



conduct another official eligibility timing pursuant to R.C. 3327.01 to determine whether the board must transport relator's children to the non-public school they attend.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that respondents complied with the requirements of R.C. 3327.01 and the ODE handbook in calculating the direct travel time between the public school relator's children would have attended and the non-public school they chose to attend. Therefore, the magistrate has recommended that we deny relator's request for a writ of mandamus.

{¶3} Relator filed objections to the magistrate's decision arguing that the magistrate misinterpreted paragraph four of the ODE handbook, which provides:

The direct travel route should be determined in advance and documented in writing. The public school district should discuss this route with the parent/guardian requesting the timing, prior to the timing taking place and the route should be agreed upon, in advance, by all parties involved.

According to relator, paragraph four required respondents to discuss with relator the direct travel route respondents intended to take in advance of the timing. Relator also contends that this provision required relator to agree on the route before that route could be used for the official eligibility timing. We disagree.

{¶4} Preliminarily, as noted by the magistrate, the ODE handbook was created by ODE "to serve as guidelines for transportation services." The guidelines set forth in the handbook are not part of any statute or administrative rule. The parties also stipulated that ODE did not hold the guidelines out as having the force of Ohio law.

{¶5} The magistrate found that paragraph four did not expressly mandate that respondents discuss with relator the route to be taken prior to the timing. Nor did paragraph four expressly prohibit respondents from proceeding with the official eligibility timing unless relator agreed on the route. Rather, the magistrate found that the language in paragraph four simply encouraged these practices. We agree with the magistrate's interpretation of paragraph four. Therefore, respondents' actions were not inconsistent with any mandatory provision in paragraph four.

{¶6} Relator also disputes whether the route taken for the official timing was a proper route to calculate the direct travel time. Relator notes that the route used went through two active construction sites and a school zone. Nevertheless, we agree with the magistrate's conclusion that the route chosen was reasonable.

{¶7} The magistrate cited to deposition testimony indicating that the route taken for the official timing was the "shortest route" as calculated by a computer program. Although relator contends that respondents obtained this information after the official timing took place, that fact, even if true, does not contradict respondents' position that the route used was the shortest route. Nor does the record reflect that there were any unusual delays during the official eligibility timing despite the fact that the route included two construction sites and a school zone. Lastly, there is nothing in the record indicating that the route sought by relator would have been quicker.

{¶8} For these reasons, we overrule relator's objections.

{¶9} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of

law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus.

*Objections overruled;  
writ of mandamus denied.*

McGRATH and CONNOR, JJ., concur.

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**A P P E N D I X**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. [Ron] Graham, :

Relator, :

v. : No. 08AP-1104

Ohio Department of Education, Painesville : (REGULAR CALENDAR)

City Local Schools and Painesville City

Board of Education, :

Respondents. :

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M A G I S T R A T E ' S D E C I S I O N

Rendered on September 18, 2009

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*Ron Graham, pro se; Neil R. Wilson, for relator.*

*Richard Cordray, Attorney General, Peggy W. Corn and Mia T. Meucci, for respondent Ohio Department of Education.*

*Petersen & Ibold, and Jerry Peterson; Britton, Smith, Peters & Kalail Co., L.P.A., David Kane Smith and Michael E. Stinn, for respondents Painesville City School District and Painesville City Local Schools Board of Education.*

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IN MANDAMUS

{¶10} In this original action, relator, Ron Graham, requests a writ of mandamus ordering respondents Ohio Department of Education ("ODE"), Painesville City School District ("Painesville City S.D.") and Painesville City Local Schools Board of Education

("board") to conduct another official eligibility timing pursuant to R.C. 3327.01 to determine whether the board must transport relator's children to the nonpublic schools they attend.

Findings of Fact:

{¶11} 1. Ron Graham ("Graham") is a resident of the City of Painesville. Graham has two children. His son was age 13 and his daughter was age 11 in April 2009 when Graham was deposed in this action.

{¶12} 2. Graham's children reside with him and his wife in Painesville City S.D. During the 2008-2009 academic school year, Graham's children attended Notre Dame Elementary School ("NDES") located at 13000 Auburn Road in Chardon, Ohio. NDES is a private, nonpublic school.

{¶13} 3. Had Graham's children attended a school run by the Painesville City S.D. during the 2008-2009 academic school year, Graham's daughter would have attended Chestnut Elementary School and his son would have attended Heritage Middle School.

{¶14} 4. At the beginning of the 2008-2009 school year, Graham telephoned James Haffa, the transportation director of Painesville City S.D. Graham requested timings to determine whether the board was required to transport his children to NDES.

{¶15} 5. In late September 2008, Haffa verbally informed Graham by telephone that he had conducted timings from Chestnut Elementary School and from Heritage Middle School to NDES. Graham was informed that the Chestnut Elementary School timing was 31 minutes and the Heritage Middle School timing was 32 minutes.

{¶16} 6. By letter dated October 1, 2008, Haffa informed Graham that both timings exceeded 30 minutes and, thus, the board was not required to transport

Graham's children pursuant to R.C. 3327.01. The letter also informed Graham that he could "challenge" the timing by sending a written request to the superintendent of Painesville City S.D. and ODE's area coordinator.

