LEXIS 21639 at \*28 (2003).

Although [STUDENT's] mother testified that her son is very comfortable with his disorder (FF 46), she also testified that he is embarrassed to ride the small school bus (FF 44) and she has supported him in this to the point of transporting him home herself every day (FF 45), leaving from the same place in school from which the small school bus departs (FF 31). Similarly it presents a riddle to this hearing officer to contemplate that a 13-year-old boy reportedly would not mind having a medication inserted into his rectum in the presence of his peers, with or without a privacy blanket, but would not feel normal riding the small school bus (FF 51, 52). This hearing officer found the District nurses who testified very credible. First of all the nurse/aide who is actually with [STUDENT] all day in school treating his seizures and who also rides with him on the small school bus presented a convincing picture of the difficulty she would encounter treating [STUDENT] on the large school bus as opposed to the small school bus (FF 32, 37). Moreover, in her morning conversations with [STUDENT] during the 20-minute bus ride to school he has never expressed discomfort with riding the small school bus (FF 14, 47).

The school nurse's testimony was likewise credible, particularly as she had been the ESY bus nurse and had a first hand knowledge of what happens on ordinary school buses (FF 33). Her testimony about the unfortunate cruelty arising from the immaturity of some middle school students was down-to-earth and realistic, and this hearing officer appreciated her candor in this regard (FF 38, 40, 41). The District has plans to provide [STUDENT] privacy in school should a major seizure of four minutes' duration necessitate preparation for administration of Diastat to [STUDENT] (FF 42). It is important to note that [STUDENT] has not reached puberty with its attendant physical and psychological changes (FF 53). The Parents are encouraged to consider seriously the implications of pubertal changes, and to recognize that teenagers, even friends, can be highly inappropriate particularly regarding bodily functions, and that one incident that triggers ridicule, even in jest, could follow [STUDENT] throughout the rest of his public school career. In an ideal world these would perhaps not be necessary considerations, but in this real world [STUDENT] deserves to be protected and his dignity preserved, even against his stated wishes. It is also suggested that his peers likewise need to be protected against being in a situation where in their immaturity and desire to show off they may make inappropriate comments for which they then would suffer consequences, however richly deserved.

#### Order

It is hereby ordered that:

The small school bus transportation offered to [STUDENT] by the [REDACTED] School District is appropriate and represents the least restrictive environment for him.

March 23, 2009

The DBYD Difference is published by Dischell Bartle Yanoff & Dooley, P.C. It does not, and is not intended to, constitute legal advice. Your receipt of this publication does not create or constitute an attorney-client relationship. You should not consider this publication to be an invitation for an attorney-client relationship, you should not rely on the information provided in this publication without first obtaining separate legal advice, and you should always seek the advice of competent legal counsel in your own state. This publication should not be viewed as an offer to perform legal services in any jurisdiction other than those in which DBYD's attorneys are licensed to practice. DO NOT send DBYD any information concerning a potential legal representation until you have spoken with one of DBYD's attorneys and obtained authorization to send that information.