

BRIEFING REPORT

TO: June Eanes, Michael Brown
Doug Cox

FR: Judy Douglas

DATE: April 6, 2012

SUBJECT: **TRANSPORTATION FOR STUDENTS WITH DISABILITIES –
EVACUATION DRILLS**

I completed research on the above referenced topic you brought to Doug and me. The following sets forth my review from a regulatory perspective and recommendations for revisions in both policy and training efforts. I am available should you have any questions or wish to discuss the matter further. Additionally, if after your analysis, you want the Attorney General's office to review the issue, please advise me and I will prepare a packet of all this information for them and request for their legal opinion.

Nature of Query: You have asked me to review the issue of emergency bus evacuation drills for students with disabilities and propose language for a policy statement addressing the same, as well as possible revision to the regulation at 8 VAC 20-70-110 (2).

Background: Virginia transportation regulations require all "pupil riders" to practice emergency bus exit drills at least twice a year. VDOE's Training Curriculum on Transportation states that students with special needs "should actively participate in evacuation drills." You noted that schools are not actually removing all special education students from buses during evacuation drills. Furthermore, aides are either not present on buses during these drills, or students who have aides in the school building are not necessarily being assisted by these aides during the bus evacuation drills.

Specific Questions To Be Addressed:

- (1) What rules regulate execution of a bus evacuation drill?
- (2) Does "practicing" a drill require evacuation?
- (3) Does 8 VAC 20-70-110 (2) require revision?
- (4) What elements should be considered in VDOE's Policy and Training on evacuation drills?

What Rules Regulate Execution of a Bus Evacuation Drill?

State law and local policy largely determine the appropriate safety procedures for transporting students with disabilities. *Letter to McKaig*, 211 IDELR 161 (OSEP 1980).¹

¹ Throughout this report "OSEP" refers to the US ED's Office of Special Education Programs. "IDELR", "LEXIS", and "LRP" refer to the law reporting services that our office uses. "SEA" refers to a hearing officer's decision.

Additional regulation of safe transportation practices comes from the National Highway Traffic Safety Administration, which has established federal laws regulating the special safety requirements for school buses used to transport students in wheelchairs. Local policies must be consistent with all federal standards. Just as OSEP enforces compliances with federal law and regulations governing special education, the US Office for Civil Rights (OCR) also enforces compliance with federal laws, as well as applicable state and local regulations relative to transportation of students with disabilities. *Prescott (AZ) Unified Sch. Dist.*, 29 IDELR 69 (OCR 1998).

The National Highway Traffic Safety Administration (NHTSA) has developed a series, which is available in its entirety for online download, which includes a training module on “Transporting Students with Special Needs.” It is available at: www.nhtsa.gov/people/injury/buses/UpdatedWeb/topic_9

While this training module does not have the force of law, it can certainly be valuable as a reflection of that federal agency’s interpretation of its own regulations and therefore should be given great weight and deference.

Does “Practicing” a Drill Require Actual Loading Onto and Evacuation from the Bus?

The short answer is: No.

The NHTSA training module does call for conducting “regular” evacuation drills for disabled students with the same regularity as for non-disabled students. The module notes that some students “may be physically unable to fully participate in the drills but **they should always be walked through the drill.**” (emphasis added) The following recommendations are made:

- Consult the IEP team about a student’s ability to participate.
- It may make sense to do the drill in the classroom to avoid unnecessary risks initially but it should also be practiced on the bus;
- Or do the drill with some of the students and have other students watch to see the process.

This guidance is consistent with that provided in the past by OCR. In *Allegheny (PA) Intermediate Unit*, 20 IDELR 563 (OCR 1993), OCR declared that students with disabilities must participate in evacuation drills to the extent that they are able, given the nature of disabilities, but that their participation in such drills could be excused or modified as appropriate given their disability.

