

*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**  
**Final Decision and Order**

**OPEN HEARING**  
**ODR File Number: 21448-18-19**

**Child's Name:** M.D.      **Date of Birth:** [redacted]

**Parent:**  
[redacted]

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**Local Education Agency:**  
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**Hearing Officer:** Linda M. Valentini, Psy.D, CHO  
Certified Hearing Official

**Date of Decision:** January 1, 2019

## Background

Student<sup>1</sup> is a pre-teen aged student who resides in the District but due to the severity of Student's disabilities attends a private school in a neighboring state. Student is identified as eligible for special education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and its Pennsylvania implementing regulations, 22 Pa. Code § 14 *et seq.* (Chapter 14), as a child with autism, intellectual disability and other health impairment (seizure disorder). As such, Student is also regarded as an "individual with a disability" as defined by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*, and as a "protected handicapped student" under the Pennsylvania regulations implementing Section 504 in schools, 22 Pa. Code § 15 *et seq.* (Chapter 15).

Student's seizure disorder requires that rescue medication be administered if a seizure lasts longer than three minutes. Student requires transportation to and from school, and Student must be accompanied by a nurse in the event that rescue medication is needed during transport. The Parent requested this hearing because the District, to date, has not provided a nurse and she therefore has either transported Student herself with assistance from another person, or has accompanied Student during the morning and afternoon trips in vehicles with drivers supplied by the District. After some initial resistance the District now accepts responsibility for providing the nurse, but the agency with which the District contracts for private nursing services has not found a nurse with certification in both Pennsylvania and the neighboring state where Student attends school.

The District offered a number of stipulations which helped to move the matter toward partial resolution, with additional follow-up cooperation planned for the parties and counsel. This decision endorses said follow-up, and addresses secondary issues surrounding the dispute including reimbursement for the Parent's expenses, reimbursement for expert witnesses, and compensatory education for the time Student missed school because of transportation issues. In light of the evidence before me I find for the Parent on some but not all of her claims.

Because of the urgency of the matter, I am issuing a streamlined decision with references made to each witnesses' testimony generally rather than citing specific pages from the transcript.

## Issues<sup>2</sup>

1. Should a nurse or nurses be assigned to Student full time, specifically during transportation to and from school and during the time Student is at school?

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<sup>1</sup> 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. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

<sup>2</sup> In the written complaint and in the closing brief Parent referenced a denial of a one-to-one aide. However, at the hearing the opening statement fleetingly referenced an aide, and consequently the issue of an aide was not included in the hearing officer's recitation of issues confirmed by counsel. No testimony was provided about an aide. Therefore this decision only addresses the need for an appropriately certified nurse.

2. If a nurse cannot be assigned, or during the interim when the nurse is being sought, should the Student be given an alternate means of transportation that would meet Student's needs?
3. Should the Parent be reimbursed for fees for experts retained for this hearing?
4. Is Student entitled to compensatory education for the days or part-days that Student missed school because of transportation issues, and if so in what form and in what amount?
5. Should the Parent be reimbursed for the costs she incurred in transporting the student herself?

### **Stipulations Offered by the District**

1. Student is a resident of the District with a date of birth of [redacted].
2. Student is currently age [redacted] and attends grade seven at the [redacted] School located in [redacted].
3. Student is eligible for special education and related services pursuant to a disability classification of autism.
4. Student also suffers from a nut allergy for which Student has been prescribed the availability of an epinephrine auto injector, or EpiPen, in the event of an allergic reaction.
5. Student also suffers from a seizure disorder for which Student has been prescribed the availability of the rescue medication of Clonazepam in the event of or occurrence of a seizure lasting over five minutes.<sup>3</sup>
6. Student initially commenced attending an out-of-district placement to [redacted] School on or about May 1, 2018. On May 25th, 2018, Parent executed a settlement agreement waiving all claims against the District relating to Student's educational program through the date of execution of that agreement with a specific carve out for any Section 504 discrimination claims.
7. On June 12, 2018, the District issued an IEP for Student's placement in a full-time multiple disabilities program at the [redacted] School incorporating present levels of academic and functional performance, goals and objectives, program modifications, and specially designed instruction, related services of speech and occupational therapy and supports for school personnel developed by the [redacted] School.

