

RECEIVED

FEB 25 2009

SPECIAL EDUCATION
SERVICES

ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING

[Redacted]

Student,

v.

[Redacted]

Local School District.

)
)
)
)
)
)
)

CASE NO. 2009-0110

MARY SCHWARTZ
Impartial Hearing Officer

DECISION AND ORDER

Jurisdiction

This matter is before the undersigned hearing officer on the parent's request for a due process hearing. This hearing officer has jurisdiction pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. § 1400 *et. seq.*, the Illinois School Code, 105 ILCS 5/14-8.02a *et. seq.*, and 23 Il. Adm. Code § 226.600 *et. seq.* The parties have been fully advised of their rights pursuant to these statutes and regulations.

Procedural Background

The parent, through her attorney [Redacted] filed a due process complaint on September 16, 2008. The district is represented by [Redacted], who is with the district's Due Process and Mediation department. The Illinois State Board of Education ("ISBE") appointed the undersigned as hearing officer on September 23, 2008. The undersigned issued a preliminary scheduling order to the parties on September 25, 2008, advising the parties of the applicable timelines pursuant to the IDEA. The parties have been fully advised of their rights in this matter.

The district filed its response on September 24, 2008. The next day, the parent filed an amended complaint and also asked the undersigned to order the district to respond to her complaint pursuant to the requirements of the IDEA and the Illinois School Code. The undersigned, finding the district's response incomplete, granted the parent's request on October 1st. The district filed its response to the amended complaint on September 30th and then, pursuant to the October 1st interim order, filed a second amended response on October 17, 2008. The parties participated in what they termed a resolution meeting on October 20th but were unable to resolve the issues identified in the parent's amended complaint. The prehearing conference was held as scheduled on October 27th via telephone conference call.

The parent filed a motion for a stay-put ruling on September 16th. The district responded on October 3rd, and the parent filed a reply that same day. The undersigned issued a stay-put order on October 8, 2008, finding that the student's stay-put placement included the private nurse assistant, who had accompanied the student on the school bus to and from school and throughout the school day.¹ On October 24, 2008, the parent filed a motion to compel the district to comply with the stay-put order and asked for leave to seek enforcement of the order from the ISBE or the federal court. The parent also asked this hearing officer to issue a default judgment against the district and order all the relief requested in her complaint. The undersigned granted the parent's request for leave to seek enforcement; however, as the district had not responded to the parent's motion, no decision was made on the request for a default judgment. The district responded to the motion on December 3, 2008. Two days later, the parent filed her reply. The undersigned denied the parent's request for a default judgment on December 23, 2008.

On January 12, 2009, the district asked the undersigned to recuse herself in this matter, stating that it believed that the undersigned is biased and that it could not receive a fair and impartial hearing in this matter. Over the district's objection, the parent was given the opportunity to respond to the district's request. The undersigned denied the district's recusal request on January 22, 2009.

Each party filed a motion to strike witnesses and exclude documents just prior to the hearing. The undersigned's order on these motions was read into the record at the start of the hearing. The order was modified on the record during the hearing, based on the parties' withdrawals of specific objections. The hearing was held on February 4, 5, 6, 9, 10 and 11, 2009. [REDACTED] provided court reporters throughout the proceeding. As no transcript was issued prior to the date of this decision, the undersigned has relied on her notes taken during the hearing and her memory for the testimony referenced below. All documentary evidence and case law submitted by the parties was reviewed in the process of rendering this decision. This decision is issued within ten days after the hearing's conclusion, as required by Illinois law. 105 ILCS 5/14-8.02a(g55)(5).

Issues Presented and Remedies Sought

The parent contends that the district violated the student's right to a free appropriate public education ("FAPE") in one or more of the following ways from September 16, 2006, through the present:

1. The district failed to implement the student's IEPs for the 2006-07 school year (10/20/06 IEP) and the 2008-09 school year with a certified teacher in violation of

¹ Although different terms are used in the documents and testimony to refer to the private nurse assistant and specifically to JB, the current person hired and paid for by the parent to fulfill this role, this decision will use the term "private nurse assistant" or JB throughout for purposes of clarity, unless directly quoting from a document.

state regulations, including the failure of the district to ensure implementation of a student's IEP and certified staff to provide services.

2. The district failed to properly monitor the student's placement at [REDACTED] as required by state special education regulations, including the provision of assistive technology and alternative augmentative communication ("AT/AAC").
3. The district failed to implement the October 3, 2007, IEP with a 1:1 paraprofessional when it did not process the request for a position in a timely manner and did not fund the position for the 2007-08 school year in a timely manner.
4. The district failed to implement the October 3, 2007, IEP that specifically provides that the parent will provide private nursing services, as the district refused to allow the student to attend his public school accompanied by a private nurse assistant hired and paid for by the parent. Transportation is required by the student's IEP.
5. The district failed to convene an IEP meeting in a timely manner to consider [REDACTED] independent educational evaluation ("IEE") and failed to provide augmentative communication and assistive technology ("AT") in a timely manner.
6. The district failed to write into the student's IEPs all the services that were being provided to the student including harness with appropriate equipment, mobility device/stroll, private nursing care, and medical needs.
7. The district failed to provide prior written notice, as required by federal and state law, regarding the district's decision to refuse to allow the student to attend his public school accompanied by a private nurse assistant hired and paid for by the parent. The student's IEP includes transportation, and the district's unilateral action effectively denied the parent's rights to participate in decision making, object, and/or participate in decisions regarding her child. The district's actions were outside the IEP meeting process.
8. The district failed to honor the 2000 settlement agreement, and therefore breached the settlement agreement between the parties, when it refused to allow the student to attend his public school accompanied by a private nurse assistant hired and paid for by the parent.
9. The district retaliated after the private nurse assistant reported bus issues and the parent exercised her due process rights, and thereby violated the ADA, Section 504 of the Rehabilitation Act of 1973, and Section 1983. The foregoing statutes require exhaustion of IDEA administrative proceedings.
10. The district failed to respond to the parent's due process complaint per 34 C.F.R. §300.508(e) and 105 ILCS 5/14-8.02a(g-5).
11. The district failed to provide the information in the parent's record request per 34 C.F.R. §300.616, which requires districts to provide a list of types and locations of education records collected, maintained or used by the district when a parent requests such a list.

As relief for the above alleged violations of the IDEA, the parent requests that the hearing officer order that:

1. The district failed to implement the stay put order.

2. The district provide safe and reliable transportation for the student, which includes:
 - a. another safe way for him to enter and exit the transportation/bus, and
 - b. appropriate equipment, such as the clips for the harness and the mobility device/stroller for getting on/off the bus.
3. The district convene an IEP meeting to implement the order.
4. The district provide all services that the student is receiving written in his IEP;
5. The district implement the 2000 settlement agreement.
6. The district is prohibited from convening an IEP meeting to modify or terminate the settlement agreement;
7. The district has specifically violated the settlement agreement;
8. Order other relief the hearing officer deems appropriate regarding settlement agreement and IEP.
9. Reimburse the parent for all costs associated with transportation and other expenses not currently known;
10. Provide compensatory services for the days student was out of school due to the district's breach of the settlement agreement, failure to implement the stay put order, and lack of implementation of the student's current IEP that specifically states that his private nurse assistant can accompany him in his public school placement in the form of:
 - a. Compensatory education beyond the current May 2000 settlement agreement compensatory provisions of 3.5 years after the age of 21, including 9 months for lack of teacher certification and one day compensatory education for each day the student was out of school from August 29, 2008, to the date on which the district commences transportation to [REDACTED];
 - b. Compensatory education of speech/language therapy and occupational therapy to make up for missed related services between August 29, 2008, and the date on which the district commences transportation to [REDACTED];
 - c. Compensatory services for the missed AT/ACC services, which may include a lap top with a touch screen for home/school use and appropriate programs, based on testimony of parent's expert witness; and,
 - d. Other relief the hearing officer deems appropriate.
11. Order the district to comply with 34 C.F.R. §300.508(e) and 105 ILCS 5/14-8.02(g-5), as the district's most recent response does not comply with the hearing officer's October 1st order; and,
12. Order the district to comply with 34 C.F.R. §300.616 in a timely manner and before the document disclosure date – parent asserts student records are still outstanding.

Burden of Proof

In an administrative hearing, the party seeking relief bears the burden of proof. *Schaffer v. Weast*, 126 S. Ct. 528, 539 (2005). Therefore, in this matter the parent has the burden of proof. The parent also will present her case first. Under Illinois law, the school district must provide evidence that it has appropriately identified the student's

educational needs and that the special education and related services are adequate, appropriate, and available. 105 ILCS §14-8.02a(g). This statutory provision requires the district to produce evidence but does not shift the burden of proof to the district. *Kerry M. v. Manhattan Sch. Dist. #14*, 106 LRP 5847 (N.D. Ill. 2006).