{¶17} 7. By letter dated October 6, 2008 to the superintendent, Graham objected to the timing results.

{¶18} 8. Thereafter, Graham received a telephone call from Haffa informing him that an official timing with ODE was scheduled for Monday morning, October 20, 2008. Haffa invited Graham to ride along in the bus during the timing.

{¶19} 9. According to Graham's deposition testimony in this action, on October 16, 2008,<sup>1</sup> Graham received a call from Haffa regarding the route to be driven during the timing. Haffa informed Graham that the route would include Girdled Road. According to Graham's testimony, Graham responded: "That's not a bad route, but there is a little bit of a better route." Graham Deposition, at 25. Graham proposed that the route include Clark Road.

{¶20} According to Graham's testimony:

The problem with going down Girdled Road was, when you turn left onto Auburn, there is a Chardon bus that stops along and Auburn Road and it makes three stops.

What I told him was I go down to Clark Road and if I go down Clark Road, I miss the bus, in fact, the bus turns down Clark and you pass it, you miss it.

So I told him that I thought that Clark Road was a better route.

He told me that if I didn't like the route, I had to send something to the Ohio Department of Education objecting to the route and then they would consider it.

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<sup>1</sup> The telephone call may have occurred on October 15, 2008, according to Graham's October 16, 2008 fax to Frank Huml. See below.

Graham Depo., at 25.

{¶21} 10. Haffa testified in this action by deposition. Haffa testified that (on October 15 or 16, 2008): "Instead of turning right on Auburn Road, I suggested we turn right on Girdled." Haffa Deposition, at 16.

{¶22} 11. On October 16, 2008, Graham sent the following fax to Frank Huml, an ODE area coordinator:

I am the parent [of] students [who] attend \* \* \* Notre Dame Elementary in Munson Township. I spoke with James Haffa from Painesville City yesterday and the route he is going to take is Chestnut to Route 84 to Route 44 to Girdled Road to Auburn Road. The only problem that I have with the route since I drive it is that I take Clark Road to get to Auburn because at the time we are leaving a Chardon bus is heading down Auburn with about three stops and taking Clark Road avoids the bus.

{¶23} 12. On the morning of October 20, 2008, Graham met Haffa and Huml at the Painesville City S.D. bus garage. According to Graham's testimony, at the garage:

I had a brief conversation with Mr. Huml, again raised my concern about the fact that if we went down Girdled Road, we might catch the bus.

And I said to him - - I said, "Well, if we catch that bus, I'm going to ask that the timing be stopped."

And he said, "Well, that's not going to happen," and he - -

I said, "Well, we're supposed to agree on a route."

\* \* \*

And he said, "Oh, no, we don't have to."

And I said, "Well, here's your guidelines," and I handed them to him[.] \* \* \*

Graham Depo., at 27-28.

{¶24} 13. According to Haffa's testimony, on the morning of October 20, 2008, at the bus garage, Graham arrived first. When Huml later arrived, Haffa handed Huml a memorandum dated October 20, 2008 describing the route that was to be taken that day. The October 20, 2008 memorandum stated:

A time study from Chestnut Elementary to Not[r]e Dame Cathedral Latin [sic] will be conducted on Monday October 20<sup>th</sup> 2008, with Frank Huml, Area Coordinator, James Haffa, Transportation Supervisor, and Arlie Spargur, Bus Driver.

We are taking the most direct and safest route to be traveled.

Please see below the directions[.]

Begin at 341 Chestnut St Elementary School, Painesville, Oh  
Turn Right on Johnnycake Ridge Rd  
Turn Left on Morley Rd  
Take Ramp onto OH-44 S  
Turn Right on Auburn Rd  
Continue on Auburn Rd  
Arrive at NDCL Elementary 13000 Auburn Rd, Chardon, Oh

{¶25} According to Haffa's testimony:

Q Did you share that with Mr. Graham at that time?

A I had the copy sitting right there, on my desk.

Haffa Depo., at 18.

{¶26} 14. According to Huml's testimony:

I reported there at whatever time it was, 7:30 or 7:00 in the morning, prior to the timing itself; went into Mr. Haffa's office and at that time Mr. Graham was there, in the office, with the transportation director, and they had been talking. When I walked in, I introduced myself and then I asked Mr. Haffa for the route, because I asked him to have it in writing, and he was able to hand it to me in writing.

\* \* \*

\* \* \* Mr. Haffa, I think, handed me the route, and I think Mr. Graham either asked for a copy or Mr. Haffa shared a copy with him, and Mr. Graham said that that was not the route that he wanted taken, and we determined that that was the route that we would be taking.

Huml Deposition, at 18-19.

{¶27} 15. At the garage, Graham, Haffa and Huml boarded a school bus driven by Arlie Spargur. Spargur then drove the bus to Chestnut Elementary School.

{¶28} 16. At Chestnut Elementary School, Graham, Haffa and Huml were all aboard the bus when the timing began. According to Graham's testimony:

Q Did they start the timing run then?

A At some point they did and that's where we get into this disagreement over the collection point.

I don't think it was properly started at the right collection point, when the stopwatch was started.

\* \* \*

Q What do you mean by a collection point?

A The collection point is where the children are picked up and dropped off.

Q Where did this timing run actually start from?

