This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

PENNSYLVANIA

SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: Z. C.
Date of Birth: [redacted]
CLOSED HEARING
ODR File No. 18753-16-17AS

Parties to the Hearing:	Representative:
Parents Parent[s]	Mark W. Voigt, Esquire Law Office of Mark W. Voigt Plymouth Meeting Executive Campus 600 West Germantown Pike, Suite 400 Plymouth Meeting, PA 19462
Local Education Agency Boyertown Area School District 911 Montgomery Avenue Boyertown, PA 19512	Shannon R. Pierce, Esquire Fox Rothschild LLP 10 Sentry Parkway, Ste. 200 P.O. Box 3001 Blue Bell , PA 19422-3001
Dates of Hearing:	March 24, 2017; April 4, 2017; April 12, 2017[1]
Date of Decision:	April 24, 2017
Hearing Officer:	Cathy A. Skidmore, M.Ed., J.D.

[1] Testimony was completed in two sessions; the April 12, 2017 session was devoted to admission of exhibits and closing arguments.

INTRODUCTION

The student (hereafter Student)[2] is an early elementary school-aged student residing in the Boyertown Area School District (hereafter District). Student is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA)[3] and is also entitled to the protections under Section 504[4] as a child with multiple disabilities. Student currently attends a private school (hereafter Private School) pursuant to a settlement agreement executed in May 2016.

The dispute presented for this decision involves Student's transportation by the District to and from Private School. Following two hearing sessions and closing arguments on the record,[5] the matter is ready for final disposition.

For the reasons set forth below, the Parents have established a portion of their claims but the District will not be ordered to take any action beyond that which it is currently implementing.

PROCEDURAL HISTORY

A. The parties entered into a settlement agreement (Agreement) executed in the spring of 2016 and approved by the District School Board on May 10, 2016. That Agreement provided for, *inter alia*, Student's attendance at Private School for the remainder of the 2015-16 school year, and the entire 2016-17 and 2017-18 school years through the end of Extended School Year (ESY) services in 2018, at District expense. (P-2; S-3)

[2] In the interest of confidentiality and privacy, Student's name and gender, and other potentially identifiable information, are not used in the body of this decision.
[3] 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are set forth in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 14.101 – 14.163 (Chapter 14).
[4] 29 U.S.C. § 794. The federal regulations implementing Section 504 are codified in 34 C.F.R. §§ 104.1 – 104.61. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 15.1 – 15.11 (Chapter 15).
[5] Citations to the record will be as follows: Notes of Testimony (N.T.); Parent Exhibits (P-) followed by the exhibit number; School District Exhibits (S-) followed by the exhibit number; and Hearing Officer Exhibits (HO-) followed by the exhibit number. Citations to duplicative exhibits, particularly email messages, are not exhaustive. Parent in the singular is used to refer to the mother, but the plural is used when it appears that one or the other Parent was acting on behalf of both.

B. The Agreement included a provision that the District would provide Student with transportation for the specified time period excluding an ESY program not relevant here. "Transportation" was not described or defined in the Agreement, nor was there a provision for resolving any disputes regarding transportation. (P-2; S-3)

C. The Agreement included provisions for a reevaluation and development of a new Individualized Education Program (IEP) during the spring of 2018. The Agreement also included the Parents' global waiver of claims through the end of ESY in 2018. (P-2; S-3)

D. The Parents filed a Due Process Complaint in February 2017 that set forth a number of factual assertions prior to May 2016 that included the existence of the executed Agreement. (Due Process Complaint at 2-9 (P-5; S-9))

E. The Parents' Complaint also set forth a number of factual assertions that post-dated the Agreement, alleging certain changes in Student's medical condition and diagnoses and the failure of the District to ensure Student's safety during transportation. The Parents' Complaint was based on the IDEA and Section 504. (Due Process Complaint at 9-12 (P-5; S-9))

F. The Parents' Complaint set forth a proposed resolution that was limited to relief available under the IDEA and Section 504, albeit not all within the authority of a special education hearing officer. Remedies sought included a certified nurse during Student's transportation to and from Private School, and an Order directing that the District place a dashboard camera on the van Student used and that the Parents be permitted to utilize certain audio technology while Student was on the van. (Due Process Complaint at 12-13 (P-5; S-9))

G. The District filed an Answer to the Complaint generally denying all claims and raising the Agreement as a bar to any relief. (District Answer to Complaint (P-6, S-13))