Other rulings from OCR suggest that an evaluation of the student’s ability to participate in an evacuation drill, and in what manner or to what extent, may be required. It is clear that school divisions must evaluate a student’s needs when developing a transportation plan. In some cases, such evaluations have been conducted by a student’s physician or physical therapist. *See, Board of Education of the City School District of the City of Saratoga Springs*, 106 LRP 16961 (SEA NY 2003); *Allegheny (PA) Intermediate Unit*, 20 IDELR 563 (OCR 1993); *Greenbrier*

County (WV) Sch. Dist., 16 IDELR 616 (OCR 1989); *Charles County Public Schools*, 52 IDELR 302 (SEA MD 2009). A logical extension of the requirement for a transportation evaluation would be for that evaluation to include recommendations that would assist the IEP team in devising an evacuation plan for the student, as well as an evacuation drill plan. Since provision of transportation is a related service, it is properly addressed by the student's IEP team. *See, Saratoga Springs*, 106 LRP 16961; *Letter to McKaig; Oceanside Unified School District*, 112 LRP 14645 (SEA CA 2012).

Does 8 VAC 20-70-110 (2) Require Revision?

The short answer: No, if the following policy elements are adopted.

Proposed Language for VDOE's Policy² on Participation in Evacuation Drills

As a preliminary matter, it may be appropriate to require school divisions to use the NHTSA's training module(s), since those modules are easily available and obviously endorsed by the federal agency charged with promulgating the safety regulations with which the school division must comply. This would be a more direct approach than simply adopting the recommendations made by the NHTSA. It would certainly NOT be advisable to adopt some, but not all, of the NHTSA's recommendations.

Another consideration is what position VDOE wishes to take vis-à-vis defining the term "pupil riders." Since all students may ride a bus during the course of a school year, even if only occasionally for a fieldtrip, it may be appropriate to require all students to participate in bus evacuation drills. This can be done by way of the policy statement (by using the term "all students" instead of "pupil riders"), or by taking the more concrete step of amending the regulations to define the term. I suggest simply adjusting the term used in the policy statement.

If "pupil riders" is interpreted to mean "all students," which the regulation implies, then school divisions may require some guidance on when, or if, failure of a student to participate in the required bi-annual drills can be excused. It is certain that some students will be absent from school on any given day, so clarifying for schools the extent to which VDOE expects compliance with the regulation would be helpful to compliance monitoring. Perhaps such guidance is already in place; but if it is not, it would be advisable.

Policy Elements

- Students with disabilities must participate in emergency exit drills to the extent that they are able, given the nature of their disabilities. Participation in actual loading onto, and evacuation from, a traditional school bus vehicle may be excused if the physical acts involved would put a student at risk of injury. However, for those students whose disability precludes full performance of a traditional evacuation drill, the school division must develop a modified drill that is designed to reasonably

² The term "Policy" may be revised to "Protocols", or other substitute language.

prepare the student and/or transportation personnel to respond safely in the event of a vehicle emergency.

- The inability of some disabled students to participate in traditional emergency exit drills does not permit the school division to categorically exclude all disabled students from participation in drills. School divisions must consider the safety of all students during transportation emergencies and develop contingency plans for disabled students to make sure they have the same opportunity to escape to safety as their nondisabled peers. Plans should be put in writing and all transportation personnel should be familiar with the plans' contents and understand their roles and responsibilities in implementing the plans. For example, special procedures must be developed for students who are deaf and cannot hear instructions, students who are blind, students with mobility impairments who have no movement or limited movement, and students with cognitive impairments (such as certain students with intellectual disabilities) who do not understand the full impact of the dangers to which they are exposed.
- Contingency plans and drill modifications must be individualized in order to take into account the particular needs of each disabled student, the availability of adult personnel to assist the student in the event of an actual emergency requiring vehicle evacuation, and the characteristics and features of the vehicle in which the student is typically transported. To be relevant, drills should to the extent possible anticipate the student's typical transportation experience. For example, it may be inappropriate for a disabled student who is transported in a sedan-like vehicle to practice an evacuation drill from a traditional school bus. Participation in a drill by a student with a cognitive impairment who would not understand the drill might seem unwarranted, except that the drill would give the adult(s) responsible for transporting the child (driver and/or aide) practice that would be relevant in case of an actual emergency. Thus, limitations on a student's ability to safely and independently load and unload from a traditional school bus does not excuse the school from considering the purpose of Virginia's emergency exit drill mandate: to make sure that all students and transportation personnel are reasonably prepared to respond safely in the event of a vehicle emergency that occurs during transport to or from school. (emphasis added).