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<sup>3</sup> At the time of the hearing the District was not aware that Student's most recent prescription specifies that the medication should be administered after three minutes. This change was verified on the record when the Parent produced the bottle of medication labeled with the directions for use. [NT 50-51]

8. The District's IEP also included specialized transportation for Student which included a one-to-one assistant or attendant.
9. Student's educational program is not in dispute. The only issue in dispute is the District's failure to provide one-to-one nursing services for Student.
10. For purposes of this proceeding, and reserving the District's rights and defenses with respect to any separate proceedings, the District stipulates that it is obligated to provide Student with a full-time one-to-one nurse to facilitate Student's attendance at the [redacted] School, and the District is willing to stipulate that Student's IEP be amended to include that related service.
11. The District's obligations to provide a full-time nurse for Student to facilitate Student's attendance at the [redacted] School would include nurse(s) who would be available to attend to Student during transportation to and from school as well as be available to Student during the school day.

### **Findings of Fact**

1. When Student started attending the School on or about May 1, 2018 Student was transported on a bus. Beginning on June 8, 2018 the District arranged cab/private car door-to-door transportation for Student and the Parent. [S-12, S-13]
2. Although Student was transported in the District-funded cab/private car, at some point prior to or during ESY the Parent began renting a car and started driving the Student to and from School herself. [Testimony of Parent]
3. At some indeterminate point the Student's grandmother told the assigned cab/private car driver that the Parent was declining transportation services and the Parent would be in contact should she again need the service. On that day the Parent was already in route to the School with Student. According to the Parent the grandmother was incorrect. [Testimony of Parent; Testimony of Special Education Liaison for Transportation]
4. About two weeks before ESY ended the Parent became ill and could not accompany Student to ESY in the cab/private car or transport Student to school herself. The Special Education Liaison for Transportation was not notified until toward the end of August that the Parent had been previously renting a car and transporting Student herself. [Testimony of Parent; Testimony of Special Education Liaison for Transportation]
5. On September 4, 2018 the Parent notified the District that she no longer wanted the cab service. [S-12]
6. Although the Parent declined the cab/private car the District offered and was renting cars and taking Student to the School herself, as of the hearing date she can no longer continue the transportation due to health issues. [Testimony of Parent]

7. Although Student began attending the School on May 1, 2018, the need for nursing services was not initially communicated to the District until on or about May 15, 2018. The communication indicated the need for the administration of an EpiPen in the event of an allergic reaction while being transported to and from school. Reference was also made to Student's seizure disorder, but the administration of any required medication for this disorder was not indicated. (S-1; S-12 pp. 1-3.)
8. On May 16, 2018 the request was amended to include an express reference to the need for the rescue medication Clonazepam for a seizure over 5 minutes<sup>4</sup> in duration during transportation. [S-2, S-12]
9. Student's physician did not specify the need for nursing services as opposed to "skilled personnel". [S-1, S-2, S-12]
10. On July 9, 2018 following the beginning of the School's ESY program Student's physician specifically identified the need for nursing services. At the same time the request was expanded from during transportation to full-time at school. [S-5]
11. The need for a full-time nurse removed the difficulty of finding a part-time nurse or nurses to fill only the few hours during morning and afternoon transportation. [S-12]
12. The requirement that the nurse hold certification in both Pennsylvania and the neighboring state has proven to be an obstacle for the District. [S-12]
13. The District's transportation department is able to provide transportation with a one-to-one aide. [Testimony of Special Education Liaison for Transportation]
14. The District's transportation department cannot procure or assign a nurse; the District's School Health Coordinator is the person responsible for this task. [Testimony of Special Education Liaison for Transportation; Testimony of School Health Coordinator]
15. Aside from the 265 nurses in its direct employ situated in the schools, the District contracts with one single provider of nursing services (hereinafter the Contracted Provider) when the need is for a service outside a District school. [Testimony of School Health Coordinator]
16. Although the School Health Coordinator has made repeated contacts with the sole Contracted Provider, the sole Contracted Provider has not found a dually certified nurse to fill the part-time or the full-time hours. [Testimony of School Health Coordinator; S-12]
17. The School Health Coordinator appears not to have alerted her supervisor, the Director of Nursing, or the assigned regional or District Special Education Director, that there was an emergency situation involving denial of FAPE to a child. [Testimony of School Health Coordinator]
18. The School Health Coordinator, and/or the Office of General Counsel, apparently did not alert any other high-level administrator in the District that there was an emergency situation