H. The District filed a Sufficiency Challenge and Motion to Dismiss based in part on the Agreement. The Sufficiency Challenge was denied, and the Motion to Dismiss was denied without prejudice to its right to renew those arguments at a later stage of the proceedings. (HO-1)

I. Both parties filed Motions to Compel certain documents which were granted in part and denied in part. (HO-2)

J. The District filed a Second Motion to Dismiss on March 8, 2017, asserting that the issues to be presented at the hearing were moot, as the District had agreed as of that date to provide a certified nurse during Student's transportation to and from Private School; however, that person had not yet been hired. The Parents responded in opposition and requested a conference call. (HO-3, HO-4)

K. Counsel for both parties participated in a conference call with the hearing officer on March 10, 2017. Following that conference call, by Order of March 12, 2017, the District's Second Motion to Dismiss was denied without prejudice, and clarification was made to a portion of the earlier Order granting in part the parties' Motions to Compel. (HO-3, HO-4)

L. In communications following the March 12, 2017 Order, the parties through Counsel provided updates on the status of the matter. On March 18, 2017, the District filed its Third Motion to Dismiss, attaching thereto the resume of a certified nurse who had been hired to be present during Student's transportation to and from Private School beginning March 20, 2017. (HO-5)

M. Following email communication from counsel, during which it was relayed that the nurse was not present on the van on March 20, 2017, this hearing officer denied the District's Third Motion to Dismiss by Order of March 21, 2017, and set forth the specific evidence to be presented at the scheduled March 24, 2017 hearing, to include testimony by one Parent witness and one District witness regarding the provision of nursing services on the van for development of an evidentiary record on that issue. (HO-5)

N. Hearing sessions convened on March 24, 2017 and April 4, 2017, with closing arguments provided via conference call on April 12, 2017. (N.T. 1-550)

O. Objections to three specific exhibits (P-9, P-12, and S-5) were taken under advisement. (N.T. 480-95) Each of those exhibits is hereby admitted as providing background and context, although none were significantly probative of the precise issues presented.

P. This decision is issued within the 75 day timeline for Parent-requested Due Process Complaints (*see* 34 C.F.R. §§ 300.510 and 300.515).

ISSUES

1. Whether the District should be ordered to provide a certified nurse during Student's van transportation;

2. Whether the District should be ordered to install a dashboard camera on the van;

3. Whether the District should be ordered to permit the Parents to utilize technology that permits them audio access to the van during Student's transportation; and

4. Whether the District should be ordered to reimburse the Parents for expert witness fees?

FINDINGS OF FACT

1. Student is an early elementary school-aged child who resides in the District. Student is a child with a disability on the bases of an Intellectual Disability and a Speech/Language Impairment; Student is also identified with Autism. (P-1; S-7)

2. Student is essentially nonverbal and requires constant monitoring throughout the day. Student requires assistance in all activities of daily living. (N.T. 59-60, 154-55)

3. Student experienced a number of febrile seizures prior to the age of twenty three months. Student was diagnosed with a seizure disorder at the age of nine months and has been prescribed Diastat, a rescue medication used to treat acute, prolonged seizures outside of a hospital setting. (N.T. 48-52, 57, 67, 155-57, 310-11; P-7; P-10)

4. Student may experience a subclinical seizure while sleeping and has reportedly done so. Unlike a clinical seizure with noticeable body movement, others near Student may not notice a subclinical seizure. (N.T. 56-57)

5. Student was diagnosed in May 2016 with a chromosomal abnormality that has been identified as commonly producing developmental delays and other conditions including seizure disorders. (N.T. 57-58, 162-63, 227; P-1, P-9 pp. 1-2)

6. Administration of Diastat requires training and skill, including the ability to assess Student to determine whether Student is having a seizure, but does not need to be provided by a medical professional; another adult could be trained in its administration to Student. Student's Parents are able to administer it to Student because they have been provided training by Student's neurologist. Side effects of improper administration of Diastat can be quite serious. (N.T. 51-52, 54, 58-60, 74-75, 157-58, 294; P-13, P-26)

7. Student has a certified home health aide who is not a nurse but who has had training in first aid and cardiopulmonary resuscitation. She has been trained in the administration of Diastat. (N.T. 119-21)

8. Student's home health aide cares for Student during activities of daily living and helps to ensure Student's safety. Her schedule depends on the needs of the Parents. (N.T. 121)