\* \* \*

THE WITNESS: We started it at the beginning of the collection point, not the midpoint.

\* \* \*

Q Now, what do you mean by the beginning of the collection point?

A Well, the beginning of the collection point is where they begin to pick up the kids and drop them off, and it is supposed to start at the midpoint.

Q What do you mean by it is supposed to start at the midpoint?

A I'm sorry, Mr. Wilson. The guidelines state the timing is supposed to start at the midpoint of the collection point.

Q Do you know on that day where the midpoint of the collection point would have been?

\* \* \*

THE WITNESS: I don't. To be honest with you, I don't, but it didn't seem like that was the midpoint.

Graham Depo., at 29-31.

{¶29} 17. Using a stopwatch, Huml did the timing. According to Huml's testimony:

Q - - tell me where in relation to the school you started.

A Let me see. If this is the door to the school where we were starting, and this is the street where the driveway exits onto the street, it was somewhere probably just a hair behind midway, between those two spots.

\* \* \*

Q When did you start the stopwatch?

A I would tell you it was somewhere just a hair after the midway point, between those two locations.

Q Okay. So you didn't start it as soon as the bus started moving?

A No, no.

Q You started when you were still in the driveway - -

A Yes.

Q - - on the school grounds?

A That's correct.

Huml Depo., at 24-25.

{¶30} 18. Leaving the school grounds, the bus turned left onto Chestnut Street and proceeded to follow the directions to NDES as set forth in Haffa's October 20, 2008 memorandum.

{¶31} 19. After proceeding southbound on Route 44, the bus turned right onto Auburn Road. By so doing, the bus did not use either Girdled or Clark Roads. Regarding the bus making an early turn onto Auburn Road rather than waiting for Girdled or Clark Roads to connect to Auburn Road, Graham testified:

A Much to my surprise the bus turned right, onto Auburn Road.

Q All right.

A Then I said to the bus driver, I said, "No, no, no," just like that.

And he said to me - - because I was seated right behind the bus driver - - he said, "That's the route I was told to take."

Q Can you tell us why you objected to the bus turning right on Auburn Road?

\* \* \*

A Right now there are two construction sites in that area, Lake Hospitals is building their new hospital in that area and University Hospitals is building a new outpatient surgery center there, so you've got two active construction sites going on there.

Also on that stretch there is a school, Auburn Career Center, and there is a school zone which is 20 miles per hour.

I mean, it wouldn't be a way you would go and it was never a way that we ever discussed. I was never told that was the way we were going to go. The only conversation I had with Mr. Haffa was about Girdled Road and Clark Road. We never talked about going down Auburn Road and going

through the construction and going through the school zone, we never discussed that.

Q Mr. Graham, after the bus turned right on Auburn Road, off of Route 44, did it pass through the first construction zone?

A Yes, it passed through the first construction zone, which would have been the University Hospitals outpatient surgery center.

Q Was there any traffic on Auburn Road at that time, as a result of that construction zone?

\* \* \*

THE WITNESS: There was traffic. It is Auburn Road, there is always traffic there, not only are there the construction sites, there is a BP station and McDonald's there also, so that area always has a lot of traffic.

\* \* \*

Q Did it have traffic on that morning, at that time when you were there?

A It did have traffic, yes.

Q And then what is the second construction zone?

A The second construction zone is the new Lake Hospitals TriPoint Hospital that they're constructing there, and that was the second construction site that we went through.

Q And was there traffic around that construction?

A There was.

Q Was there traffic that appeared to you to result from the construction?

\* \* \*

THE WITNESS: Again, it is a busy area. There is traffic going in and out of the construction area. There is a McDonald's and a BP station. It is a very heavily traveled area.

Q What did the bus do then, as it passed through this second construction zone? Where did it go?

A We continued down Auburn Road until - - at that time the bus was doing - - I think the posted speed limit is 45.

We then entered the Auburn Career Center school zone.

Q And what was the speed limit in that school zone?

A That was 20 miles per hour.

Q Was there any school-related traffic?

A There was. The lights were flashing. The bus driver slowed the bus down to 20 miles per hour. There was [sic] pedestrians. There was - - it was a school zone, the lights were flashing, so the bus driver slowed down to 20 miles per hour.

Q Okay. Can you describe the Auburn school zone complex and how long a distance that school zone is and what it passes through?

A It started just north of the career center, I want to say maybe 100 feet north of the center. It goes through the whole center and I believe the school zone ends around the stop sign at Girdled Road.

Q And the bus that you were riding that day, you state, I believe, proceeded through that school zone at 20 miles an hour; is that correct?

A Yes.

Q After you passed through that school zone, then where did the bus go?

A We stopped at the stop sign at Girdled Road and Auburn. We then proceeded across, to Auburn Road, and then continued down Auburn Road.

Q Okay. And how long a distance did you travel on Auburn Road or to what destination did you travel?

A Then we traveled all the way to Notre Dame Elementary School.

Graham Depo., at 33-37.

{¶32} 20. During his deposition testimony, during direct examination by counsel for Painesville City S.D., Haffa explained why he chose the route that was taken on October 20, 2008:

Q Would you look at Exhibits 11 and 12, please? Do you recognize those?

A Yes.