What Elements Should Be Considered in VDOE's Training on Vehicle Evacuation Drills?

The Role of the Aide

Whether or not a student rides the bus with an aide, an aide who serves a student while in the school building may be required to assist that student in a bus evacuation drill. This conclusion is logical because a school bus evacuation drill is conducted on school property, during the school day, and does not involve "operation" of the vehicle (i.e., the bus is not moving). In the case of *Robinson v. Forrest Marshall Peirce*, 2010 U.S. Dist. LEXIS 138678 (MD PA, 2010), a blind student with osteoporosis participated in a bus evacuation drill and was

instructed to jump from the rear door of a bus parked in front of his school. The school was aware of the student's disabilities but did not provide an aide to assist him in the evacuation drill. The student was injured as a result of jumping out of the bus, and his parents sued the school division. The court dismissed the case, but noted that the "failure to render assistance to the minor Plaintiff in conducting the bus evacuation drill may amount to negligence on the part of the school district." *Id. at *22*. Because safety is a FAPE issue, the dismissal of the parents' negligence claim does not speak to the dereliction of the school's duties to provide the student FAPE by denying him/her the assistance of an aide to allow him/her to safely participate in a school activity during the academic portion of the student's school day.

- ❖ Neither Section 504 nor the ADA (Americans with Disabilities Act) requires the provision of aides on school buses that transport students with disabilities. *Prescott (OCR)*. However, under IDEA, if personalized services are warranted in the classroom, there is a compelling argument that they also will be needed on the school bus. The provision of an aide on the school bus may be necessary to enable the student to ride with nondisabled peers and thereby satisfy LRE (the mandated standard of least restrictive environment). Aides have also been necessary for students who ride alone in a vehicle to and from school. *Dallas Indep. Sch. Dist.*, 26 IDELR 364 (SEA TX 1997). See also, *DeLeon v. Susquehanna Community Sch. Dist.*, 556 IDELR 260 (3d Cir. 1984); *San Mateo-Foster City Sch. Dist.*, 31 IDELR 23 (SEA CA 1999).
- ❖ Aides may be expected to perform a variety of functions and duties for the children to whom they are assigned. Aides have been required to ensure a student's safety, supervise behavior management programs, play a communication function, convey the student from residence to the bus, and even administer medical procedures on the school bus. See, e.g., *District of Columbia v. Ramirez*, 43 IDELR 245 (D.D.C. 2005); *Mobile County Bd. of Educ.*, 34 IDELR 164 (SEA AL 2001); *Allegheny (PA) Intermediate Unit*, 20 IDELR 563 (OCR 1993). The Illinois Department of Education determined that an IEP, which provided a medically fragile student primarily with a one-to-one aide rather than a one-to-one nurse, violated the IDEA. The district was directed to provide the student with a one-to-one nurse for the entire school day as well as when he was on the bus. *East Maine Sch. Dist.*, 111 LRP 70690 (SEA IL 2011).
- ❖ If the nature of a student's physical disabilities prevents the child from maneuvering independently, a personal attendant to assist the student during transportation will likely be necessary. On the other hand, if the student is able to manipulate his or her body and equipment without the help of others, the child may manage without a full-time aide and may simply require occasional assistance from the bus driver or other persons. Typically, the students who require this level of personal support have severe disabilities that render them unable to use their limbs, such as persons whose physical condition would be termed "paraplegic" and "quadriplegic." See, *Seattle Sch. Dist.*, 16 IDELR 1091 (SEA WA 1990); *Amherst Pub. Schs.*, 28 IDELR 585 (SEA MA 1998).
- ❖ The determination as to whether a school is required to provide a monitor for visual assistance to a blind student while riding on the school bus depends upon the method of

assistance the blind child relies upon and routinely uses for navigational purposes. *See, e.g., Alvin Indep. Sch. Dist.*, 506 IDELR 294 (SEA TX 1984).