2015-16 SCHOOL YEAR AND SUMMER AFTER AGREEMENT

9. Following the Agreement and through the end of the 2015-16 school year, a District van aide was assigned to Student to accompany Student during transportation to Private School. (N.T. 159-60, 357)

10. Private School evaluated Student in May 2016 shortly after Student enrolled there, and it issued a Reevaluation Report. (P-20; S-4, S-7)

11. An IEP meeting was held at Private School in May 2016, and Student's seizure disorder was discussed. Through invited, no District representative attended the meeting because of the Agreement, with the District understanding that it was not the Local Educational Agency (LEA). The District also did not issue a Notice of Recommended Educational Placement (NOREP). (N.T. 170-71, 352-56, 410, 443; P-21, P-22, P-24 pp. 5-6; S-2, S-6, S-10 pp. 19, 27, 30, 34)

12. Student's IEP at Private School provided annual goals addressing a number of pre-academic and daily living skills, as well as speech/language, occupational, and physical therapy; it also included a Positive Behavior Support Plan. Transportation with an aide was noted to be provided by the District. (P-22; S-6)

13. In August 2016, Student underwent and the Parents received the results of an EEG study that reflected abnormal brain activity (two seizures). Student was diagnosed with epilepsy at that time. (N.T. 160-61, 191-92, 227; P-7 pp. 25-27)

14. Student was prescribed Depakote, an anti-seizure medication, after the August 2016 EEG. (N.T. 48-49, 57, 161, 310-11; P-7 p. 34, P-10)

FALL 2016-17 SCHOOL YEAR

15. The District's Director of Special Education is responsible for making any decisions regarding Student's transportation. (N.T. 375, 385, 411)

16. On the first day of the 2016-17 school year, the aide was not on the van. The Parents told the driver that Student had a seizure disorder and were concerned that the driver was not aware of Student's specific needs; they drove Student to school that day. They also called the District transportation office to request that an aide be placed on Student's van. (N.T. 163-65, 220, 239-40, 357, 411, 414, 423)

17. Several days into the 2016-17 school year,[6] the Parents contacted the District, the transportation company, and Private School about Student's need for an aide during the van transportation. (N.T. 220-23, 358-59; P-24 pp. 11-12, 18; S-10 pp. 62-65)

18. An aide was again provided for Student's van transportation in early to mid-September 2016. Except for a short period of time, Student was on the van with the driver and aide and no other students or adults. (N.T. 175, 359, 372, 435)

19. Sometime after the start of the 2016-17 school year, Student appeared reluctant to get on the van. (N.T. 126-29, 176-77)

20. On two occasions in the fall of 2016 through very early 2017, Student's chest harness for the van seat was not properly secured. On several other occasions during the fall of 2016, one of the straps connected to a buckle was not in a correct position. The home health aide provided instructions to the van aide on how to secure Student properly in the van. (N.T. 122-25)

21. On one occasion in the fall of 2016, Student sat down in the driveway on the way to the van and resisted the Parent's efforts to move toward the van. The van aide asked the Parent to "hurry up," and the Parent believed the aide did not understand children like Student or Student's needs. (N.T. 179-80)

22. In October 2016, the Parents asked for a different aide to accompany Student on the van ride to Private School. (N.T. 229; P-24 p. 22; S-10 p. 121)

23. By mid-November 2016, the District arranged for the van to drive up the family's driveway because of the Parents' concerns with Student transitioning to the van. (N.T. 231, 363-65)

24. In early December, the Parents through counsel raised concerns about the van aide, and mentioned the possibility of installing a dashboard camera on Student's van. They also asked for an IEP meeting. (N.T. 186, 234, 371-72; P-8 p. 8; S-11 p. 83)

25. On December 19, 2016, the Parents through counsel provided written confirmation of the chromosome abnormality and consequent possibility of serious and sudden seizures. They requested a nurse accompany Student on the van ride at that time. (P-8 pp. 11-13; S-11 pp. 105-06, 108-09)

26. Student's treating pediatrician wrote a letter on January 10, 2017 at the request of the Parents. That letter, "To Whom It May Concern," provided a diagnosis of generalized seizure disorder and stated that, "[i]t is medically necessary that a nurse to be [sic] present on the bus when traveling to and from school, should emergency seizure medications need to be administered." That conclusion was based, at least in part, on the pediatrician's understanding of an aide's qualifications and his experience helping to