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<sup>4</sup> See footnote #3 above.

that required an immediate and possibly creative response. [Testimony of School Health Coordinator]

19. There was no apparent consideration of creative responses such as searching out another provider that could locate a credentialed nurse and asking the school board to award an emergency no-bid contract to that provider<sup>5</sup>, or assigning one or more of the 265 nurses in its employ to render the services to the child, or engaging a medical transportation service for the travel times and using a nurse certified in the neighboring state for the school-hours shift. [Testimony of Special Education Liaison for Transportation; Testimony of School Health Coordinator]
20. Student has missed whole school days and parts of school days due to a lack of nursing services during transport to and from school. [Testimony of Parent]

### **Legal Basis**

**Burden of Proof:** The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3<sup>rd</sup> Cir. 2012). In this case the Parent asked for the hearing and thus assumed the burden of proof.

**Credibility:** During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at \*28 (2003); The District Court "must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion." *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); *see also* generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 \*11-12 (M.D. Pa. 2014); *A.S. v. Office for*

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<sup>5</sup> Parent's counsel, in his closing argument, notes that minutes of the School Board show various approvals of contracts throughout the entire school year based on schools' and students' needs. He reported that one such contract, approved on October 18, 2018, was actually for substitutes and per-diem nurses from two separate health care services providers other than the sole contracted provider about which the School Health Coordinator testified. He urged me to review some of the Board Minutes as well as speak to any School Board Member, to clarify the misinformation that was shared during testimony by the School Health Coordinator. I decline to conduct any such investigation outside the hearing context, but do note that I questioned the School Health Coordinator on the record about the possibility of the school board's approving a special contract.

*Dispute Resolution (Quakertown Community School District*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

Although the Parent's expert witnesses were credible, their testimony was granted little weight as the information they offered was not particularly helpful. The Special Education Liaison for Transportation testified openly and cooperatively and I found his testimony to be credible. The School Health Coordinator projected a tense and defensive demeanor, and while I believed her description of her contacts with the sole contracted provider I was puzzled about why she had not made a concerted and persistent effort to find an alternate way to solve the situation. While the Parent's care and concern for her child was palpable, and the intensity of the child's needs was evident in the hearing room, I must note that I found her response to my question about any use of the monthly rental car beyond transporting her child to and from school not to be credible. However, this credibility finding is not influencing my consideration of the question of reimbursement for the car.

FAPE: Student is entitled by federal law, the Individuals with Disabilities Education Act 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). FAPE "consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction." *Ridley School District v. M.R.*, 680 F.3d at 268-269, citing *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982). The Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with "meaningful educational benefits" in light of the student's "intellectual potential." *Shore Reg'l High Sch. Bd. f Ed. v. P.S.* 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir. 1988)); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). In *Andrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), 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." The Court concluded that "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

Related Services: Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education ... 34 C.F.R. §300.34(a). Nursing is a "school health service" that, when required, must be specified in a child's IEP. A local school district is generally permitted to discharge its obligation to provide a related or special service by contracting with a third-party provider, such as a nursing agency. 34 C.F.R. § 104.33(b)(3). However, the use of a private contractor to deliver a related service does not relieve an LEA of its responsibility for ensuring the continuous implementation of that service consistent with IDEA and Section 504. The public agency remains responsible for ensuring that the requirements of the IDEA are met. 20 U.S.C. § 1414(d)(1)(a)(IV); 34 C.F.R. §§ 300.34(a), (c)(13), 300.320(a)(4).