Q And what are they?

A They are directions that I put together, using the route that I took and the route that Mr. Graham wanted to take.

Q And those are Google reports; is that right?

A Yes.

Q Did you feed those into the computer?

A Yes, I did.

Q All right.

A On Exhibit 11, the first one, when you put in your starting point, it will ask you for and [sic] ending point and there are tidbits off to the side, you can say, like, shortest time, shortest distance, and when I put in the shortest time, that gives you the directions on Exhibit 11.

Q Is that the one that shows going up Auburn to Girdled and then - -

A No, this is the one that we drove on the day of the timing.

Q Okay. You told it you wanted the shortest route and that's the one it gave you - -

A Yes.

Q - - on 11?

What does Google say the approximate time is?

A 32 minutes.

Q And the distance?

A 13.3 miles.

Q Now, the other one, did it print out exactly as you requested or was there a variance?

A No, it put in a jog that's on there, turn right on Auburn and then left on Girdled, it didn't take it straight through Route -44 down to Clark.

Q Did you try to correct that?

A Yes, I did, and then, when I printed it, I thought it was corrected, but I did not recheck it and it printed out the old way, that has the jog on there onto Auburn and onto Girdled.

Q That jog is about 100 feet; is that correct?

A Down Auburn and up Girdled?

Q No, I say the Girdled Road section, Mr. Graham said was about 100 feet long?

A No, it's longer than that, I would say maybe 500 feet or so, if not longer.

Q Okay. Not very long.

A No.

Q And nonetheless, that one came out longer and slower, right?

A Yes. It's got two extra turns in it.

Haffa Depo., at 23-25.

{¶33} 21. During his deposition testimony, Huml indicated that ODE generally defers to the school district officials in the determination of the route:

Q You had indicated, in your direct testimony, that when there is a dispute about the route, you go back to the judgment of the school district; is that right?

A I always defer to their judgment, yes.

Q You always defer, so whenever a parent makes an objection to the route, you never consider - -

A No, I didn't say that I always. I mean, you put that word in my mouth. I didn't say that I always, I said that I defer to their judgment.

\* \* \*

Q All right. We can agree on October 20th you also deferred to the Painesville City School District?

A Yes, I did.

Huml Depo., 43-44.

Q Who do you believe is in a better position to know the best route to take?

\* \* \*

THE WITNESS: I would think that the transportation director or coordinator is the one responsible for establishing the routes and they're always held accountable for whatever the outcomes are.

BY MS. CORN:

Q As you understand your authority, can you say to Mr. Haffa, sorry, we're not going to take the route you chose, we're taking the route I'm choosing?

A No, no. We don't take that position, because of the fact that they do that work on a day-to-day basis. We're not here every day to understand all of the conditions.

Huml Depo., 37-38.

{¶34} 22. During his deposition testimony, Graham testified about the timing at the arrival of the bus at NDES:

A I told them where they had to turn in to go where the buses go. I told them where to turn.

We turned into that area. At that time I knew we were getting close, I knew we were getting close to that 30 minutes, so we pulled in.

We then stopped the bus there, because there was a couple of buses ahead of us, and instead of stopping the stopwatch, Mr. Huml kept running the stopwatch.

We then pulled around and once we were the first bus in line, he then clicked the stopwatch and he turns to Mr. Haffa and he says, "Well the time is 30 minutes 52 seconds."

And I said - - at that time I'm like, we're 51 seconds over the time limit, so that's what happened once we got to Notre Dame.

Q Mr. Graham, where was the bus located in reference to the entrance to Notre Dame Elementary School, when Mr. Haffa made that announcement?

A It was Mr. Huml.

Q Mr. Huml.

A Well, he waited. I mean, there were two buses ahead of us, we were the third bus.

We were aware that the students get dropped off in the morning to go into the school, we were right in front of the main entrance of the school.

We were the third bus, he continued to run the stopwatch, once the other two buses pulled away, we then pulled up and stopped and then he clicked the stopwatch off.

Q So when the bus initially pulled up and stopped behind the two other buses, that distance from that location to the final resting place would be approximately the distance of a length of two buses?

A Yes.

Q Is that correct?

A Uh-hun.

Q Now, have you, yourself, dropped your children off at that elementary school?

A Absolutely. Pretty much I do it four out of the five days, I drop them there every morning.

Q And do you know where the drop-off points are located? Based on your personal experience, where do the children get out of their vehicles to go into the school?

\* \* \*

A There are two places. Actually, there is a bus drop-off area and there is a drop-off area for car riders.

As I pull around as the car riders, I can see the buses pulling in and dropping off children at the bus drop-off area[.] \* \* \*

\* \* \*

[Q] What do you observe about the procedures for the buses dropping off children, the children actually exiting the buses?

A Yes. They don't wait until they get up to the first one in line, the buses are in line, they open the doors and the children leave the buses.

Q Okay. And do you have any idea how long the bus you were on that day waited; how much time elapsed, from the time that the bus first pulled up into that line and stopped, until the stopwatch was turned off?

\* \* \*

THE WITNESS: I don't know. We were there for a few seconds, there is no doubt, but I don't know how long.

Graham Depo., at 39-43.