[6] This hearing officer takes notice that the three days prior to September 6, 2016 were the Labor Day weekend.

secure nursing services in other situations involving aides. (N.T. 54-55, 78-79, 294; P-3 p. 31; S-11 p. 152)

27. The Parents provided medical records to the District on January 10, 2017 related to Student's epilepsy diagnosis and chromosomal abnormality. (P-8 p. 18, S-11 p. 119)

28. A meeting convened on January 11, 2017 to discuss Student's diagnoses and the need for Diastat. The Parents reiterated their request for a nurse to accompany Student on the van. They also requested use of, and described, the technology that would permit them audio access to the van environment. The District requested additional medical records and the Parents provided releases. (N.T. 192-94, 377-78, 382-85, 444-45; P-8 pp. 17-20; S-10 pp. 258-59, S-11 pp. 118-19)

29. The District provided Student's medical information to its physician, who reviewed the records but did not examine Student. He spoke with Student's treating pediatrician and the neurologist. The District's physician concluded that, because Student was not having active seizures, Student did not require a nurse during van transportation to Private School, and that the need for a trained individual to administer Diastat could be adequately served by an aide or paraprofessional. (N.T. 255-72, 278, 295, 380-82, 386-88)

30. The technology that the Parents seek permission to use for audio access during the van ride involves a Global Positioning Device that is attached to Student's clothing or an item such as a book bag. The technology permits someone with appropriate authorization to listen in to the environment where the device is located, but he or she cannot communicate through the device. (N.T. 135-37, 194, 323; P-14)

31. The District through counsel denied, in writing, the Parents' request to use the audio technology, and advised that none of the vans have dashboard cameras. (P-8 pp. 15, 19)

32. The District has a policy that authorizes audio and video recording equipment on transportation vehicles. (P-18)

SPRING OF 2016-17 SCHOOL YEAR

33. Student experienced a seizure in early February 2017. The seizure was not prolonged and no medication was administered. (N.T. 199)

34. On March 18, 2017, the District confirmed to the Parents through counsel and the hearing officer that a nurse had been hired and would be available on Student's van transportation beginning on March 20, 2017. (HO-5 pp. 3, 7-9)

35. The nurse who was hired was an employee of an agency with whom the District contracts, and was to accompany Student to and from Private School five days per week. The District Director of Special Education was contacted on March 20, 2017 at approximately 7:45 a.m. by the transportation company, advising that the nurse had not arrived for Student's van ride. (N.T. 108-09, 112)

36. The bus transportation company telephoned the Parents at approximately 8:20 a.m. on March 20, 2017 and informed them that the assigned nurse had not reported, but that a substitute nurse had been located who would accompany Student on that morning's van ride. The van with the nurse arrived approximately ten or fifteen minutes late that morning. (N.T. 103-04)

37. The District provided a nurse on the van both to and from Private School each school day during the week of March 20, 2017. Those nurses were District employees. As of the April 4, 2017 hearing session, a nurse was provided on Student's van to and from Private School for each day it was in session from March 20, 2017 forward. (N.T. 104-05, 109, 201; S-10 p. 51)

38. The Parents have no concern with the ability of the nurses in administering Diastat to Student if necessary. (N.T. 106)

39. The District was provided a Seizure Action Plan for Student in March 2017. The Seizure Action Plan included the administration of Diastat for a seizure lasting longer than five minutes. Following review of that Seizure Action Plan, the District concluded that Student should be accompanied by a nurse during van transportation to and from Private School. At the end of the testimony at the final April 4, 2017 hearing session, the District Director of Special Education confirmed that the District would continue to provide a nurse on Student's van through the end of the Agreement. (N.T. 393-95, 450-51; P-7 p. 62)

40. The District has hired a nurse to accompany Student four days each week both to and from Private School. A different nurse has been hired to accompany Student on the other day in the morning, and several others have accepted employment for that day's afternoon ride. All of the nurses are District employees and have a copy of the Seizure Action Plan. (N.T. 110-13, 390-91, 395, 454, 463)

41. The prior van aide has been discontinued from Student's van. (N.T. 396)

42. As of April 4, 2017, Student was never administered Diastat. However, no one can predict whether or when Student may have another seizure, and Student's seizure disorder is not adequately under control. (N.T. 61, 289-92, 311)

DISCUSSION AND CONCLUSIONS OF LAW

GENERAL LEGAL PRINCIPLES

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly,

the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in "equipoise." The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution* (*Quakertown Community School District*), 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be generally credible, testifying to the best of his or her recollection. There was little contradiction in the testimony itself despite some conflict in the parties' and witnesses' perspectives on the matters in dispute. The testimony of the Parents' physician was accorded greater weight than that of the District's physician,[7] because the Parents' physician was Student's treating pediatrician and had extensive knowledge of Student's medical history and diagnoses, whereas the District physician only briefly consulted with two of Student's treating physicians, in addition to reviewing medical records, and never met or examined Student.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, as were the parties' closing arguments.