The Supreme Court has made it clear that districts are required to provide only those services that are necessary to enable the child to benefit from education. In *Irving Independent School*

*District v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed. 2d 664 (1984), the Court stated that “only those services necessary to aid a handicapped child to benefit from special education must be provided ...” Thus, a child with a disability is entitled to transportation services and nursing services only if these are required to help that child benefit from his or her special education program. In the instant matter it is incontrovertible that Student requires transportation and nursing services in order to benefit from Student’s education.

Compensatory Education: Compensatory education is an appropriate remedy where an LEA knows, or should know, that a child’s educational program is not appropriate or that he or she is receiving only a trivial educational benefit, and the LEA fails to remedy the problem. *M.C. v. Central Regional Sch. District*, 81 F.3d 389 (3d Cir. 1996); *Ridgewood Education v. N.E.*, 172 F.3d. 238, 250 (3d Cir. 1999). *Ridgewood* provides that a school district has a reasonable period of time to rectify a known issue. Given the District’s lassitude in securing appropriate nursing services once the need became known, compounded by the District’s initial disavowal of any responsibility for providing this service, I am not calculating a rectification period and compensatory education will begin on July 10, 2018.

Compensatory education is an equitable remedy. *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990). Courts in Pennsylvania have recognized two methods for calculating the amount of compensatory education that should be awarded to remedy substantive denials of FAPE. Under the first method (“hour for hour”), which has for years been the standard, students may potentially receive one hour of compensatory education for each hour that FAPE was denied. *M.C. v. Central Regional*. An alternate, more recent method (“same position”), aims to bring the student up to the level where the student would be but for the denial of FAPE. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005); *B.C. v. Penn Manor Sch. District*, 906 A.2d 642, 650-51 (Pa. Commw. 2006); *Jana K. v. Annville Cleona Sch. Dist.*, 2014 U.S. Dist. LEXIS 114414 (M.D. Pa. 2014); *Ferren C. v. Sch. District of Philadelphia*, 612 F.3d 712, 718 (3d Cir. 2010)(quoting *Reid* that compensatory education “should aim to place disabled children in the same position that they would have occupied but for the school district’s violations of the IDEA.”). The “same position” method has been recently endorsed by the Third Circuit in *G.L. v. Ligonier Valley Sch. Dist. Authority*, 115 LRP 45166, (3d Cir Sept. 22, 2015) although the court also cites to *M.C.*

The “same position” method, while essentially ideal, has significant practical problems in that unless the parents produce a credible expert to testify about what is needed to bring the child up to the same position he or she would occupy but for the denial of FAPE the hearing officer is left with having to craft a remedy based on educated estimation. Although on several occasions this hearing officer has been able to do so with relative confidence, the instant matter does not present such an opportunity. Therefore the default “hour for hour” approach will be used.

## **Discussion**

Listening to the testimony of the District’s School Health Coordinator, one would conclude that moving the District to act in creative ways to address what was becoming an emergency situation is as impossible a task as turning the Queen Mary around while she sails full speed ahead. The



District at various levels of administration does not seem to have appreciated the fact that this situation was developing into an emergency in that the absence of a nurse was denying a severely impaired child FAPE.

I consider the issues raised in this matter as follows:

Should a nurse or nurses be assigned to Student full time, meaning during transportation to and from the school and during the time Student is at the school?

The District has stipulated that it is responsible for providing an appropriately certified nurse for Student during transport and during school hours. Certainly up to July 9, 2018 the District did not suspect that an emergency was brewing based on nursing services. On that date it became incumbent on the District to begin to solve the problem it faced quickly. I find that the District is entitled to consideration for a reasonable period during which 1) to learn that its Contracted Provider was not able to handle the need; and 2) to devise a creative solution. I estimate that the District should have had a nurse in place by the first day of the 2018-2019 school year.