Findings of Fact²

The student, who is currently 17 years old, has had multiple severe and profound disabilities since birth. He was born premature at 24 weeks, weighing only one pound, 12 ounces. Due to respiratory problems, he was hospitalized until he was 18 months old. (PD 273). He was ventilator dependent as a small child. (PD 263). His medical history includes frequent ear infections, recurrent urinary tract infections, respiratory distress syndrome, poor muscle tone and decreased muscle mass, severe developmental delays, severe hearing impairment, aphasia, gastro esophageal reflux disease ("GERD"), recurrent pneumonias, bowel and bladder incontinence, and allergic reactions. He requires a gastrostomy tube ("G-tube") for feeding. (PD 259 - 265, 277-280).

The student is non-verbal. Although he can walk, he requires constant supervision because of balance problems. He is dependent on adults for all activities of daily living ("ADL"). On the Scale of Independent Behavior- Revised given in 2007, his overall score was at the 1 year, 3 month level. (PD 184). A 2008 letter from his pediatrician reports that he is medically fragile, has always required trained nursing supervision, and will require 24 hour nursing care indefinitely. (PD 277, 278).

Currently, the student is eligible for special education and related services under the following categories: severe-profound cognitive impairment, hearing impairment, physical disability, speech and language impairment, and other health impairment. (SD 19; PD 185). The district placed the student at his current educational placement, ██████████ in school year 2003-04. (PD 90). ██████████ is a private therapeutic school located just outside of ██████████ (SD 14). Each of the student's IEPs at ██████████ until the most current January 23, 2009 IEP, has stated that the parent provides a private nurse assistant for the student. This statement is set forth in the accommodations/modifications page of the IEPs. (PD 92, 105, 110, 120, 141, 159, 188). The parent's provision of the private nurse assistant on the bus and throughout the school day is the focal point of this due process complaint.

It is necessary here to provide the historical context for the private nurse assistant. On December 7, 1998, the parent filed a due process request against the district. The parties entered into a settlement agreement on May 18, 2000. As relevant to the issues before this hearing officer, the settlement agreement provides that the student is "entitled to attend public school accompanied by a private nurse's aide hired and paid for by the Parent." The settlement agreement also includes monetary payment

² Parent's documents are indicated as PD followed by a page number. District's documents are referred to as SD followed by a number. If the instances in which both parties have included the same document in their evidence binders, this decision might refer to only one of documents.

to the parent for private education services she provided to the student from 1995 through 1999 and three and one-half years of compensatory education after the student turns 21 as full compensation for the district's failure to provide the student as free appropriate public education ("FAPE") from Winter 1995 through Summer 1999. (PD 276; SD 187).

The student was enrolled at his neighborhood public school when the settlement agreement was signed. (PD 2,3). He was placed in another public school the following school year, still accompanied by the private nurse assistant on the bus to/from school and throughout the school day. (PD 19, 45, 47). In Fall 2002, the district placed the student at [REDACTED], a private therapeutic school. His IEP states that he has a private nurse assistant. (PD 63, 64). In January 2003, the student began receiving homebound services, which apparently continued throughout that school year. (PD 85-88). The following school year, the student began attending [REDACTED] (PD 90).

His November 24, 2003 IEP requires 1:1 assistance from an aide and a nurse "at all times." (PD 92). The accommodations and modifications page of the November IEP states "private nurse assistance – provided by parent; school nurse provides consult and accommodations per parent's request and prior Due Process history." (PD 105). Transportation services include "one on one nurse for medical needs; school bus aide - safety," an air conditioned bus, and a bus with a lift. (PD 110). The IEP also requires a 1:1 aide for the student for all ADLs and for safety, as he has no awareness of danger. (PD 112).

The district convened a triennial reevaluation IEP meeting on October 25, 2004. The IEP developed at that meeting again includes a 1:1 aide and "individual nurse services" provided by the parent. (PD 120). On the Scales of Independent Behavior – Revised, the student's level of adaptive behavior was at a 1 year, 1 month level. (PD 114). He was able to ambulate within the school setting but required constant supervision due to his unsteady gait. (PD 115). The IEP does not include any direct or consult nursing services. (PD 133). It also does not include a transportation page.

The student's October 19, 2005 IEP requires "adult supervision and assistance at all times." (PD 139). As in the prior IEPs, this IEP states that the "parent provides individual nurse services." This statement is in the accommodations/modifications section of the IEP. (PD 141). The IEP does not require either consult or direct nursing services. (PD 149). Transportation requirements include an air conditioned bus and a bus aide for safety reasons. (PD 153). Records indicate that the parent attended each IEP meeting held on the student from 1999 through October 19, 2005. (PD 1, 2, 3, 18, 19, 35, 48, 52, 55, 60, 89, 113, 136).

The district held an annual review IEP meeting for the student on October 20, 2006, which the parent did not attend. (PD 154; SD 135). As before, the IEP modifications and accommodations page states that the parent provides "individual nurse services" for the student. (PD 159; SD 140). The student's academic goal sheets are signed by [REDACTED] who is identified as special education teacher. (PD 160-164, 166,

167). The IEP requires 30 minutes/week of direct nurse services. (PD 171; SD 152). Transportation needs include an air conditioned bus and a bus aide for safety issues. (PD 175; SD 156). On March 30, 2007, the district convened an IEP meeting to update the IEP because the student would be entering ninth grade. (PD 177). The parent did not attend the IEP meeting. [REDACTED] attended the meeting and signed in as special education teacher. (PD 178; SD 128). The IEP again requires an individual aide in the classroom. (PD 181; SD 139).

The district convened a triennial reevaluation and transition planning IEP meeting on October 3, 2007. The parent did not attend the meeting. [REDACTED] signed in as the special education teacher. (PD 183; SD 85). The IEP states that the student has an individual classroom aide and that the parent provides individual nurse services. (PD 184, 187, 188; SD 86, 89, 90,). His transportation needs include a bus aide for safety concerns, a harness, and an air-conditioned bus. (PD 204; SD 105).

On July 24, 2008, the district sent out a conference notification for an IEP meeting scheduled on September 3, 2008. The IEP meeting was to consider the parent's independent AT/AAC evaluation, conducted by [REDACTED], Ph.D. (PD 219, 284; SD 67). On August 29, 2008, the meeting was rescheduled to September 23, 2008. (PD 220). The district's assistive technology department prepared an AT/AAC report for the September 23rd meeting. The report reviewed available information to determine the student's AT/AAC needs. The evaluator consulted with the student's speech/language therapist and reviewed the independent AT/AAC report. The district evaluator recommended a single VOCA device, a voice output communication device with up to eight pictures and strap for carrying the device, a communication binder for photographs and/or picture communication symbols, a touch window for the classroom computer, and computer software programs that focus on literacy and functional concepts and provide both auditory and visual supports. The report provides a plan describing how the recommended equipment should be used. (SD 68-70; PD 228-230).

On November 26, 2008, the district scheduled an IEP meeting for January 13, 2009. (PD 226; SD 66). At the beginning of January, the meeting was rescheduled to January 26, 2009. (PD 227; SD 65). The January 26th IEP does not include a statement that the parent provides a private nurse assistant for the student on the bus and throughout the school day. Instead, the IEP requires 1:1 paraprofessional support and a licensed nurse to administer G-tube feedings and medication infused prior to the feedings. The feeding lasts 60 minutes, and the medication needs to be infused 30 minutes prior to the feeding. The IEP states that the district will provide an air conditioned bus for the student upon proper documentation from the student's physician. (SD 22, 36).

The student's current private nurse assistant, [REDACTED] is trained as a certified nursing assistant ("CNA"). (PD 310). The parent testified that [REDACTED] began accompanying the student to/from school and throughout the school day in September 2007. Prior to that time, the parent employed others for the student's private nurse assistant.

Conclusions of Law

I. Did the district fail to properly monitor the student's placement at Blue Cap as required by state special education regulation in the following ways:

A. Failure to implement the student's IEPs for school years 2006-07 and 2008-09 with a certified teacher in violation of state regulations, including the failure of the district to ensure implementation of the student's IEP and certified staff to provide services

The parent testified she first learned that [REDACTED] was a substitute teacher during the times relevant to this issue at the September 23, 2008 IEP meeting.³ She testified that during the meeting, the [REDACTED] principal stated that [REDACTED] was a substitute teacher, not a certified special education teacher, when she was the student's teacher in 2006-07 and in the fall of 2008-09.