IDEA PRINCIPLES

The IDEA and state and federal regulations obligate LEAs to provide a "free appropriate

[7] Although the Parents objected to the testimony of the District's physician, it was considered for the limited purpose of understanding the District's response to the request for a nurse on Student's van. His opinion regarding the limited instruction necessary for a non-medical professional to administer Diastat (N.T. 270) was given less weight than that of the Parents' physician, who provided a more detailed description of the requisite knowledge and training for a person who is not a medical professional.

public education" (FAPE) to children who are eligible for special education. 20 U.S.C. §1412. The IDEA defines a "child with a disability" as a child who has been evaluated and identified with one of a number of specific classifications and who, "by reason thereof, needs special education and related services." 34 C.F.R. § 300.8(a); *see also* 20 U.S.C. § 1401.

"The term 'special education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability[.]" 20 U.S.C. § 1401(a)(29). In addition,

> [t]he term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(a)(26); see also 34 C.F.R. § 300.34.

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that IDEA obligations are met by providing personalized instruction and support services that are reasonably calculated permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). LEAs meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.' " *Mary*

Courtney T. v. School District of Philadelphia, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

Recently, the U.S. Supreme Court considered a lower court's application of the *Rowley* standard, observing that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas County School District RE-1*, ___ U.S. ___, ___, 137 S.Ct. 988, ___, 197 L.Ed.2d 335, 350 (2017). The Court explained that, "an educational program must be appropriately ambitious in light of [the child's] circumstances… [and] every child should have the chance to meet challenging objectives." 197 L.Ed.2d at 351. This standard is consistent with the above interpretations of *Rowley* by the Third Circuit.

SECTION 504 PRINCIPLES

Section 504 specifically prohibits discrimination on the basis of a handicap or disability. 29 U.S.C. § 794. A person has a handicap if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). "Major life activities" include learning. 34 C.F.R. § 104.3(j)(2)(ii).

The obligation to provide FAPE is substantively the same under Section 504 and under the IDEA. *Ridgewood, supra*, at 253; *Lower Merion School District v. Doe*, 878 A.2d 925, 931 (Pa. Commw. 2005). In this matter, the Section 504 and IDEA claims are the same and will be addressed together.

DISTRICT'S RENEWED MOTION TO DISMISS

Courts that have considered the authority of a hearing officer regarding a settlement agreement appear to concur that, to the extent the agreement relates to the provision of FAPE,

the document may be reviewed and considered by a hearing officer for specific purposes. For example, hearing officers may decide if an enforceable agreement exists. *I.K. v. School District of Haverford*, 2011 U.S. Dist. LEXIS 28866 (E.D. Pa. Mar. 21, 2011); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 263 (Pa. Commw. 2014); *see also Lyons v. Lower Merion School District*, 2010 U.S. Dist. LEXIS 142268, 2010 WL 8913276 (E.D. Pa. Dec. 14, 2010). However, case law is also clear that hearing officers are not permitted to enforce settlement agreements.

> Enforcement of a settlement agreement may determine if parents have waived certain rights under the IDEA, or whether an LEA has contracted to provide certain benefits above those that the IDEA requires, but it is not related to the fundamental question of whether a 'child received a free appropriate public education.' Enforcing a settlement agreement thus appears to exceed the authority that the IDEA confers upon a hearing officer.

J.K. v. Council Rock School District, 833 F. Supp. 2d 436, 448-49 (E.D. Pa. 2011); *see also Lyons, supra*.