I will order that the District secure and provide an appropriate means of transportation for Student no later than February 1, 2019.

If a nurse cannot be assigned, or during the interim when the nurse is being sought, should the Student be given an alternate means of transportation that would meet Student's needs?

Starting on February 1, 2019 the District must provide Student with an alternate means of transportation if it has not located an appropriately credentialed nurse. I will so order.

Should the Parent be reimbursed for fees for experts retained for this hearing?

Although the experts were retained before the District stipulated to its responsibility to provide transportation for Student, their testimony in this regard was not needed as the District's responsibility is a clear point of law that can be decided without that testimony. However, in the hope of hearing some specific ways in which the parties could approach solving the problem facing them I allowed the experts' testimony. Ultimately their testimony was not helpful in this regard and I am denying reimbursement for their time.

Is Student entitled to compensatory education for the days or part-days that Student missed school because of transportation issues, and if so in what form and in what amount?

As noted earlier, given the District's lassitude in securing appropriate nursing services once the need became known, compounded by the District's initial disavowal of any responsibility for providing this service, I am not calculating a rectification period and compensatory education will begin on July 10, 2018. Student is therefore entitled to a full day of compensatory education for every day that lack of nursing services during transportation prevented Student's attendance at school beginning on July 10, 2018 through the end of the ESY period, and then beginning on the first day of school of the 2018-2019 school year, through January 31, 2019. I will also award compensatory education hours for the hours Student missed because of late arrivals during these time periods.

The compensatory education hours are to be used exclusively for educational, developmental and therapeutic services, products or devices that further the Student's IEP goals. The value of these

hours shall be based upon the usual and customary rate charged by the providers of educational, developmental and therapeutic services in the county where the District is located and geographically adjacent Pennsylvania counties. The compensatory services may be used after school, on weekends and in the summers until Student's 21<sup>st</sup> birthday. The services are meant to supplement, and not be used in place of, services that are in Student's IEPs.

Should the Parent be reimbursed for the costs she incurred in transporting the student herself? Student was initially transported by bus and the District put cab/private car service for Student and the Parent in place on June 8, 2018. At some point Student's grandmother told the assigned cab driver that the Parent did not want the cab service any longer. On September 4, 2018 the Parent notified the District that she was declining this service. Given that the District was offering transportation, albeit with the Parent's participation, I will not order that the Parent be reimbursed for the expenses she incurred when she chose to rent a car and transport her child to and from school herself rather than accompanying Student in the vehicle supplied by the District.

### **Order**

It is hereby ordered that:

1. The District and the Parent through counsel must work collaboratively and intensively toward securing appropriate nursing services for Student while Student is enrolled in the current school.
2. No later than February 1, 2019 the District must assign full-time nursing services to Student during transportation to and from the school and during the time Student is at the school. The nurse(s) must be appropriately credentialed.
3. If a nurse or nurses cannot be assigned, or during the interim when the nurse(s) is/are being sought, the Student must be given an alternate means of transportation that will meet Student's needs.
4. The District is not required to reimburse the Parent for fees for experts retained for this hearing.
5. Student is entitled to a full day of compensatory education for every day that lack of nursing services prevented Student's attendance at school beginning on July 10, 2018 through the end of the ESY period, and then beginning on the first day of school of the 2018-2019 regular school year through January 31, 2019. I will also award compensatory education hours for the hours Student missed because of late arrivals. The amount of compensatory education shall be calculated based solely upon the School's attendance records. The compensatory education shall be used exclusively for the purposes noted above.
6. The District is not required to reimburse the Parent for expenses she incurred in transporting Student to and from the School.

Any claims not specifically addressed by this decision and order are denied and dismissed.

*Linda M. Valentini, Psy.D., CHO*

January 1, 2019

Linda M. Valentini, Psy.D. CHO  
Special Education Hearing Officer  
NAHO Certified Hearing Official