It appears that no special education or regular education teacher attended the October 20, 2006 IEP meeting as these signature lines are blank. (PD 154; SD 135). Neither party called [REDACTED] as a witness. However, the evidence shows that she signed the 2006 academic goal sheets on October 2, 2007, as a special education teacher. (PD 160-164, 166, 167). These goal sheets indicate that the student had met his annual goals as of October 3, 2007.⁴ She also signed as a special education teacher on the March 2007 IEP revision. (PD 178; SD 128). On the October 2007 IEP, she signed in on the line designated for regular education teacher but crossed out "regular" and wrote "special" below it. (PD 183; SD 85).

[REDACTED]'s principal, is certified as a special education teacher and was a classroom teacher for ten years. She testified that [REDACTED] was a substitute teacher, not a certified special education teacher, in 2006-07 and in the fall of 2008 when she was employed as the student's classroom teacher. [REDACTED] had a striking lack of knowledge regarding information she provided to the district about [REDACTED]. She could not remember if she had told the district that [REDACTED] was certified in special education or that she was having difficulty hiring a special education teacher. [REDACTED] stated that she had tried to hire a special education teacher in 2006-07 for the student's classroom. The principal testified that [REDACTED] had been listed on [REDACTED] one of the district's databases, as a substitute teacher. [REDACTED] is used for entering attendance and billing, and it also lists certified and non-certified school staff. She testified that she supervised [REDACTED] while she was

³ The case manager testified that the September 23rd IEP meeting was the first IEP meeting the mother had attended since CC was assigned as case manager. The mother testified that she was unable to attend the October 26, 2006 IEP meeting because she had an unexpected surgery. She did not have the meeting rescheduled because she did not know how long it would take her to recover from the surgery. The mother also testified that she was unable to attend the October 3, 2007 IEP meeting because of severe medical problems.

⁴ Although the district has the goal sheets in the 2006 IEP in its evidence binder, it does not the goal sheets signed by DL on October 3, 2007.

working as a substitute teacher. [REDACTED] said that [REDACTED] implemented the student's IEP and provided appropriate instruction. She further testified that there was no detriment to the student because of [REDACTED]'s lack of certification.

The case manager, [REDACTED] has been a district administrator since 2003. She is a certified special education teacher and had worked as a teacher prior to her current position. She is responsible for ensuring that IEPs for students in private therapeutic schools are written in a timely manner and that required services are in place for each student. She meets with school principals to review lesson plans and to complete a document called School at a Glance. She said this form does not cover teacher certification. [REDACTED] testified that [REDACTED] had presented herself as the student's special education teacher during IEP meetings. She corroborated [REDACTED] testimony that [REDACTED] is listed on [REDACTED] as a substitute teacher but was unable to remember when she first saw that information on [REDACTED]. She testified that she learned that [REDACTED] had not been certified during the September 23, 2008 IEP meeting but did not ask [REDACTED] why the student had had a substitute teacher.

The [REDACTED] attendance sheets report the student's attendance for the times relevant to this issue. For the 2006-07 school year, the student attended 144 days out of 172. (SD 177-186). Between August 28, 2008 and November 17, 2008, the student attended 14 days.⁵ (SD 160-163).

Illinois' special education regulations permit approved organizations that provide special education services to students with disabilities to contract with school districts to provide such services to eligible district students. 23 Ill. Adm. Code §§401.5, 401.10(c). ~~An approved provider must give written notice to the State Superintendent of Education and the placing school district if a professional position remains vacant after 30 calendar days and again after 60 calendar days of its attempts to permanently fill the position and of its efforts to provide necessary instruction to the students enrolled, including the use of substitutes. 23 Ill. Adm. Code §401.20(b)(4)(A)).~~ A provider may not accept placement of a student unless it has determined that it can provide the educational programming and related services specified on a student's IEP. 23 Ill. Adm. Code §401.110(f). A provider must report changes in its staff as required by Section 401.20. 23 Ill. Adm. Code §401.210(d). Providers may use substitute teachers holding valid elementary, secondary, special k-12, or substitute certificates to replace absent teachers; however, only certified teachers or approved special education teachers, as applicable to the students being taught, may be used to begin a school year. 23 Ill. Adm. Code §401.240(b). A provider's approval status may be changed if the State Superintendent determines that the program has operated for more than 60 consecutive calendar days in noncompliance with Section 401.240. 23 Ill. Adm. Code §401.240(d).

A school district is responsible for "monitoring the performance of each facility where its students are placed" to ensure that each student's IEP is implemented in accordance with state special education regulations. 23 Ill. Adm. Code §401.110. A district may not place a student in a special education program unless it has determined

⁵ The student's current teacher testified that she returned to Blue Cap on November 17, 2008.

that the educational programming and related services specified on a student's IEP will be provided to the student. 23 Ill. Adm. Code §401.110(f).

The district has argued that this issue should have been included in the parent's initial due process hearing request as the parent knew, or should have known, that this was an issue. The parent filed her original due process request on September 16, 2008, one week before the September 23rd IEP meeting at which she learned that [REDACTED] was a substitute teacher when she had been the student's classroom teacher. The district's case manager also testified that she was informed of this at the September 23rd IEP meeting. Given this, the parent did not know, and could not have known, this information on September 16th when she filed her due process complaint.

The parties do not dispute whether [REDACTED] was certified in special education during the relevant times. The district argues that [REDACTED] was responsible for informing the district of this fact; because [REDACTED] did not do so, the district maintains that it could not have known of this problem. The district also contends that [REDACTED] supervised [REDACTED] and testified that the student had made progress. Therefore, the district contends that the student was not denied a FAPE.

No evidence was proffered to show that [REDACTED] gave the required written notice to the district and the ISBE. Entering the required information into [REDACTED], assuming *arguendo* that [REDACTED] did so in a timely manner, does not provide the notice required in Section 401.210(d). Although [REDACTED] testimony that she found out about [REDACTED] lack of required certification at the September 2008 IEP was credible, the fact remains that the district, and ultimately the ISBE, are responsible for ensuring that the requirements of the IDEA and the Illinois School Code are met. Illinois law places the responsibility for ensuring the student's IEP is implemented according to state special education regulations squarely on the district's shoulders. 23 Ill. Adm. Code §401.110. [REDACTED] could have requested certification information about all staff during her annual meetings with the principal. As a certified special education teacher and experienced administrator, she must have been aware of the certification requirements.

The district's argument that the student made progress, and therefore received a FAPE, fails for two reasons. The undersigned finds [REDACTED] testimony on whether the student made progress lacks credibility as it is self-serving. Moreover, a free appropriate public education requires education provided by qualified personnel. *Evanston Comm. Consol. Sch. Dist. No. 65 v. Michael M.*, 365 F. 3d 798, 803 (7th Cir. 2004). The student's teacher during the relevant times was not qualified as a special education teacher. It therefore follows that the student did not receive a FAPE during the times at issue.

B. Failure to monitor the provision of assistive technology to the student

The parent claims that the large PECS book listed in the student's 2004 IEP as AT equipment is missing, and asserts that the district was responsible for monitoring this equipment. The parent contends that she did not know about this PECS book or

that it was missing until the 2008 due process hearing held on behalf of this student.

A district AT inventory form indicates that the AT department loaned a large PECS book to ██████ school on January 21, 2004, for the student's use. (PD 232). The October 20, 2006 IEP does not list PECS under AT devices or in any academic goals. (PD 158-164). The related service speech/language goal states that the student will utilize picture/object exchange to receive desired items." (PD 168.)

The student's speech/language therapist, ██████ and his current teacher, ██████ both testified that he did not have a PECS book when they began working with him. ██████ has worked with the student since January 2006. She provides 60 minutes/week of speech/language therapy, during which she works with the student on his expressive and receptive communication and ability to increase his tolerance to different food tastes and textures. ██████ first saw the AT inventory form in the fall of 2008, when the parent's attorney showed it to her. ██████ testified that she had made a PECS book for the student because he did not have one. She first saw the inventory form in the spring of 2008. ██████ further testified that she never asked the AT department for a PECS book and that PECS was not discussed at the 2007 IEP meeting. The principal, who signed the receipt for the book in 2004, was not asked about it whereabouts. (PD 233).

The district has argued that this issue was decided at the due process hearing held on behalf of this student on July 31 and August 1, 2008. The ACC/AT issues raised in that hearing was "whether the District violated Student's right to a free, appropriate public education by failure to provide an augmentative communication and assistive technology evaluation of Student from April 30, 2006 to present." (SD 2, 3). The prior hearing officer found that the student had not been denied a FAPE on this issue. (SD 8). Nothing in the decision refers to a PECS book or alleged failure to monitor technology equipment. Based on these reasons, the undersigned finds that this issue was not raised and decided in the prior due process hearing.