{¶35} 23. During his deposition, Huml testified about the timing at the arrival of the bus at NDES:

Q \* \* \* The stopwatch, what did the stopwatch show?

A It showed a total of 30 minutes and 52 seconds.

Q When did you push it to stop it?

A At the time the bus actually stopped at the door, at the drop-off point.

Q Okay. And as you recall it there were no buses between -  
- strike that.

There were no buses - -

A Blocking the entrance?

Q - - in front of you?

A I'm sorry.

Q There were no buses in front of you?

A No, I don't recall any.

Q No buses between your bus and the drop-off point?

A No, I don't recall any.

Huml Depo., at 33-34.

{¶36} 24. During his deposition testimony, Haffa testified about the timing at the arrival of the bus at NDES:

We pulled in there, into the school, which the posted speed limit in the school, I believe, is 20 miles an hour.

We went down, around and swung right in and stopped, and that's when Frank stopped the stopwatch and asked the time from Mr. Graham, also.

Q Were there any buses in the discharge area, other than your bus?

A. Not that I can recall, no. I don't remember seeing another bus in front of us.

Haffa Depo., at 22-23.

{¶37} 25. During his deposition testimony, Spargur, the bus driver, testified about the timing at the arrival of the bus at NDES:

Q You got out to Notre Dame. Tell us about once you turned right off of Auburn into the Notre Dame complex.

A I followed the entryway all the way back and made a left at the appropriate place and came to a stop beside the school, where I had been instructed the day or two before.

When I went up there in the van, I asked them where their drop off and pick up point was.

Q You asked somebody from Notre Dame?

A Yes, sir. The previous time when I was out there, because I wasn't sure of the location.

Q All right. And when you were running the timing, were you able to drive directly to that stopping point that they told you was the discharge point?

A As I recall it, everything went really smooth. I don't recall anything interfering with us.

Q Do you recall any buses being in front of you at that point, within the Notre Dame complex?

A No, sir, I don't recall it. I just remember we had a really smooth ride.

Spargur Deposition, at 14-15.

{¶38} 26. By letter dated October 22, 2008, Huml informed the superintendent of the Painesville City S.D.:

Your request to determine the eligibility of pupils for transportation to the Notre Dame/Cathedral Elementary in Chardon was addressed by way of an official timing on Monday, October 20, 2008, beginning at 7:22 am.

The time was measured from the bus pick-up point at Chestnut St. Elementary along the safest, quickest, as established by the district, route most traversable and honoring all posted speed limits by school bus, to the bus

drop-off point at the Notre Dame/Cathedral Elementary non-public building of attendance.

The time consumed on this run was 30 minutes and 52 seconds. Pursuant to ORC 3327.01, your district board of education should declare that pupils attending Chestnut St. Elementary school attendance area who attend the Notre Dame/Cathedral Elementary school are not eligible for transportation.

(Emphasis sic.)

{¶39} 27. On October 22, 2008, Graham wrote to Pete Japikse, ODE Pupil

Transportation Director:

I am writing to object to an eligibility timing done by Frank Huml from your office[.] \* \* \*

\* \* \*

There is [sic] a number of instances where I believe if your representaive [sic] followed your own procedures a different result would have occurred. On Monday I made a number of objections to Mr. Huml and I am reiterating the major ones in this letter for your benefit.

I am objecting to the timing because the procedures were not in accordance with Ohio Department of Education Guidelines contained in Chapter 3 page 7.

[Paragraph Four] The direct travel route should be determined in advance and documented in writing. The public school should discuss this route [with the] parent/guardian requesting the timing, prior to the timing taking place and the route should be agreed upon in, in advance, by all parties involved.

The route was discussed with me on Wednesday, October 15, 2008 about taking Chestnut Street to Route 84 to Route 44 to Girdled Road to Auburn Road.

On October 16, 2008, I faxed to Frank Huml my suggested route that we go Route 44 to Clark Road[.] [T]he fax is enclosed. No response from Mr. Huml or Painesville City regarding my suggestion.

On October 20, 2008, the morning of the eligibility timing the bus turned down Auburn Road from Route 44 and we passed through not only a construction area but a school zone. The construction zone which has become so bad for traffic the hospital has hired a deputy sheriff to direct traffic[.] [S]ee the attached article from the News-Herald[.] This route was never disclosed to me and when the bus starting [sic] turning I yelled no no no and the bus driver stated this is the route I was told to take.

[Paragraph Eight] The timing shall commence at the point the bus begins motion at the midpoint of the collection point (public school building) and ends when the bus stops at the school bus drop-off point for the chartered nonpublic or community school.

The timing started at the collection point at the public school and not at the midpoint as outlined which resulted in a delay as well.

The time that resulted was 30 minutes 52 seconds and the fact that the procedures were not followed makes in [sic] clear in my opinion this was not an official timing. Therefore, I am requesting you order another timing. \* \* \* [The timing] was not in conformity with the guidelines set forth by your agency.

{¶40} 28. By letter dated November 10, 2008, Japikse informed Graham:

I have reviewed your request for a new eligibility timing from Chestnut School in Painesville to Notre Dame Elementary.

After reviewing your request, I also reviewed the facts of the timing with Mr. Huml (ODE area coordinator) and Mr. Haffa (Painesville Transportation Coordinator) so that I could have the benefit of all perspectives of the timing.