- ❖ The inability to communicate may be a characteristic associated with deafness, as well as a number of other types of disabilities that render the child nonverbal. If a child is unable to make his/her needs known to others, it is highly likely that a monitor or interpreter will be necessary to lift those communication barriers and assist the child in communicating. *See, McAllen (TX) Indep. Sch. Dist.*, 25 IDELR 766 (OCR 1996). On the other hand, if the child can adequately gain the attention of others despite some communication difficulties, the monitor will not be necessary. *Austin (TX) Indep. Sch. Dist.*, 17 IDELR 383 (OCR 1990). If the student receives these types of interpreter services in the classroom, a strong argument can be made that a similar service also will be warranted on the school bus. For example, a school division was held to have denied FAPE to a deaf child when it declined to require a sign language proficient staff member to ride on the student's bus. The child's IEP was found to be inappropriate because its transportation provision did not address the communication barriers between the child and the bus staff and therefore, created a significantly unsafe situation. *Detroit Pub. Schs.*, 56 IDELR 58 (SEA MI 2010).
- ❖ Personal supervision by an aide on the way to and from school may be warranted for students with behavior problems and/or a record of truancy and delinquency. Schools have been required to provide personal supervision on the school bus for students who present discipline problems while en route to and from school, as well as directly on the school bus. *See e.g., Highline Pub. Sch.*, 18 IDELR 941 (SEA WA 1992); *Buffalo City Sch. Dist.*, 503 IDELR 224 (SEA NY 1982). Delinquent and truant students with disabilities also may require constant and direct supervision -- referred to as "escort services" -- to watch them and make sure that they attend school. *See San Lorenzo Unified Sch. Dist.*, 27 IDELR 245 (SEA CA 1997).
- ❖ For students with autism, SED, OHI and/or ADHD, a trained aide may be required to accompany the student on bus rides if necessary to manage the student's behavior on the bus and insure the student's safety while being transported to and from school. *Los Angeles Unified Sch. Dist.*, 50 IDELR 114 (SEA CA 2008); *Corpus Christi Indep. Sch. Dist.*, 111 LRP 63318 (SEA TX 2011).
- ❖ For students with disabilities who require some assistance on the school bus, but whose needs do not rise to the level of individualized attention, an appropriate response by schools has been to provide one aide to serve a group of students with disabilities. *See, e.g., Allegheny (PA) Intermediate Unit*, 20 IDELR 563 (OCR 1993) (School district's transportation arrangements were safe and appropriately suited to meet the student's needs, even though the assigned bus aide was responsible for supervising a total of five students on the bus).

The Role of the Bus Driver

TRAINING FOR BUS DRIVERS – GENERALLY

- Drivers must be made aware of students with disabilities who ride in their vehicles, and informed of any special needs that may arise, given the nature of some of the students' disabilities. (8 VAC 20-81-110 B.3(a) and (b)). For example, drivers may be given information about a student with special needs, such as the student's IEP, any behavior plan that may exist, and relevant medical information, including medication the student may be taking.
- School divisions may be required to address several areas in driver training, such as operation of specialized equipment and training in special education matters.
- VDOE must ensure that communication between divisions and transportation providers exist so the providers are well-informed and well-trained to provide safe and appropriate student transportation. *Memorandum to State Directors of Special Educ.*, 40 IDELR 155 (OSEP 2003).

TRAINING FOR BUS DRIVERS – UNDERSTANDING THE SPECIAL NEEDS OF SOME STUDENTS

- School divisions must educate bus drivers regarding the special needs of certain disability populations. Among those disability groups with unique transportation needs are students who are blind or deaf, given their vision and hearing limitations and the resulting complications regarding the ability to travel safely. *See, e.g., San Diego (CA) City Unified Sch. Dist.*, 32 IDELR 264 (OCR 1999).
- In *Enright v. Springfield School District*, 49 IDELR 100 (E.D. Pa. 2007), the court ruled there was sufficient evidence to show that the district violated the child's right to personal safety and security by failing to properly train and supervise its bus drivers. Not only did the district fail to instruct drivers on the special needs of students with disabilities, but it told drivers to use their best judgment in deciding whether to report unruly behavior.
- Assigning students to help one another may not be permissible in Virginia. In *Wharton v. Albemarle County School Board*, 47 Va. Cir. 169 (Circuit Court of Albemarle County, Virginia, 1998), the Circuit Court overruled the school board's position as to a negligence claim brought by the mother of a student who was injured during a school bus evacuation drill. Two older students had been assigned the "job" of assisting the student as she jumped from the bus emergency door to the pavement below. They did not assist her correctly and she fell, striking her face and stomach on the pavement, resulting in a lacerated liver. No information was available on the final resolution of the case. (My guess is that there was a confidential, sealed settlement agreement.)
- Students with disabilities may be accompanied by a service animal in certain cases and under certain conditions. VDOE's guidance document on this subject provides valuable information to include in trainings of drivers. *See VDOE Guidelines for School Division Policy and Procedures Regarding Service Animals in Virginia's Public Schools - Revised 2011*, available on our web site at:

http://www.doe.virginia.gov/special_ed/tech_asst_prof_dev/guidance_service_dog.pdf

TRAINING FOR BUS DRIVERS – FIRST AID AND OTHER TRAINING NECESSARY TO RESPOND TO MEDICAL NEEDS

- Affirmative obligations in the area of first aid training for bus drivers may be imposed as a matter of state law. *See, Allegheny (PA) Intermediate Unit*, 20 IDELR 563 (OCR 1993). Schools must consult these provisions to determine what medical training is necessary for their bus drivers. *See, e.g., Covington Community Sch. Corp.*, 18 IDELR 180 (SEA IN 1991). Even if it is not required as a matter of state law, basic first aid for drivers is a recommended practice.

TRAINING FOR BUS DRIVERS – MEDICALLY FRAGILE STUDENTS

- Special training issues may arise in administering care to medically fragile students. While a bus driver may need to receive basic training in first aid procedures such as CPR, the provision of more advanced medical procedures presents an entirely different matter and probably demands the attention of a one-to-one assistant who can focus her/his undivided attention on these serious medical concerns and deal with them as they arise. Schools should be cautioned against imposing so many responsibilities on the driver as to compromise the safe operation of the vehicle. It may be a good idea to carry emergency information regarding specific medical needs of students directly on the school bus.³ The information may include necessary steps in the event of an emergency. Where these plans exist, personnel should be expected to follow them.

TRAINING FOR AIDES – GENERALLY

- The IDEA and Section 504 do not address the training school divisions should provide to personal assistants who accompany students with disabilities en route to school. However as noted above, service providers must be appropriately and adequately prepared and trained in the areas of the IEP for which they are responsible. (34 CFR § 300.323(d); corresponding Virginia Regulations at 8 VAC 20-81-110 B.3 (a) and (b)). Any relevant training and certification for bus aides would be established as a matter of local school policy. The same training areas discussed with regard to bus drivers also are relevant for aides.

TRAINING FOR AIDES – SPECIAL CONSIDERATIONS

³ It is critical in all of these provisions where drivers and aides are being provided personally identifiable information on the student that the school division insure that these service providers are also trained/briefed on the provisions of confidentiality of records, so as to prevent any breach of the student's educational record.

- Affirmative duties have been recognized with regard to medical training of aides where they are assigned responsibility for a student with a health condition requiring a certain level of medical attention. Therefore, bus aides should be trained in first aid and responding to medical emergencies commensurate with the needs of the students they assist. *See, e.g., Boston (MA) Public Schs., 25 IDELR 838 (OCR 1996)*. Schools also must heed any relevant state law provisions that regulate the qualifications of individuals who can administer certain procedures. Like bus drivers, aides generally have not been held to the level of doctors and only can be expected to respond to the best of their abilities.

JD/

Cc: Hank Millward

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