Although the above testimony shows that the student did not have the PECS book at least since January 2006, no evidence was introduced showing how this loss impacted the student's learning. No one at ██████ requested a PECS book from the district, and no one informed the district it was missing. The student's teacher made her own rather than asking the district to provide one. Although the district is responsible for monitoring the student's placement, it is not reasonable to expect the district to inquire about each piece of equipment or supplies that it gives a private school. As in the preceding section, ██████ bears the initial responsibility for informing the district of such matters. While the parent has shown that the PECS book provided by the district in 2004 was no longer with the student in 2006, she has not shown that this loss deprived him of a free appropriate public education.

C. Failure to implement the student's October 3, 2007 IEP with a 1:1 paraprofessional when the district did not process the request for the position in a timely manner and did not fund the position for the 2007-08 school year in a timely manner

█ was the student's teacher in 2007-08. She testified that his 1:1 aide quit after the first week of school and that another aide was not assigned until late spring 2008. █ had seven students in her classroom that year and also had a classroom aide. The classroom aide helped provide support for the student. █ testified that the student requires a 1:1 aide to assist him with his ADLs, monitor his clothing and safety, provide redirection and re-teaching, and help set up the student's schedule. The parent testified that she learned about the aide's departure in a letter from the principal.

The evidence shows that the 1:1 left her position at █ shortly after the school year started. (PD 344). The testimony and documentary evidence shows that other staff helped out in the classroom to cover the aide's responsibilities. It must be noted that the letter does not indicate that it was copied to the district.

The district does not dispute the lack of a 1:1 aide. It does argue that the parent did not establish a timeframe for when there was no aide. The district also asserts that the student was not in school during much of the time when there was no aide. This is not what the evidence shows. █ testimony was clear and credible: there was no aide from one week after school started until late spring 2008 – a timeframe of approximately seven months. According to attendance records submitted by the district, the student attended school six days in September, 21 days in October, 20 days in November, and 14 days in December 2007. (SD 171-174). His attendance fell off after that. He attended 12 days in January, 14 days in February, and six days in March 2008. (SD 168-170). He did not attend any days in April or May 2008. (SD 166, 167).

The district also argues that the parent should have raised this in her original complaint as she knew, or should have known, this was an issue at that time. The parent asserts that pursuant to 34 C.F.R. §300.513(c), she had the right to file a separate due process claim on an issue separate from a due process complaint already filed. Had she chosen to do that, rather than amend her complaint, the ISBE procedure would have been to consolidate the new complaint with the one already before this hearing officer. Even if the ISBE had decided not to follow its customary procedure, judicial economy persuades this hearing officer that permitting the parent to raise this issue in this hearing is the right path. This hearing is taking place shortly after a prior hearing held on behalf of this student.

While the preponderance of the evidence shows that there was no 1:1 aide for the student for the majority of the school year, the question remains whether the lack of the 1:1 aide denied him a FAPE. The parent argues that the lack of the 1:1 aide is a *per se* denial of FAPE. *B.B. v. Perry Township High Sch. Corp.*, 2008 U.S. Dist. LEXIS 53246 (S.D. IN. 2008). In *B.B.*, the district failed to provide a student with OT services in a timely manner. Citing *Michael M.*, the court held that the district's failure to provide

any OT services was a violation of FAPE. B.B. at 29.

Both *Michael M.* and *B.B.* addressed the necessity for qualified personnel, i.e., those who met the licensing standard for their respective professions, to provide special education and related services to ensure the delivery of a FAPE to students. This issue does not deal with services provided by a licensed or credentialed person. There is a significant difference between a student not receiving any OT services and the situation at hand, in which the student did not have a 1:1 aide. The evidence shows that the classroom aide provided support for the student. There was no evidence showing that the student's personal care or safety was jeopardized during the 67 days that he was without an aide. This is not to excuse the lack of an aide or the responsibility of [REDACTED] and those who have a statutory duty to monitor [REDACTED]. Certainly [REDACTED] should have informed the district, and the district should have addressed the situation with the school. The parent, however, has alleged that the district did not process the request for an aide in a timely manner and did not fund the position in a timely manner. There is no evidence to showing that the lack of an aide was due to the district's failure to process the request in a timely manner or to its failure to fund the position in a timely manner. Additionally, the evidence does not support a finding that the student was denied a FAPE because of the lack of a 1:1 aide.

IV. Did the district fail to implement the student's October 3, 2007 IEP that specifically provides that the parent will provide private nursing services when the district refused to allow the student to attend his public school accompanied by a private nurse's aide hired and paid for by the parent, and when transportation is required by the student's IEP?

To begin, the hearing officer takes judicial notice of the fact that the student does not attend a public school. His IEP states that he attends [REDACTED] a private therapeutic day school. (PD 209). The district placed the student at [REDACTED] and pays for his placement there. The IDEA is very clear as to the distinction between public and private schools. For example, a section entitled "Children placed in, or referred to, private schools by public agencies" lists the requirements for private school standards and payment and reimbursement for students placed at private schools. 20 U.S.C. §1412(a)(10); 34 C.F.R. §§300.145-300.147. The following analysis and conclusion is based on the fact that the student attends a private therapeutic school.

The private nurse assistant accompanied the student to and from school and throughout the school day from October 3, 2007, through August 28, 2008. This dispute begins on August 29th, when the district implemented its decision that the private nurse assistant could no longer accompany the student on the bus to and from school. No evidence was presented as to whether the district had also decided that the private nurse assistant could not accompany the student throughout the school day; however, that was the practical impact of the decision regarding transportation. The undersigned ordered that the student's stay put placement included the private nurse assistant, and the student began attending school pursuant to the stay put order on November 5, 2008. Based on the foregoing analysis, the district failed to implement the October 3rd

IEP with the private nurse assistant from August 29, 2008 through November 5, 2008.

V. Did the district fail to convene an IEP meeting in a timely manner to consider the parent's independent educational evaluation and fail to provide AT/AAC in a timely manner?

A district must convene an IEP meeting within 10 days after receiving the report of an IEE conducted at public expense. 23 Ill. Adm. Code §226.180(d). [REDACTED] evaluated the student on June 27, 2008 and completed her report in July 2008. On July 24, 2008, the district sent out a notice for a September 3rd IEP meeting to consider the IEE (PD 219). Another conference notice was sent out on August 29th, rescheduling the IEP meeting to September 23rd. (PD 220). The IEP meeting was held on September 23rd, but the student's IEP was not completed. Another was scheduled for January 13th and then re-scheduled to January 26, 2009. (PD 226, 227; SD 65, 66).

The evidence shows that conflicts in schedules – between the private school staff and the public school staff as well as between counsel for the parties – resulted in the delay of the IEP meeting. [REDACTED] testified that the IEE was considered at the September IEP meeting. She testified that [REDACTED] staff were trying to get AT equipment to use with the student and requested training from the district on the equipment. [REDACTED] who oversees the district's AT department, testified that the district requested equipment for the student on September 29th. Apparently the district has a complicated system whereby it orders equipment from its warehouse, has the equipment sent downtown to the central office, and then sends the equipment out to the private school. The equipment was sent to [REDACTED] on November 7th, and the school received it on November 12th. (PD 334). It was suggested, though not proven, that this delay was because the student was not at school between August 29th and November 4th. [REDACTED] testified that she received a telephone message from [REDACTED] on November 25th and spoke with her the next day regarding training for the staff. She further testified that the district provided training for [REDACTED] on December 15th and January 9, 2009.

There is a gap of at least six months between the time the district received the IEE report and the time the student's school received the AT equipment. Based on this, the undersigned finds that the AT was not provided in a timely manner. However, the preponderance of the evidence does not show that the student was denied a free appropriate public education because of this delay.

VI. Did the district fail to write into the student's IEPs all the services that were being provided to him, including a harness with appropriate equipment, a mobility device/stroller, private nursing care, and medical needs.

A. Transportation

The student's 2006 and 2007 IEPs require a bus aide, an air-conditioned bus in warm weather, and a bus with a lift. (PD 175, 204). The IEP transportation sections do not consistently indicate that the student needs a harness on the bus and clips to

secure the harness. The parent testified that the bus company provides the harness, which the student takes home at the end of the day and carries back to the bus the next day. Similarly, although the IEPs indicate that the student has his stroller at school and sometimes uses it there, this section does not show that he uses it on the lift to access the bus. It must be noted that the stroller is not provided by the district. The student takes it to school, uses it intermittently throughout the school day, and then takes it home at the end of the day. Given the student's severe physical impairments, the transportation section of the IEP should indicate that the student requires a harness and clips on the seat to secure the harness. It should also indicate that the student uses a stroller to board the bus. The transportation page has a series of boxes that can be checked to indicate if the student needs special transportation due to sensory or physical need, limited endurance, or significantly reduced intellectual development. None of these boxes is checked and, given the student's profound disabilities, they should have been. (PD 175, 204). The boxes are checked on the January 26, 2009 IEP. The January IEP also notes that the student needs an aide on the bus and a harness. Although an air conditioned bus is not indicated, testimony shows that the district has agreed to provide an air conditioned bus upon receipt of a doctor's order for this. (SD 40). The IEPs must indicate all the transportation services that the district is providing – a bus aide, an air conditioned bus, and clips to secure the student's harness. They also should indicate, as does the 2009 IEP, that he has significantly reduced intellectual development and physical need/limited endurance. Although the above information must be included in the student's IEP, the evidence does not show that the omission of some of this information in different IEPs has denied the student a FAPE.

█ is quality assurance safety manager for the district's transportation department. She oversees contract compliance with the district's bus vendors. She testified that only district staff or their designees may ride the buses, although exceptions are made for parents to accompany students on field trips. She said that the bus vendors hire the aides for the buses. She stated that she learned that a private nurse assistant accompanied the student during the prior due process hearing held on behalf of this student.

Several employees of █ bus company testified regarding the bus services. The employees included a dispatcher, a bus driver and a bus aide. None of the employees knew why the student needed a 1:1 aide on the bus or knew of his medical needs or G-tube. The question of whether bus employees should have been informed of all the student's medical issues raises privacy questions that outside the purview of this hearing officer's authority. This student's needs during transportation times were met by the private nurse assistant and the aides on the bus. There is no evidence to show that the student was denied a FAPE because bus employees were not informed of, or trained in, the student's medical needs.

Although the 2006 and 2007 IEPs provide for 30 minutes/week of nursing services, nothing in these documents indicates what this service entails. (PD 171, 180). These IEPs should have indicated the services that the nurse was to provide. The

student's 2007 IEP lists his medical needs as developmental delay, GERD, G-tube for nourishment, hearing loss, speech/language delay, hypotonia, medication therapy as needed, and ongoing care and monitoring of his physical condition. (PD 208). The 2006 IEP does not include this information. Although the above information should have been included on the student's IEPs, the parent has not shown that the omission of this information denied the student a FAPE.

B. Medical needs/private nurse assistant.

The focus of this issue is whether the IEP must include the private nurse assistant. The private nurse assistant is also addressed in issues 4, 7, and 8. As noted in previous sections, each of the student's IEPs prior to September 23rd state that a private nurse assistant accompanies him to and from school on the bus and throughout the school day. Those IEPs also state that a private nurse assistant provides the G-tube feedings and delivers medications. Although the district has disputed the significance of these statements in the IEPs by arguing that they merely record that fact that the private nurse accompanies the student to and from school and throughout the school day, it does not dispute that the IEPs do include this statement. The IEP that began to be developed on September 23rd does not contain such a statement. (SD 22).

In her closing statement, the parent contends that the student needs "consistency and constant care in order to function." She points to several letters from the student's pediatrician to support this assertion. It must first be noted that these documents are dated June 6 and September 27, 2008; thus, none of this information could have been in the prior IEPs. (PD 277-280; SD 188-192).

The parent testified regarding the student's medical and developmental history and current needs. She is a licensed professional registered nurse and is employed by the district as a teacher in a program that trains medical assistants. She has worked for the district for 20 years. She said the student has a severe cognitive impairment, a hearing impairment, and is vocal but not verbal. His recurrent and current medical conditions include GERD, chronic ear infections, urinary tract infections, lung damage, gastric problems, dental problems, difficulty swallowing, and various allergies. He requires a G-tube for feeding. She has trained each private nurse assistant whom she has hired to care for the student. This training includes a review of the student's medical history, instruction on how to use oxygen and other supplies, bathing, administering the G-tube feedings, and various safety instructions for the home setting. She said that it takes weeks to train a person because the person needs to practice the skills and become comfortable with the student, which means learning how he communicates and what his behaviors mean. The mother testified that on the bus, the private nurse assistant makes sure that the student is secured to his seat, checks the position of the G-tube in relation to the harness, monitors drooling and may need to perform suctioning with a bulb syringe if drooling is excessive, monitors the student's incontinence, and monitors respiratory functioning.

██████ has been the student's pediatrician since he was six months old. She is

board certified in pediatrics and has been in private practice for 29 years. She testified regarding the student's complex medical history over the past 17 years. [REDACTED] stated that the student's medical needs currently are stable. However, he is "not a typical case of anything" and said it has been a struggle to find what works with him. She said that because the student has limited ability to communicate and no sense of personal safety, he requires close monitoring and constant attention by a person who knows him. Having the same person care for him allows the student "to thrive as much as he can." She testified that if the current private nurse assistant quit, the student would stay home until the parent hired another person. [REDACTED] wrote the September 27th letter to the district at the parent's request, after the parent informed her that the district would no longer permit the private nurse assistant on the bus. (SD 189-192).

[REDACTED] described the student's G-tube as non-standard, and stated that anyone feeding him would need training in using this particular G-tube. She testified that if his G-tube became dislodged, it would not be life-threatening if it were connected within one hour. She said that it has been "a very long time" since the G-tube became dislodged. The doctor described GERD as a feeding problem in which some food and digestive acids come back up. The student is at greater risk for vomiting because his throat muscles are not well coordinated. She has prescribed Zantac to control the GERD, and it is administered with his G-tube feedings. Although Zantac is an over the counter medication for adults, it is a prescription medication for children.

The doctor did not know that the district provides an aide for the on the bus and throughout the school day. She had no knowledge of the type of school the student attends, the training of its staff, or the pupil-teacher ratio. She testified that the person who monitors the student for safety does not need to be an RN, LPN, or CNA. She said it "could possibly work" if the student had a 1:1 aide and an LPN provided his G-tube feedings, if these people were consistent. [REDACTED] said that it is very important for the mother to provide training to the person who will care for the student during the day. She emphasized that the person must have daily communication with the parent, particularly regarding the student's G-tube feeding.

[REDACTED] is a licensed practical nurse and has worked at [REDACTED] for 15 years. Although she does not provide any direct services to the student, [REDACTED] has known him since he began at [REDACTED]. She is available if there are emergencies with the student. [REDACTED] testified that four other students at the school have 1:1 nurses, who are provided by the districts responsible for those students. These nurses are either LPNs or RNs. The students require fulltime nurses because they have tracheotomies and severe seizures. [REDACTED] said that the student is not at the same level of need as these four students. She testified that in her experience, CNAs do not usually administer medications or give G-tube feedings. Despite that, she said she had no concerns about the private nurse assistant doing these tasks because she had been trained by the student's parent, who is a nurse. [REDACTED] testified that as far as she knows, the student's G-tube has never come out in school. She stated that the student needs a nurse on the bus because he has GERD, which could cause him to vomit and, depending on the severity of the vomiting, could aspirate.

██████ is a licensed registered nurse and has been a certified school nurse for 15 years. She is employed by the district as a school nurse. She has reviewed the student's records, including his IEPs and available medical records, and also talked with the ████████ LPN several times. She observed the student in his classroom for approximately 30 minutes in December 2008. She did not observe him receiving a G-tube feeding. ████████ recommended that appropriate nursing services for the student would be 300 minutes/week by a licensed nurse, which would include a daily G-tube feeding. (SD36). ████████ testified that there are no reports of the student's G-tube becoming dislodged and stated that it is not necessary to have a nurse present to prevent this, either at school or on the bus.

She has never spoken with the student's pediatrician. ████████ testified that the 2008 letters from ████████ do not state why the student needs 24 hour nursing care or specify which of his listed medical conditions have been resolved. The note states that the list is of "past medical problems." (SD 188-192).

~~The majority of ████████'s testimony addressed the training differences between a RN, LPN, and CNA as well as what each of these professionals was qualified to do. She also testified about the Nurse Practice Act, 225 ILCS 65 et. seq. and training requirements for CNAs. (SD 194-207). According to ████████, a CNA has 16 hours of training while an LPN has 14th months and a RN has between two years (registered nurse) or four years (licensed registered nurse). She testified that allowing a CNA privately hired and paid for by a parent into the school setting presents a liability to the district and violates the Nurse Practice Act.~~

~~What is initially striking and disturbing about the above testimony is that the student's doctor knows nothing about the student's educational setting and services provided and/or available to the student, and the district's nurse has never spoken with the pediatrician or reviewed the student's medical records, other than routine school forms and recent letters from the doctor. The parties dispute whether a correct release of information was provided to the district to authorize such communication. That this remains unresolved and the communication has not been facilitated highlights the acrimonious relationship between the parties.~~

~~The parent cites three cases in support of her position that the district must permit the private nurse assistant to accompany the student to/from and during school. The first, *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999), involves a ventilator dependent student who required continuous 1:1 nursing care in order to attend school. The district refused to pay for the 1:1 nurse. The Court held that the 1:1 nursing services were related, not medical, services. Because the student required these services to attend school, the Court held that the district must provide the services. *Garret F.* at 78, 79.~~

The parent also points to *Morton Community Unit School District No. 79 v. J.M.*, 152 F.3d 583 (7th Cir. 1998), *cert. denied* 526 U.S. 1004 (1999). The student in this

case also required full time 1:1 nursing care in school due to a tracheostomy and intermittent ventilator use with continuous suctioning, and hourly medications for his eyes. The district argued that these services were medical services that it was not required to provide. The Seventh Circuit upheld the decisions of the hearing officers, who had found that the required services were related, not medical, services. *Morton Grove* at 587.

The last case is *Skelley v. Brookfield LaGrange Park School District 95*, 968 F. Supp. 385 (E.D. Ill. 1997). The student had a rare neurological-muscular disease, which resulted in his being developmentally delayed. He had a tracheostomy tube, which required periodic suctioning, and a G-tube. The mother had accompanied the student on the bus to provide the tracheostomy suctioning. The court found that the suctioning was not a medical service and could be done by a properly trained individual; therefore, the district was required to provide a properly trained aide for the student on the bus to and from school. *Skelley* at 396.

The parent suggests that these cases show that people without formal nursing training can provide care in the school if the care is necessary for the student to attend school. In *Garret F.*, the parents provided the required physical care for the student during his early years in school and then hired a LPN to do so. *Garrett F.* at 70. The parents in *Morton Grove* received about one week of training at a hospital to learn how to provide the care the student required. *Morton Grove* at 1115. The student in *Skelley* was accompanied by his mother on the bus and performed the suctioning. The hearing officer had found that the student's need on the bus could be met by an aide. *Skelley* at 387.

These cases do not address the issue in this matter: whether a private nurse assistant hired and paid for by the parent can accompany the student on the bus and throughout the school day to provide necessary care for him. Moreover, the district is neither arguing that the student requires medical care nor refusing to provide medical services, as did the districts in the above cases. Rather, the district herein is offering to provide the nursing care that the student needs at school. This matter is distinguishable on its facts; therefore, the rulings in the foregoing cases are inapplicable.

Although the evidence shows that the 2006 and 2007 IEPs indicate that the student has a private nurse assistant who is hired and paid for by the parent, the case manager's testimony shows that she wrote this into the IEP without any understanding or investigation into the services provided by the private nurse assistant or her training. She certainly should have inquired about this information as it came up, rather than merely entering it into the student's IEP. The central question posed here is whether the district must permit the private nurse assistant to accompany the student on the bus and throughout the school and therefore include her in the IEP. As indicated above, the pediatrician testified that a plan that includes a LPN to provide the student's G-tube feedings and administration medication administration and a 1:1 aide could work if the people were consistent, were trained by the parent, and had daily communication with the parent. The district's proposal includes a LPN for 300 minutes/weeks to provide the

G-tube feedings and a 1:1 aide. (SD 22, 36). The parent has not shown by a preponderance of the evidence that the student requires a private nurse assistant to receive a free appropriate public education. The parent's great concern for her son, as well as the care she has given him and provided him throughout this life was very clear from her testimony. The undersigned sincerely hope that she will use this care to assist the school in all it needs to know about her son, as the pediatrician has suggested.

VII. Did the district fail to provide prior written notice, as required by federal and state law, regarding the district's decision to refuse to allow the student to attend his public school accompanied by a private nurse's aide hired and paid for by the parent?

The parent testified that the student began the 2008-09 [REDACTED] school year on August 27, 2008, accompanied by [REDACTED]. She testified that the [REDACTED] bus, which the district provides, picked up the student and [REDACTED] on August 27th and 28th. She further testified that on August 29th, [REDACTED] paged her and told her that [REDACTED] bus personnel would not allow her to board the bus with the student. The mother then called [REDACTED] to inform the principal that the student would not be at school. She testified that the principal was unaware that [REDACTED] was not allowed on the bus. The mother emailed [REDACTED] in the district's transportation department to inquire how the decision had been made and why she had not been given notice. (PD 392).

[REDACTED] oversees the private bus transportation to [REDACTED]. She testified that she learned that the student has a private nurse assistant at the end of the 2007-08 school year when the school informed her that the student's transportation needs included an air conditioned bus and a 1:1 "private nurse." She did not question this information because the private nurse assistant was already in place. When she "started asking questions" of [REDACTED] s principal, she learned that the school did not provide the private nurse assistant. She testified that the principal told her that [REDACTED] could not tell the private nurse assistant what to do because she was not employed by [REDACTED]. At some point, [REDACTED] began to question whether the private nurse assistant posed liability issues as she was not employed by either the district or [REDACTED]. [REDACTED] testified that the district changed the bus vendor for [REDACTED] in May 2008 to [REDACTED] because of problems involving the student's transportation and the prior vendor. [REDACTED] informed the [REDACTED] principal of the new vendor in August 2008 and also told her the district was putting a 1:1 aide on the bus for the student. She testified that she told the both the district's case manager and [REDACTED] to inform the mother that the private nurse assistant could no longer ride the bus with the student. She said the decision had been made by her supervisor, [REDACTED].⁶ [REDACTED] did not feel it was her responsibility to inform the parent that the district had decided that the private nurse assistant could no longer accompany the student on the bus.

[REDACTED] the district's case manager for [REDACTED], testified that no one had told her that the private nurse assistant rode the bus with the student, and she did not ask. She learned that the private nurse assistant was no longer allowed on the bus "as it was happening." She thought that [REDACTED] told her this. She further testified that "someone was

⁶ CT was out on medical leave at the time of the hearing and thus unavailable to testify.

responsible" for informing the parent of the decision. She was not sure if she knew that the parent had not been given notice of the decision. She stated that she had not take any action on the emails that the mother sent her. [REDACTED] did not respond to the mother because the case was in due process. She testified that she had never told her supervisor or the district's due process department that the private nurse assistant accompanied the student to school.

Numerous emails were entered into evidence documenting correspondence between the parent and [REDACTED] and [REDACTED] regarding the decision not to allow the private nurse assistant on the bus. (PD 391-406, 409-413, 416-432, 438-445, 450, 481). No evidence was proffered showing that the parent was given prior written notice of the district's decision that the private nurse assistant could no longer accompany the student on the school bus and throughout the school day.

Several [REDACTED] employees testified regarding their knowledge of the decision that the private nurse assistant was not allowed to ride the bus with the student. The bus driver testified that [REDACTED] general manager, had given him this information at the beginning of the school year. The bus dispatcher testified that [REDACTED] had told her that the private nurse assistant could not ride the bus with the student. She did not call the parent to inform her of this. She directed the mother to [REDACTED] when the mother asked her why the private nurse assistant could no longer accompany the student on the bus.

~~The evidence shows that the parent was the last person to learn of the district's decision that the private nurse assistant could no longer accompany the student on the bus. The parent's testimony that she first learned of the decision from the private nurse assistant after she was not allowed on the bus is uncontroverted. Additionally, no evidence was presented showing that the mother was ever given written notice of the district's decision, prior or otherwise.~~

~~A district must provide prior written notice whenever it proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of a special education student or the provision of a free appropriate public education of that student. 20 U.S.C. §-1415(b)(3). The written notice must include a description of the district's proposed or refused action, an explanation of why the district proposes or refuses to take the action and a description of each evaluation procedures, assessment, record or report the district used as a basis for its proposed or refused action, a statement of the procedural safeguards afforded the parent under the IDEA, sources for the parent to contact to obtain assistance in understanding the provisions of the IDEA, a description of other options considered by the IEP team and reasons why those options were rejected, and a description of factors relevant to the district's proposal or refusal. 20 U.S.C. §1415(c).~~

The district has presented several different arguments as to why it was not required to give prior written notice. In its amended response, the district asserted that it had complied with the notice requirements through its evaluations and IEPs for the student. The district also asserts that prior written notice is not required because it did

not change the student's placement and because the student's IEP does not specifically state that the student needs a nurse on the bus. (District's stay put response, pp. 2, 3). The district also contends that administration in due process and transportation were not aware that a private citizen was riding the bus with the student and accompanying him throughout the school day until the parent filed her September 16, 2008 due process request. (District's January 12, 2009 recusal request, p. 2). The district cites *A.C. and M.C. v. Board of Education of Chappaqua Central School District*, 47 IDELR 294 (S.D. N.Y. 2007) in support of its position. In *A.C.*, the parents alleged that they were not give prior written notice of the district's decision not to recommend private placement for the student. The court found that the lack of prior written notice was a technical violation that did not constitute a FAPE denial because the parents knew of the district's determination from an IEP meeting and thus were not harmed or prejudiced by the lack of written notice. *Id.*

The undersigned finds that the reasoning in *A.C.* does not apply herein because the case is distinguishable on its facts. The decision not to allow the private nurse on the bus - and presumably throughout the school day, though the district has never actually said that - was not made at an IEP meeting. The decision appears to have been made by various administrators within the district and then disseminated to bus personnel and the case manager. There is no evidence showing that the parent, or [REDACTED] was involved in the decision making process or received prior notice, written or oral, of the decision. Unlike the parents in *A.C.*, the parent herein was prejudiced by lack of notice. A private nurse assistant had accompanied the student to and from school and throughout the school for eight years. Assuming *arguendo* that the district's decision that the student did not require such care on the bus was correct, the parent still should have been part of the decision-making process and should have been notified prior to implementing the decision so that she could prepare her son for this change and provide whatever information she believed was necessary to those who would be in charge of him. It is not disputed that the student requires G-tube feedings and medication during the school day. It is also not disputed that a private nurse assistant has provided these services for the last eight years. Because the student's IEP does not include nursing services for G-tube feedings and medication administration, an IEP was required to put these new services into place. These services are part of the student's educational program as he could not attend school without them. Sending him off to school without a revised IEP would not only violate IDEA but also would raise medical, safety and health liability issues as no one was identified to provide these services for the student.

As to the district's argument that due process and transportation administrators were not aware that the private nurse assistant was with the student on the bus and throughout the school day, the undersigned is unaware of any legal authority holding that prior written notice is required only when due process or transportation administrators are aware of the contents of an IEP. Indeed, such a requirement would place an unwieldy burden on administrators who certainly already have their hands full. Here, the district representative who was responsible for writing the student's IEP and who testified that by doing so, she was committing the district to the services in the IEP,

knew that the private nurse assistant not only accompanied the student on the bus and throughout the school day but also gave him his G-tube feeding and necessary medications. It is also important to note that had the private nurse assistant not fulfilled these duties, no one else was required by the IEP to provide these services.

Based on the foregoing testimonial and documentary evidence, the undersigned finds that the district's decision to forbid the private nurse assistant from accompanying the student to - and presumably during - school was a change in its provision of a FAPE to this student. Therefore, the district was required to provide the parent with prior written notice.

The lack of prior written notice is a procedural violation. A hearing officer may only find that a procedural violation denied a student a FAPE if it impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. 20 U.S.C. §1415(f)(E). Undoubtedly, this parent was left out of the decision making process. However, given the ultimate decision in this case, the undersigned does not find that that denied the student a FAPE.

VIII. Did the district fail to honor the 2000 settlement agreement, and therefore breach the settlement agreement, when it refused to allow the student to attend his public school accompanied by a private nurse's aide hired and paid for by the parent?

The district contends that a hearing officer has no jurisdiction over a breach of settlement agreement and has provided case authority that it asserts supports this position.⁷ First is *McCormick v. Waukegan School District #60*, 374 F.3d 564 (7th Cir. 2004). In that case, the parents filed a complaint under 42 U.S.C. §1983 in federal court alleging that their son's Constitutional rights had been violated by the district and several of its employees. The complaint alleged that the student had suffered permanent physical injuries that would affect his quality of life and also emotional distress. The student was receiving special education and thus had rights under the IDEA. The district court dismissed the complaint, finding that the parents had not exhausted their administrative remedies. The Seventh Circuit reversed, holding that the nature of the student's claim was not educational and thus could not be redressed under the IDEA. *Id.* The district also points to *Robert K. and Karen K. v. Cobb County School District*, 50 IDELR 62 (11th Cir.). The parents in *Robert K.* requested enforcement of a settlement agreement, which even they admitted did not involve the IDEA. The court found that because their state law breach of contract claim did not require adjudication of their rights under the IDEA or consideration of the text of IDEA, it was not "brought under" the IDEA. *Id.* The undersigned disagrees with the district's interpretation of these cases. Rather than holding that a hearing officer has no jurisdiction over a claim for breach of settlement agreement, they hold that there was no

⁷ The district also has submitted *Aaron M. v. Yomtoob*, 2001 WL 1465251 (N.D. Ill. 2001) in support of its position. Although this case involves a settlement agreement, the parent's federal court complaint alleged that the breach of settlement agreement deprived them of their statutory and constitutional rights under 42 U.S.C. §1983. This case is not applicable to the matter before this hearing officer.

jurisdiction because the complaints did not allege claims related to special educations and thus had no remedies under the IDEA.

A parent may file a due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education of such child." 20 U.S.C §1415(b)(6)(A). Read together, these cases stand for the principle that if a complaint is brought under Section 1415 - that is, it alleges injuries that are educational in nature and for which IDEA provides a remedy - a parent must exhaust her administrative remedies under the IDEA prior to filing suit in federal court. The case authority provided by the parent supports this proposition. *J.P. v. Cherokee County Bd. of Educ.*, 218 Fed. Appx. 911 (11th Cir. 2007); *Traverse Bay Area Intermediate Sch. Dist. v. Michigan Dept. of Educ.*, 2007 U.S. Dist. LEXIS 54660 (S.D. 2007); *R.P. and M.P. v. Springdale Sch. Dist.*, 2007 U.S. Dist. LEXIS 12073 (W.D. Ark. 2007); *M.J. v. Clovis Unified Sch. Dist.*, 2007 U.S. Dist. LEXIS 28761 (E.D. Ca. 2007); *Farzana v. Ind. Depart. of Educ.*, 2005 U.S. Dist. LEXIS 38561 (N.D. Ind. 2005); *Steward v. Hillsboro Sch. Dist. No. 1J*, 2001 U.S. Dist. LEXIS 9887 (Ore. 2001).

The question, then, is if the nature of the alleged breach of the 2000 settlement agreement relates to the identification, evaluation, or educational placement of the student or the provision of a FAPE. 20 U.S.C §1415(b)(6)(A). The parent's due process claim alleges that the district denied the student a FAPE when it breached the settlement agreement by refusing to allow the private nurse assistant to accompany the student on the bus and at school. The undersigned finds that this claim is brought under 20 U.S.C. §1415 and that, therefore, this hearing officer has jurisdiction over the breach of settlement claim.

The provision of the 2000 settlement agreement at issue here states that the student "is entitled to attend public school accompanied by a private nurse's aide hired and paid for by the Parent." (SD 187). [REDACTED] is an experienced school law attorney in Chicago. He was the director of the district's due process department in 2000 and signed the settlement agreement on behalf of the district. He left the district's employ in 2003. [REDACTED] testified that that the agreement was signed to resolve an ongoing dispute between the parent and district, one part of which was the care the student needed on a daily basis. He testified that in 2000, the student had choking and breathing problems, and the mother wanted a private nurse assistant to accompany him on the bus to school and throughout the school day. Transportation was also an issue because of the student's stroller, which needed to be secured to get him safely on the bus.

[REDACTED] stated that the settlement agreement had to put into the context in which it was signed. He said that at the time the settlement agreement was signed, the district had a shortage of nurses and of funding for transportation. He also said the parent had trust issues with the district. [REDACTED] testified that while he had considered liability, the student had "sat home for years," and he wanted to make sure that the student returned to school. He stated that district policies were not raised as an issue at the time of the settlement agreement. [REDACTED] testified that the phrase "attend public school" did not

include a private school.

█████ testified that the student's needs were looked at on a yearly basis and made part of his IEP. He attended the student's IEP meetings while he was due process director and stated that the student's placements were willing to accommodate the student by having the private nurse assistant. █████ stated that the district could not be locked in to a long agreement because it had no way to know the student's needs in the future. He said that he had no way of knowing what the student needs today, eight years after the settlement agreement was signed.

The parent also testified regarding the settlement agreement. The parent's position is that the agreement does not apply to a particular school and has no time limit. She testified that when the private nurse assistant was raised as an issue during IEP meetings at █████ and █████, █████ said that the parent had a settlement agreement that permitted the private nurse attendant to accompany him. She said that after a while, the private nurse assistant was in place and no longer raised as an issue.

While the undersigned finds the testimony of both witnesses credible, she finds █████ testimony persuasive. See, *J.P. v. County Sch. Bd. of Hanover County, Va.*, 108 LRP 8342 (4th Cir. 2008). It is clear from █████'s testimony that the settlement agreement was not intended to be enforced in perpetuity. The student's needs were determined on an annual basis and, as he testified, the schools were willing to make the accommodations the parent wanted. That they were willing to do so, however, does not mean that they did so pursuant to the 2000 settlement agreement. The undersigned finds that the settlement agreement, now over eight years old, does not apply today. To hold otherwise would contradict one of the foundations of the IDEA: that a student's needs must be determined each year and an IEP must be developed annually to specify the special education and related services the student needs to address those needs and to receive a free appropriate public education. Given this finding, this decision does not address the other arguments raised by the parent.

~~IX. Did the district retaliate after the private nurse's aide reported bus issues and the parent exercised her due process rights and thereby violate the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and Section 1983?~~

This hearing officer has been appointed in this matter pursuant to the Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400 *et. seq.* and the Illinois School Code, 105 ILCS 5/14-8.02a *et. seq.* Therefore, this hearing officer has jurisdiction only over issues arising under these two statutes. For purposes of this decision, the parent's claims under the ADA, Section 504, and Section 1983 are dismissed.

~~X. Did the district fail to respond to the parent's due process complaint per 34 C.F.R. § 300.508(e) and 105 ILCS 5/14-8.02a(g-5)?~~

The undersigned issued an interim order on October 1, 2008, finding that the

district's response did not comply with these provisions and order the district to file a reply meeting these requirements. The district filed an amended response on October 17th. Although the parent may disagree with the explanations provided in the district's amended response, the undersigned finds that the amended response meets the requirements of the above regulations.

XI. Did the district fail to provide the information in the parent's record request per 34 C.F.R. §300.616?

The parent stated in her closing argument that the district complied with this request. Therefore, this claim is dismissed.

Compensatory Education

██████ testified regarding recommended compensatory education should the hearing office rule in the parent's favor. ██████ is a speech/language pathologist. She has a Ph.D. in speech/language, with a specialty in ACC/AT. She has been licensed as a speech/language pathologist since 1984. (PD 300-304). She evaluated the student on June 27, 2008. (PD 284-290). She did not speak with any district personnel as part of her evaluation, although she did review some IEPs and reports. (PD 284).

██████ opined that the student needs intensive services now and consistent access to programs. Her evaluation report states that the student does not have a "functional mean of communicating that enables him to adequately express his basic wants and needs." (PD 289). According to ██████ "it is essential that an effective communication system be implemented as soon as possible." *Id.* She recommended a durable laptop computer with a touch screen for the student, which he could use both at school and at home. A keyboard is not appropriate for the student because of his physical disabilities. She stated using the same communication device in both places is important because it would provide a consistent approach. She said that the student was very motivated when using the touch screen computer during her evaluation. It helped increase his attention and interest. She suggested that a speaking program could be loaded into the computer. She noted that there are many computer programs for teens with severe disabilities, some of which are already used in his classroom, and also recommended others that could be put on the computer. She recommended a lite-tech picture system that combines pictures and a symbol-based system, which the student would carry with him at all times.

██████ recommended that the student, school staff, and the parent all receive training on the technology selected for the student. She testified that many programs have tracking software that allows a teacher to regularly assess how a student's learning is progressing.

██████ also recommended that a school based evaluation technology evaluation be conducted. She stated that the district has "people who are more than capable" of conducting such an evaluation, although she did express concern that the district has

not pursued appropriate technology thus far.

The student's current speech/language therapist testified that the student regressed during his absence in the fall of 2008. He has been working at a field of 6 in the PECS system in August but was at a level of 2-3 when he returned in November. She testified that the student needs to "bump up his skills now" rather than receive more services when he is 22.

Based on the foregoing findings of facts and conclusions of law,

IT IS ORDERED THAT:

1. The district did not implement the stay put order until November 5, 2008. The district is to provide the student with the special education and related services that he did not receive from August 29, 2008 through November 24, 2008. This includes 60 minutes/week of speech/language therapy and 30 minutes/week of occupational therapy. These services are to be provided beyond graduation and are in addition to the 3.5 years of compensatory education provide pursuant to the 2000 settlement agreement.
2. The recommendation that the student receive intensive services now to build up his communication skills rather than waiting to provide additional compensatory education at a later date for the denials of FAPE found in this decision is reasonable and is accepted by this hearing officer.⁸ Therefore, the district is to provide the following as compensatory services for the above-found denials of FAPE:
 - a. A durable laptop computer with a touch screen, which can be transported between school and home, with Boardmaker/SDP installed on it.
 - b. A school based ACC/AT assessment conducted by the district's AT department, to determine what equipment, programs, etc. would help the student improve his communication skills, to determine what programs should be installed on the laptop computer, and to determine what lite-tech communication would be appropriate for the student. The evaluator is also to determine what programs in addition to Boardmaker should be installed on the laptop. This evaluation is to occur within 15 school days of this decision.
 - c. Technology training for the student, appropriate [REDACTED] staff, and the parent so that they are familiar with the equipment and know how to use it. School staff are also to be trained in using the data collection systems in each program, so that they can monitor the student's learning on these programs and make adjustments as necessary.
 - d. A school-based reassessment of the student in six months, to determine if the technology is meeting his needs and if any substitutions or additions need to be made. The reassessment is to be conducted by the district.
 - e. 60 extra minutes/week of speech/language therapy for one year.

⁸ The student is already due 3.5 years of compensatory education after is 22, and another approximately three months after that pursuant to this Order.

3. The student is to have a 1:1 aide for the bus ride to/from school. The aide is to receive training in the student's particular needs regarding his G-tube (e.g., placement of the tube when he is in the harness) and in monitoring the student's physical condition while on the bus.
4. The IEP team is to meet within 10 school days to amend the IEP to include
 - a. A 1:1 aide on the school bus;
 - b. Nurse services increased from 300 minutes/week to 450 minutes/week, as the testimony showed that the student's G-tube feedings take a minimum of 90 minutes, including medication time;
 - c. A harness and clips for securing the harness on the bus;
 - d. A bus with a lift, so that the student can access the bus;
 - e. Upon receipt of a doctor's order, the IEP is to add that the student needs an air-conditioned bus;
 - f. 60 extra minutes/week of speech/language therapy, for a total of 120 minutes/week of speech/language therapy.
5. After the school based technology evaluation is completed and staff determine the technology needs for the student, the IEP team is to prepare an amendment to the IEP that indicates all of the district's recommendations and all equipment, software, etc. that will be given to the student.
6. The school district is to give the parent a release of information form so that, with parental permission, the district can communicate with the doctor about the student's medical needs. The district is also to provide a form for doctor's authorization for an air-conditioned bus.

Order

Within thirty (30) days of receipt of this Order, School District shall submit proof of compliance to:

Illinois State Board of Education
Program Compliance Division
100 North First Street
Springfield, Illinois 62777-0001

Right to Request Clarification

Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned hearing officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, and a copy of the request shall be mailed to the other party(ies) and the Illinois State Board of Education. The right to request such clarification does not permit a party to request reconsideration of the decision itself, and the hearing officer is not authorized to entertain a request for reconsideration.

Right to File Civil Action

This decision is binding on the parties unless a civil action is commenced. Any party to this hearing aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.02a(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision is mailed to the parties.

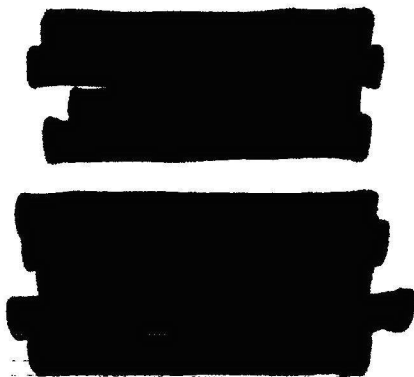
ISSUED: February 23, 2009



Mary Schwartz
Impartial Hearing Officer

CERTIFICATE OF DELIVERY BY MAIL

The undersigned hereby certifies that a true and correct copy of the Decision and Order was sent by certified mail from Chicago, Illinois, and directed to:



Mr. Andrew Eulass
Due Process Coordinator
Illinois State Board of Education
100 North First Street
Springfield, Illinois 62777-0001

before 6:00 p.m. on February 23, 2009

A handwritten signature in black ink, appearing to read "Mary Schwartz", is written over a horizontal line. The signature is cursive and somewhat stylized.

Mary Schwartz
Impartial Hearing Officer
6116 S. University Avenue, 2N
Chicago, Illinois 60637
773.684.3035(facsimile)
708.912.0755 (cellular)
maryschwartz@gmail.com