In your request to my office you included a copy of a communication to Mr. Haffa that expressed concerns with the route due to a Chardon bus that follows the same route. I understand that on the timing of October 20 that other bus was not present, nor were there any other traffic delays or obstructions.

You also enclosed a News Herald article that reports on the use of a deputy sheriff to assist with traffic congestion at a construction site. The article clearly states that the

congestion is a problem in the afternoon between 3 and 4 pm. Since the timing was performed in the morning, this would not have been a factor.

I have also learned that staff at Painesville have completed 4 timings prior to requesting Mr. Huml to supervise a timing. In each case the timing resulted in travel times in excess of 30 minutes.

Timings supervised by ODE field staff are only set aside and rerun if it appears that there is reasonable doubt that the results are replicable, or if there are significant changes in the travel conditions since the timing was completed. In this case, I find that the results are consistent with other timings, and the traffic conditions were not unusual and resulting in a timing that is longer than would be expected. A new timing will not be ordered by this office.

{¶41} 29. On December 22, 2008, relator, Ron Graham, filed this mandamus action.

Conclusions of Law:

{¶42} It is the magistrate's decision that this court deny relator's request for a writ of mandamus, as more fully explained below.

{¶43} R.C. 3327.01 states in relevant part:

A board of education shall not be required to transport elementary or high school pupils to and from a nonpublic or community school where such transportation would require more than thirty minutes of direct travel time as measured by school bus from the public school building to which the pupils would be assigned if attending the public school designated by the district of residence.

{¶44} ODE has published a document or handbook titled "Transportation Services For Chartered Nonpublic and Community Schools" ("ODE handbook"). Version 2.1 dated September 2, 2008 is reproduced for this action, and it is stipulated by the parties that the document is admissible as evidence in this action.

{¶45} According to the parties' stipulation, the ODE handbook was created by ODE "to serve as guidelines for transportation services, pursuant to R.C. 3327.01 and 3327.02." It is further stipulated that the "guidelines \* \* \* have not been adopted as statutes nor provisions of the Ohio Administrative Code pursuant to R.C. Chapter 119, nor has ODE held them out as having the force of Ohio law."

{¶46} Page seven of Chapter three of the ODE handbook was posted on the ODE website. However, ODE has never posted any other portion of the ODE handbook on its website. The ODE handbook has been disseminated in its entirety to ODE area coordinators for use in conducting official transportation timings. It is also provided in its entirety to local school district administrators, including those associated with the Painesville City S.D., at their request.

{¶47} The ODE handbook, Chapter 3, page 7, is captioned "Procedures For Conducting An Official Eligibility Timing." The timing procedures are set forth in 11 enumerated paragraphs:

Upon written request for an official timing, or a request for an appeal of a district's timing, the Area Coordinator will contact the public school district with regard to the following arrangements:

1. Public school district staff should determine the starting and acceptable arrival time for pupils at the chartered nonpublic or community school. Arrangements should be made to have a school bus travel the route beginning at the collection point at a time that would get the pupils to school near the acceptable arrival time.
2. The public school district of residence should identify the school determined to be the collection point for the student.
3. The public school district of residence should contact the parent/guardian and invite them to ride on the bus during the official timing.

4. The direct travel route should be determined in advance and documented in writing. The public school district should discuss this route with the parent/guardian requesting the timing, prior to the timing taking place and the route should be agreed upon, in advance, by all parties involved.
5. The route to be followed should be reviewed in advance with the bus driver, as he/she should be familiar with the route. The bus driver should be instructed to adhere to traffic law and the Ohio Pupil Transportation Operation and Safety Rules.
6. Official timings should be conducted only on days when school is in session and during fair weather.
7. To determine the official timing, the Area Coordinator must use a stop watch or other device that clearly measures the elapsed travel time.
8. The timing shall commence at the point the bus begins motion at the midpoint of the collection point (public school building) and ends when the bus stops at the school bus drop-off point for the chartered nonpublic or community school.
9. If some unusual situation occurs during the official timing (i.e., an accident, slow traffic due to an accident, a temporary detour, etc.) the official timing should be cancelled and rescheduled for another day.
10. Once an official timing has been completed, a letter shall be sent by the Area Coordinator to the Superintendent of the public school district, documenting the results and declaring the chartered nonpublic or community school pupil's eligibility or ineligibility for transportation services based upon the 30 minute rule.
11. Once an official timing has been completed, additional timings shall not be performed without the written authorization of the Pupil Transportation Director of the Ohio Department of Education.

(Footnotes omitted.)

{¶48} Relator contends that respondents failed to comply with paragraphs four and eight of the timing procedures. The magistrate will initially address relator's claim that respondents failed to comply with paragraph four, which again states:

The direct travel route should be determined in advance and documented in writing. The public school district should discuss this route with the parent/guardian requesting the timing, prior to the timing taking place and the route should be agreed upon, in advance, by all parties involved.

{¶49} Relator presents three sub-arguments with respect to paragraph four of the timing procedures: (1) that respondents failed to take the direct travel route on October 20, 2008; (2) that the route actually taken was not discussed with relator prior to the timing taking place; and (3) there was no agreement on the route to be taken by all parties involved.