As this hearing officer previously noted (HO-1 p. 3), the main thrust of the Parents' claims do not relate to enforcement or interpretation of the Agreement. Rather, they contend that the District is not complying with its obligation to provide transportation for Student that is appropriate under applicable law,[8] in part based on information acquired since execution of that May 2016 Agreement. Although the District has argued that the Parents have waived this and other claims because of that Agreement, the District is essentially asking this hearing officer to interpret, and give effect to and thus enforce, specific terms of the Agreement. That is something that the courts in this jurisdiction have agreed this hearing officer may not do. *See, e.g., J.K., supra*, 833 F.Supp.2d at 448-49.

[8] Although there is a provision for transportation in the Agreement (that this hearing officer is permitted to read and review), the Parents raised serious concerns that this hearing officer believed should be addressed promptly in any event.

Special education due process hearing officers have authority to decide issues relating to a proposed or refused initiation of or change in the child's identification, evaluation, or educational placement; or the provision of a free, appropriate public education (FAPE) to a child, under the IDEA. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.503, 300.507, 300.511; 22 Pa. Code §§ 14.101 – 14.163. In Pennsylvania, they are also granted authority to decide FAPE and related issues under Section 504, including discrimination against a student based upon disability, in accordance with the procedures provided by the IDEA and Pennsylvania's Chapter 14. 22 Pa. Code §§ 15.1 - 15.11. This hearing officer's jurisdiction is over Student's special education and related services based on those laws, and not under any contractual theory. As was recently explained in a somewhat similar context, when a party to a special education settlement agreement raises a challenge to the other party's compliance or noncompliance with its terms, a party "can enforce the terms of the Agreement through a state law breach of contract action [or] proceed to a due process hearing based on [the other party's] alleged failure to [comply with its FAPE obligations], notwithstanding the waiver of rights in the Agreement." *T.L. v. Pennsylvania Leadership Charter School*, 2016 U.S. Dist. LEXIS 171181, at *31-32 (E.D. Pa. Dec. 12, 2016). *See also H.E. v. Walter D. Palmer Leadership Learning Partners Charter School*, 2016 U.S. Dist. LEXIS 148904, at *5 (E.D. Pa. Oct. 27, 2016) (citing cases for the proposition that hearing officers cannot enforce settlement agreements). Because the hearing officer lacks jurisdiction to enforce the Agreement, and further because the Parents are presenting IDEA and Section 504 claims that are within her jurisdiction, the District's request for dismissal must again be denied.[9]

[9] The District has made a number of arguments regarding the importance of settlement agreements in these types of cases (*see, e.g.*, HO-5 pp. 2-6 and its closing argument). Should a court be called upon to consider the effect to be given the waiver provision in the instant Agreement, or any other issue, an evidentiary record has already been developed. Permitting this matter to continue in light of the health and safety concerns raised, despite the District's

THE PARENTS' CLAIMS

The Parents' primary contention is that Student requires a nurse while Student is on the van during transportation to and from Private School. Although the District has ultimately agreed to provide a nurse for that very purpose, the record as a whole suggests that someone other than a licensed nurse or other medical professional could potentially administer Diastat should Student need that medication during van transportation, specifically an adult with appropriate training and skill to include how to recognize whether Student is exhibiting symptoms of a seizure, at least once Student's seizure disorder is adequately controlled. The Parents and Student's home health aide are two very good examples of the exception to the proposition that a nurse is absolutely required, although their familiarity with Student is most certainly a factor to consider. However, whether an aide or other person could act in that capacity is not at issue (*see* N.T. 54-55). In any event, the record does convincingly establish that Student requires a nurse or other very well trained and qualified adult to accompany Student during transportation to and from Private School as a related service under the IDEA and its implementing regulations.[10]

It merits repeating that the District sought dismissal of the Complaint a third time on March 18, 2017 on the grounds that the primary issue was rendered moot when the District agreed to that request (HO-5),[11] and reiterated those contentions in its closing argument. Indeed,

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serial Motions, also afforded the parties the opportunity to work toward settlement as they had in May 2016 through the mandatory resolution process. As discussed more fully below, the parties did ultimately agree on the need for nursing services during Student's van transportation.

[10] There were questions by the District regarding the availability of medical services at Private School (N.T. 326-27, 332-28, 399-400), but that matter is not an issue here. In addition, since the record does not contain reliable criteria for someone other than a nurse to provide the service, nursing services shall be considered what is necessary.