{¶50} Turning to relator's first sub-argument with respect to paragraph four, it is important to note that this sub-argument necessarily invokes R.C. 3327.01's statutory command that the "direct travel time" be measured.

{¶51} "Direct travel time" is not defined by statute or even by ODE's timing procedures at Chapter three, page seven. However, Webster's Third New International Dictionary Unabridged (G. & C. Merriam Company 1966) defines the word "direct" as "proceeding from one point to another in time or space without deviation or interruption." This definition corresponds to the one offered by relator here. (Relator's brief, at 8.) An alternative definition presented in Webster's is "leading by the short or shortest way to a point or end <a ~ route>."

{¶52} The magistrate finds that relator has failed to show that respondents failed to take the "direct travel route" as directed by the timing procedures or that respondents failed to measure the "direct travel time" as directed by R.C. 3327.01.

{¶53} In effect, relator's argument is that the route taken on October 20, 2008 placed the bus on a stretch of Auburn Road that required travel through two construction areas as well as the Auburn Career Center school zone that had a posted speed limit of 20 miles per hour. Relator further testified that traffic is usually heavy on this stretch of Auburn Road. According to relator, this scenario could have been avoided and the travel time shortened had the bus turned onto Girdled Road as Haffa had discussed with Graham on October 15th or 16th, 2008.

{¶54} Respondents' response to relator's argument is supported by Haffa's deposition testimony explaining why he decided not to use Girdled Road on October 20, 2008. As earlier noted, Haffa obtained "Google" reports by using a computer. He requested the "shortest route" and that route was the one he used on October 20, 2008. His computer generated a report indicating that the Girdled Road route was longer. (Haffa Depo., at 23-25.)

{¶55} Of course, there was no official timing using the Girdled Road route that relator wanted to use. Thus, we do not know for sure whether using Girdled Road would have shortened the time of the trip and, if so, by how many seconds. But, the ODE handbook does not require alternative timings to resolve a dispute over the route to be taken. While Graham relied upon his personal experience in driving his children to NDES to suggest Girdled or Clark Roads, Haffa relied primarily on his computer request for a route.

{¶56} The magistrate finds that Haffa's method of selecting the route was reasonable under the circumstances. Haffa's decision was not arbitrary, nor was it subjective. He used an objective tool—his computer—in selecting the route. Under these circumstances, relator has failed to satisfy his burden of showing that on October

20, 2008, the bus did not take the direct travel route or that respondents failed to measure the "direct travel time."

{¶57} As previously noted, relator's second sub-argument under paragraph four of the timing procedures is that the route actually taken on October 20, 2008 was not discussed with relator prior to the timing taking place.

{¶58} The route actually taken was set forth in Haffa's October 20, 2008 memorandum as noted above. Huml testified that he arrived at Haffa's office at the bus garage after Graham did and that, upon arrival, Haffa handed him a copy of the memorandum. Huml remembered that Graham "either asked for a copy or Mr. Haffa shared a copy with him, and Mr. Graham said that that was not the route that he wanted taken." Huml Depo., at 19. In response to a deposition question asking: "Did you share that with Mr. Graham at that time?," Haffa stated: "I had the copy sitting right there, on my desk." Haffa Depo., at 18.

{¶59} Graham testified that during the bus trip, "[m]uch to my surprise the bus turned right, onto Auburn Road." Graham Depo., at 33.

{¶60} Accepting his testimony that he was indeed surprised when the bus turned onto Auburn Road, Graham never testified as to whether he actually obtained a copy of the October 20, 2008 memorandum from Haffa at the bus garage and, if so, why he did not read it.

{¶61} Apparently, Haffa did not verbally point out to Graham the route change (eliminating Girdled Road) at any time prior to the timing.

{¶62} Even though Graham was surprised when the bus turned onto Auburn Road, the magistrate, nevertheless, finds that Haffa did comply with paragraph four's directive that "[t]he public school district should discuss this route with the

parent/guardian \* \* \* prior to the timing taking place." Haffa did in fact discuss the routing of the bus on October 15th or 16th, 2008, many days prior to the actual timing. While Haffa apparently did not verbally apprise Graham of the route change prior to the timing, the surprise could have been avoided if Graham had read the memorandum that set forth the route to be taken. In any event, at some point, the discussion must end and the final call as to the route to be taken lies with the public school district.

{¶63} Moreover, paragraph four of ODE's timing procedures did not bestow upon Graham a clear legal right to discuss the route. The directive states that the public school district "should" discuss the route prior to the timing. It does not state that the public school district "shall" discuss the route prior to the timing. Thus, paragraph four does not command a route discussion and cannot create a clear legal right to a route discussion. See *State ex rel. Law Office of the Montgomery Cty. Public Defender v. Rosencrans*, 111 Ohio St.3d 338, 344, 2006-Ohio-5793.

{¶64} As previously noted, relator's third sub-argument under paragraph four of the timing procedures is that there was no agreement as to the route to be taken by all parties involved.

{¶65} The evidence before this court undisputedly shows that, indeed, there was no agreement among the parties as to the route to be taken. While that is unfortunate, it is of no legal consequence. Again, paragraph four states that the route "should" be agreed upon in advance. It does not state that the route "shall" be agreed upon. Obviously, as respondents correctly point out, if agreement cannot be reached, someone has to make the call. ODE's timing procedures do not, in effect, give the parent/guardian a veto over the school district's selection of a route.

{¶66} As earlier noted, relator also contends that respondents failed to comply with paragraph eight of the timing procedures. Again, paragraph eight states:

The timing shall commence at the point the bus begins motion at the midpoint of the collection point (public school building) and ends when the bus stops at the school bus drop-off point for the chartered nonpublic or community school.

{¶67} Unlike the directives of paragraph four addressed above, paragraph eight uses the word "shall." It commands specifically when the timing is to begin and when the timing is to end. Relator challenges the timing at both the starting and ending points.

{¶68} During his deposition, Graham testified he does not believe that the timing was properly started. He testified: "We started it at the beginning of the collection point, not the midpoint." Graham Depo., at 30. However, Graham further testified that he did not know where the midpoint of the collection point was. Given Graham's testimony, there is no evidence in the record showing a failure to commence the timing in accordance with paragraph eight of ODE's timing procedures.

{¶69} Moreover, Huml testified that he started the stopwatch "somewhere just a hair after the midway point." Huml Depo., at 25. Accepting Huml's testimony, the timing was not improperly commenced.

{¶70} During his deposition testimony, Graham testified that there were two buses ahead of their bus when they turned onto the NDES property. According to Graham, Huml continued to run the stopwatch while the two buses ahead were unloading, and he did not stop the stopwatch until their bus pulled up to the position where the two buses ahead had stopped. When asked by his counsel how much time

had elapsed due to this scenario, Graham stated: "We were there for a few seconds, there is no doubt, but I don't know how long." Graham Depo., at 43.

{¶71} Contrasting Graham's testimony, neither Huml, Haffa nor Spargur recalled any buses being ahead of them when Spargur turned onto the NDES grounds.

{¶72} If we accept Graham's testimony that a delay occurred at the school bus drop-off point, we have Graham's testimony that the delay was "for a few seconds." That amount of time cannot invalidate the timing results here which were reported to be 30 minutes, 52 seconds. In short, there is no evidence in the record showing that the timing was fatally compromised at the bus's arrival at NDES on October 20, 2008.

{¶73} Given the above findings and analysis, the magistrate concludes that the timing of October 20, 2008 complied with the directives of ODE's timing rules.

{¶74} Relator further argues that ODE's timing procedures conflict with R.C. 3327.01's requirement that "direct travel time" be measured, and that this court must order ODE to revise its timing procedures so that they no longer conflict with R.C. 3327.01.

{¶75} In furtherance of his argument, relator points out that paragraph one of the timing procedures provides that "[a]rrangements should be made to have a school bus travel the route beginning at the collection point at a time that would get the pupils to school near the acceptable arrival time." Relator points out that paragraph six provides that "[o]fficial timings should be conducted only on days when school is in session."

{¶76} Relator objects that ODE's procedures provide that the timing occur when school is in session and at the time of day that would get the pupils to school near the acceptable arrival time.

{¶77} According to relator:

While these guidelines might seem reasonable on their face, they do not follow the legislature's requirement for *direct travel time*. It is usually understood by anyone who commutes that there are particular times of the day when travel time is lengthened – the delays or interruptions are even worse when schools are in session and school buses may be stopping numerous times interrupting the travel of commuters or other buses stuck behind them. By including these limitations in the rules the Ohio Department of Education has

only invited delay and "interruption" into the process for making this measurement – in contravention to the Ohio legislature's intent[.] \* \* \*

(Relator's brief, at 9-10; emphasis sic.)

{¶78} The magistrate disagrees with relator's contention that the timing procedures conflict with R.C. 3327.01's requirement that "direct travel time" be measured.

{¶79} As ODE correctly points out, ODE's timing procedures "quite sensibly \* \* \* replicate the conditions under which a bus would transport children to their school."

(ODE's brief, at 12-13.)

{¶80} ODE further argues:

Mr. Graham imputes to the General Assembly an intent that unless eligibility timings take place under optimal conditions, a kind of commuter's dream, they must be invalidated as inconsistent with the "direct travel time" provision. As he sees it, the delays that come with actual trips to school at the same time people are driving to work in the morning – traffic, stop lights, construction, school zones – are not to be allowed to interrupt or delay the timing trip. \* \* \*

Id. at 14.

{¶81} In the magistrate's view, ODE's timing procedures under challenge here meet the test of reasonableness. There is simply nothing in R.C. 3327.01's "direct

travel time" requirement that requires the timing to occur at a time of day or even upon a route that presents optimal traffic conditions to lower the timing results.

{¶82} Moreover, courts ordinarily accord due deference to an agency's reasonable interpretation of its statutes. *State ex rel. Schaengold v. Ohio Pub. Emp. Retirement Sys.*, 114 Ohio St.3d 147, 151, 2007-Ohio-3760 (citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 289, 2001-Ohio-190). Due deference to ODE's timing procedures must be accorded here.

{¶83} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for a writ of mandamus.

/s/ Kenneth W. Macke

KENNETH W. MACKE  
MAGISTRATE

#### **NOTICE TO THE PARTIES**

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).