[11] An Eastern Pennsylvania District Court recent questioned "whether a hearing officer has the authority to dispose of an IDEA due process complaint on the procedural point that the matter is moot [because t]he IDEA explicitly requires that a hearing officer's decision be on 'substantive grounds.'" *R.V. v. Rivera*, 2016 U.S. Dist. LEXIS 167250, at *9 (E.D. Pa. Dec. 5, 2016) (citing 20 U.S.C. § 1415(f)(3)(E)(i)). Although it is not uncommon for the filing party to withdraw an issue at a due process hearing because it has been resolved, the Parents did not do so in

since March 20, 2017, the record demonstrates that the District has been providing the nursing services that were requested, and has made appropriate staffing arrangements through the end of the 2016-17 school year. In addition, the District presented persuasive testimony that it will continue to do so pursuant to the Seizure Action Plan through the end of the term of the Agreement (N.T. 450-51), and there is no reason to doubt that the services will remain throughout that period of time. Although the Parents expressed an understandable desire for Student to have a single, dedicated nurse who will consistently accompany Student because Student is more comfortable with familiar individuals (N.T. 105-06 202-04), this hearing officer can also appreciate the difficulty, if not impossibility, of guaranteeing that one specific person will be always be available for any given role. The District's plan for providing the requested nursing services during transportation adequately meets the Parents' request, and the attached Order will recognize both that services are necessary for Student and that they are already being provided by the District.

The other requests of the Parents, for a dashboard camera and use of the audio technology, have not been established by a preponderance of the evidence as necessary for Student in order to be provided with appropriate transportation services. The evidence demonstrates that those requests stemmed from the Parents' concerns about the aide who accompanied Student on the van from the start of the 2016-17 school year through early 2017 (N.T.198, 316-17) when the nurse took over that responsibility. While those concerns were clearly genuine, if not alarming, there was nothing in the record to suggest that those circumstances, or anything like them, continue. Indeed, the Parents expressed no concern whatsoever with the ability of any of the District's nurses to ensure Student's health and safety

this case, and other claims remained in dispute.

on the van; and, any such concerns that would arise could easily be promptly addressed through the type of communications between the parties that have been ongoing. Moreover, this hearing officer does not conclude that the fact that the District has a policy authorizing audio and video recording on vehicles and providing guidelines for the policy's implementation is sufficient justification for ordering the District to ensure installation of a dashboard camera or to permit use of the audio technology on Student's van under the circumstances presented here.

This hearing officer does recognize the Parents' wish to better monitor Student at times throughout the day, particularly given Student's limited communication skills and vulnerability to potential threats to Student's health, safety, and well-being. The GPS device even without the audio component clearly provides them with meaningful information that can be supplemented in other ways, such as ongoing communication with Private School teachers and any related service providers. In addition, as set forth in the Agreement, the parties will be required to continue to work together and collaborate at specified times in planning for Student's 2018-19 school year, if not before. This hearing officer strongly encourages the parties, despite the differences that led to this due process hearing, to recognize the critical importance of a cooperative and trusting relationship, particularly given Student's very young age at this early stage of Student's educational career. It is respectfully suggested that the parties reach a consensus on periodic communication about and review of Student's transportation needs as a first step toward rebuilding a collaborative relationship, and to alleviate any concerns the Parents may have about Student's safety on the van.

The final issue is the Parents' request for reimbursement for the fees incurred by them for their physician, who qualified as an expert, to testify at the hearing. That witness provided testimony that was insightful to the hearing officer in reviewing the record, and was accorded

significant weight as noted above. However, the basis for this requested remedy is Section 504, which provides in relevant part that, "*the court*, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k) (emphasis added). Similar language in the IDEA has been construed as not applying to administrative hearing officers. *B. ex rel. M.B. v. East Granby Board of Educ*ation, 201 Fed. Appx. 834, 837, 2006 U.S. App. LEXIS 27014, *6 (2d Cir. 2006) (concluding that an attorney fee award "is a district court function" under 20 U.S.C. § 1415(i)(3)(B), which provides district courts with discretion to "award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party"). Accordingly, this hearing officer declines to order that remedy.

ORDER

AND NOW, this 24th day of April, 2017, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District's Motion to Dismiss is DENIED.

2. Student requires, and must be provided with, a nurse to accompany Student during transportation to and from Private School as a related service, and will require such services for the foreseeable future.

3. The District has retained the obligation of providing transportation services to Student to and from Private School through the end of ESY 2018. Because the District is already providing a nurse to accompany Student during transportation to and from Private School, and has agreed to continue to provide those services through the end of ESY 2018, it is not ordered to take any further action.

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

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER