IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

A.B. and L.B.,	:	
Petitioners,	:	
	:	**Docket No.:**
v.	:	**OSAH-DOE-SE-[redacted]SCHROER**
OCONEE COUNTY SCHOOL DISTRICT,	:	
Respondent.	:	

FINAL DECISION

I. INTRODUCTION

On November 12, 2014, A.B. and his mother L.B. filed a due process complaint pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). The due process hearing was held before the Office of State Administrative Hearings ("OSAH") over seven days between January 27, 2014 and February 26, 2014.[1] Jonathan Zimring, Esq. represented Petitioners and Harold Eddy, Esq. represented Respondent Oconee County School District. The record remained open following the conclusion of the hearing in order for the parties to review the transcript and file post-hearing briefs. The deadline for the issuance of this decision was extended pursuant to 34 C.F.R. § 300.515(c).

II. FINDINGS OF FACT

1.

A.B. is a nineteen-year-old young man with severe to profound physical and intellectual disabilities. His mother, L.B., has been appointed his legal guardian and conservator. For the

[1] The hearing schedule was disrupted by significant winter storms in metropolitan Atlanta and Athens during late January and early February 2014, causing a series of postponements and changes in the dates, times and location of the hearing.

past several years, A.B., as a child with a disability under IDEA, has received special education and related services from the Oconee County School District ("School District" or "OCSD"). He is currently enrolled as a student at North Oconee High School ("NOHS") in Bogart, Georgia.

2.

Approximately three years ago, A.B. began having seizures. His neurologist has diagnosed A.B. with medically intractable epilepsy. The cause of A.B.'s seizures is unknown, and despite various anticonvulsant medications, A.B. continues to have breakthrough seizures. When a breakthrough seizure occurs, A.B.'s physicians have prescribed an anti-seizure medication called Diastat to be administered rectally if the seizure lasts more than five minutes. Although A.B. has never had a seizure lasting five minutes, the School District has trained and authorized school staff to administer Diastat at school and on trips into the community. The primary dispute between the parties in this matter is whether the School District is required under IDEA to train and authorize school staff to administer Diastat on the school bus between A.B.'s home and school.

A. Medical Background

3.

A.B.'s medical conditions are complex. He weighed less than two pounds at birth, and has serious vision and hearing impairments. His language skills are severely impaired and he is, for the most part, non-verbal. In addition, A.B. has autism and significant behavior issues. In a 2011 psycho-educational evaluation, when A.B. was seventeen, his physical skills were rated age-equivalent to one year and a few months, and his cognitive, social-emotional, and communication skills were rated equivalent to less than one year of age. (Tr. 417, 843; Ex. R-11, at 1118-23.)

4.

In or around May 2011, A.B. had his first seizure. He was examined at the hospital by Dr. Brannon Morris, who became A.B.'s pediatric neurologist. Since that time, Dr. Morris has prescribed A.B. various anti-epilepsy drugs ("AED"s), increasing the dosage and adding new AEDs in an attempt to control the seizures. Notwithstanding this preventive treatment, A.B. has continued to have breakthrough seizures, lasting from under one minute to more than three minutes. When A.B. begins to seize, he typically moves his head to the side and his arm will draw up. Recently, his legs have begun to pull up toward his body or lock as well. Because his seizures are unpredictable, A.B. is at risk of falling when a seizure occurs. (Tr. 314, 512, 748, 844-46, 887; Ex. P-27; Ex. P-32.[2])

5.

Seizures involve uncoordinated or irregular electrical activity in the brain. Some seizures are acute, such as seizures caused by sepsis or a traumatic injury to the brain, and others are chronic, such as A.B.'s appear to be, recurring without warning or discernible trigger. If a seizure is prolonged, the condition is considered a medical emergency because of the risk of injury to central nervous system neurons. Although most seizures stop without any medical intervention, it is generally accepted by the medical community that, on average, if seizure

[2] Exhibit 32 is a seizure log maintained by L.B., which chronicles A.B.'s seizure activity, as well as seizure-related medical treatments, prescriptions, and doctor visits, from May 2011 through December 2013. The Court took under advisement the admissibility of Exhibit 32. The School District objected to the admission of Exhibit 32 because L.B. had not provided a copy of the log to the School District before producing it for this hearing. The Court overrules this objection and Exhibit 32 is hereby admitted. The Court notes that Exhibit R-11, produced by the School District, contains an earlier version of the seizure log, which listed A.B.'s seizures through March 2012. Further, L.B. referred to the log during at least two discussions with School District personnel in 2013. Finally, although Exhibit P-32 contains additional information not included in Exhibit R-11, the additions prior to March 2012 appear to pertain to seizure-related activities reported by school staff. (Tr. 506-07, 717, 847-50; Ex. P-15; P-32; Ex. R-11, at 1102.)

activity persists continuously[3] for longer than five minutes, the seizure is not likely to stop on its own. Accordingly, physicians commonly recommend emergency intervention after five minutes of continuous seizure in order to prevent progression to a condition known as "status epilepticus" or "SE." Although there is some controversy regarding exactly when SE begins, it is generally accepted that SE is a dangerous, life-threatening condition that develops when a person continuously seizes for approximately thirty minutes.[4] Moreover, drug treatment for SE generally should be started without delay because SE becomes more difficult to control the longer the condition persists.[5] (Tr. 339, 353, 370, 539-41, 1400-04; Ex. P-33; Ex. P-51, at 558-60; Ex. R-1, at 290, 327.)

---

[3] Any reference to a "continuous" seizure herein also includes "rapidly repeating seizures without recovery or regaining consciousness between episodes." (Ex. R-1, at 327.)

[4] There is debate in the medical community over defining SE as beginning at thirty minutes, when physiological brain damage is likely to occur, as opposed to the five-minute-mark, when it becomes unlikely that the seizure will stop on its own. Some in the medical field advocate referring to the period between five minutes and thirty minutes of continuous seizure as "impending SE." Moreover, although it is generally accepted that prolonged, continuous seizures over thirty minutes can cause permanent damage, the likelihood of morbidity from prolonged seizures depends in large part on the cause of the seizure. For example, there is a much higher morbidity rate associated with SE caused by traumatic brain injuries or infections than for SE resulting from chronic seizure disorders. (Tr. 365-66, 370, 372, 1356, 1400, 1403-05; Ex. R-1, at 327-28; Ex. P-51, at 565-67.)

[5] Both parties introduced authoritative medical journal articles on the subject of SE and its treatments. A 1988 New England Journal of Medicine article relied on by one of Petitioners' medical experts, Dr. Salma Ahsan, found that "[d]rug treatment for [SE] should be started without delay" due to "the correlation between the duration of [SE] and the extent of neurologic morbidity and by experimental and clinical observations that [SE] of longer duration is less responsive to drug therapy than that of shorter duration." Dr. Michael Anderson, a medical expert testifying on behalf of the School District, relied on a 2010 article from the Journal of the American Medical Association ("JAMA") Pediatrics, which found that "[s]eizures that last longer than 5 to 10 minutes ... are unlikely to stop without treatment and become more difficult to control with time. Prolonged or recurrent seizure disorder persisting for 30 minutes may result in significant morbidity and mortality that correlates directly with seizure duration." (Tr. 353-55, 1351; Ex. P-51, at 560; Ex. R-1, at 290, 295.)

6.

"The goal of drug treatment for SE is the prompt cessation of seizure activity." For A.B., Dr. Morris has prescribed Diastat as a rescue medicine in the event he has a seizure that lasts longer than five minutes. Diastat is the brand name for a diazepam rectal gel, which is a form of Valium and part of a class of medicines called benzodiazepines.[6] Diastat is available in a pre-dosed pen set, with a syringe equipped with a tip designed for rectal administration. In general, it is fairly easy to train a lay-person to administer Diastat. Dr. Paul Haver, A.B.'s primary care physician, has trained L.B. and other caretakers to administer Diastat and his training takes approximately one hour. Essentially, the administration of Diastat involves the following steps: (i) placing the person on his side, (ii) pulling down his pants, (iii) opening the Diastat kit and removing the pre-loaded syringe, (iv) holding buttocks apart and inserting the syringe, (v) pushing the plunger in to administer the Diastat, (vi) holding for a count of three, and (vii) removing the syringe and holding buttocks closed for a count of three. (Tr. 323-24, 498, 505; Ex. P-54; Ex. R-22, at 23; Ex. P-33, at 327.)

---

[6] Benzodiazepines include diazepam, lorazepam, midazolam, and clonazepam, and are "potent, fast-acting antiseizure drugs," which "are currently used as the initial therapy for the treatment of acute seizure activity." In the United States, rectal diazepam (Diastat) is the most common rescue medication prescribed for home treatment of seizures. However, midazolam, a water-soluble benzodiazepine in the same chemical family as Diastat, can be delivered intranasally (sprayed into the nose) and has also been found to be "an effective rescue medication that can be given safely" to stop seizures. Although midazolam, commonly known by the brand name Versed, has not been approved by the Food and Drug Administration ("FDA") for intranasal delivery, persuasive medical studies have concluded that intranasal midazolam is not only safe for treating seizures outside the hospital setting, but in many respects, more effective than rectal diazepam in controlling seizures in pediatric patients and reducing the need for emergency intubation and hospital and ICU admissions. (Tr. 1363-65, 1407-14, 1436, 1440, 1535; Ex. P-51, at 973; Ex. R-1, at 291; Ex. R-22, at 24; Ex. R-23.)

7.

Lynn Heyen, A.B.'s teacher for the past four years, as well as other NOHS staff that work with A.B., have been trained to administer Diastat to A.B. if he seizes for over five minutes while in school. In addition, the school nurse, Faye Warden, is based at NOHS and is trained in administering Diastat. At least as early as August 2012, L.B. and Warden prepared a Student Health Action Plan to address treatment of A.B.'s seizure disorder while at school.[7] In the 2012 Student Health Action Plan, L.B. identified Dr. Morris as A.B.'s physician, but she denied permission to school health officials to speak with Dr. Morris. The 2012 Action Plan provided for, among other things, the administration of Diastat if A.B.'s seizure reached five minutes. (Tr. 638, 704, 1252, 1254; Ex. P-12, at 1207.)

B. Development of A.B.'s Individualized Education Program

8.

IDEA requires school districts to have an Individualized Education Program ("IEP") in effect for all children with a disability by the beginning of each school year.[8] In addition, each IEP must be reviewed annually by the child's IEP team.[9] A.B.'s IEP was set to expire in or around May 21, 2013, and the School District scheduled an IEP team meeting for April 29, 2013, a date proposed by L.B. Historically, A.B.'s annual IEP meetings have been lengthy, lasting most of the day and rarely, if ever, ending with a fully-agreed upon IEP. Rather, the completion of A.B.'s IEP typically required the subsequent exchange of draft IEPs in order to reach final agreement. (Tr. 737, 788, 1188, 1284, 1307, 1662; Ex. R-1, at 117; Ex. R-17, at 1812.)

---

[7] The Student Health Action Plan is a form used by the School District for any student needing medical care while at school, not just students with disabilities under IDEA.

[8] See 34 C.F.R. 300.323.

[9] See 34 C.F.R. 300.324.

9.

The April 29, 2013 meeting was no exception. In addition to numerous School District representatives, including Lynn Heyen, A.B.'s teacher, Suzanne Korngold, the Director of Special Programs for the School District, and Phillip Brown, NOHS' principal, L.B. attended the April 29 IEP meeting with at least four members of A.B. and L.B.'s "team," including L.B.'s lawyer, Jonathan Zimring, a parent advocate, a private behavior specialist, and a family friend.[10] The meeting lasted eight hours, but did not result in a completed IEP for the 2013-2014 school year. In addition to other issues, A.B.'s IEP team did not address transportation, school health services, or A.B.'s seizure disorder during the meeting. (Tr. 706, 856, 1187, 1200, 1304-09; Ex. R-1, at 126; Ex. P-8; Ex. P-41, at 351; Ex. P-43, at 432.)

10.

It is not clear exactly how or when the parties planned on completing the 2013-2014 IEP, although it appears that initially L.B. expected that another meeting would be scheduled once she provided the School District with her team's available dates. Sometime in early to mid-May, however, L.B. called Heyen and told her that she had received a bill from her attorney for attending the IEP meeting. L.B. requested that she and Heyen finalize the IEP without having another meeting in an effort to contain costs. Heyen accommodated L.B.'s request, and they began exchanging draft IEPs and comments. At the same time, L.B. and Korngold were communicating about extended school year ("ESY") services for A.B., a matter of urgent concern to L.B. given that summer was fast approaching.[11] On Friday morning, May 17, just a

---

[10] Dr. Salma Ahsan, a physician providing A.B. biomedical treatment for autism, attended the April 29th IEP meeting and was introduced to the IEP team as a family friend, not as A.B.'s physician. (Tr. 325, 456, 1182, 1187.)

[11] ESY services provide classes beyond the normal school year and are considered a special education related service. 34 C.F.R. 300.106(b).

few days before A.B.'s IEP was set to expire, Heyen provided L.B. with a draft IEP that she hoped addressed all of L.B.'s concerns, with the exception of issues relating to ESY services. Heyen also proposed a meeting date, if one was necessary, for Monday, May 20.[12] (Tr. 750, 1188, 1306-07, 1325; Ex. R-1, at 108, 113-17; Ex. R-12, at 1283; Ex. R-19, at 1847; Ex. P-41, at 351.)

11.

L.B. responded to Heyen on Saturday, May 18, stating that she did not believe her team could attend a meeting at such short notice and that she could not respond to the draft until her attorney and advocate reviewed it. She offered to speak to them about setting up a meeting in June, but stated that the ESY issues needed to be resolved sooner. On Monday, May 20, L.B. emailed Heyen a list of parental concerns based on the most recent draft IEP. She identified a number of concerns, many about ESY, and expressed her dissatisfaction that A.B.'s current IEP was about to expire without a new one in place. (Tr. 1297-98; Ex. R-1, at 113, 117; Ex. R-12, at 1256-59, 1291.)

12.

During late May, L.B. continued to express her frustration over the failure to complete A.B.'s IEP and began requesting an IEP meeting to do so. On May 23 and 25, L.B. wrote Heyen and Korngold and proposed a meeting on June 4 or 5 to complete the IEP. On May 28,

---

[12] Heyen attempted to send the draft IEP a week earlier, but due to a problem with the school's server, L.B. did not receive it until May 17. In an email to L.B. on May 17, Heyen resent the draft IEP, stating that she had attempted to address all L.B.'s parent concerns except those relating to ESY. Although Heyen proposed May 20 as a possible meeting date she was "hoping though that the changes in the IEP are what we have discussed! Again, let me know and I will work with you on everything! But I'm hoping that this will be what you are looking for! If not, call or email me and we can work through as much as possible without having to involved [sic] everyone if you prefer." (Ex. R-1, at 113, 117.)

Korngold emailed L.B., offering to sit down with her to review the most recent draft IEP "page by page." However, because Heyen was unavailable the first week of June and many of the school members of the IEP team were off for summer break, Korngold proposed reconvening the IEP team during the "pre-planning" period for the 2013-2014 school year, either on July 31 or August 1. L.B. opposed waiting until pre-planning to complete the IEP meeting, and requested a meeting in June regardless of the schedules of school personnel. In addition, she did not accept Korngold's offer to meet or talk one-on-one during the summer in lieu of a full IEP meeting. (Tr. 1200-01, 1304-05, 1325-26, 1739; Ex. R-1, at 124; Ex. R-12, at 1256-59, 1306, 1310, 1333, 1335, 1338, 1340, 1344; Ex. R-19, at 1864.)

13.

On or about May 29, Heyen finalized A.B.'s 2013-2014 IEP with the understanding that the IEP team could reconvene during pre-planning to amend the IEP if necessary. L.B., dissatisfied with the School District's refusal to meet again before pre-planning, scheduled her own meeting for July 1 and invited School District personnel. Even though she knew that no school members of the IEP team would be in attendance, L.B. held the meeting, during which she, her attorney, and other members of her team adopted their own plan for A.B.'s upcoming school year. L.B. sent a copy of this plan to Korngold and insisted that it was A.B.'s current, legally-binding IEP. Through the rest of the summer and early fall, L.B. refused to meet with A.B.'s IEP team until the School District (i) acknowledged the validity of the plan she and her team adopted on July 1 and (ii) agreed to pay the costs of L.B.'s attorney and other team members to attend future IEP meetings.[13] Moreover, L.B. testified that from the pre-planning

[13] On January 10, 2014, the Court issued an Order Denying in Part and Granting in Part Cross Motions for Summary Determination, which is incorporated herein by reference. The order held that L.B. was not authorized under IDEA to notice and conduct a unilateral IEP team

period through the beginning of November 2013, she was too busy with work and personal obligations to attend an IEP meeting on any of the dates proposed by the School District.[14] (Tr. 706, 752-55, 789, 956, 1014, 1037, 1187, 1191, 1200-01, 1205, 1207, 1306-07, 1311, 1313, 1317; Ex. R-1, at 126, 204; Ex. R-13, at 1470; Ex. R-17, at 1772; Ex. P-8, at 98; P-41, at 347, 351, 358, 388; Ex. P-43, at 342, 437.)

14.

In early August, some of A.B.'s teachers met to review the plan L.B.'s team adopted during the July 1 meeting. The teachers incorporated some of the components of the July 1 plan into an amended draft IEP, which Heyen sent to L.B. on or around August 16. Heyen proposed meeting to discuss the School District's draft, and repeated this request on August 23. L.B. refused to schedule a meeting, insisting that the July 1 plan was A.B.'s IEP and that the School District would have to file a due process hearing request if it wished to contest the plan. In September, Heyen again sought L.B.'s participation in an IEP team meeting, proposing September 27, October 4, 8, 14 or 18 as possible meeting dates. L.B. again refused to meet until her conditions were accepted. (Tr. 1203; Ex. R19, at 1891, 1895-97, 1910, 1916, 1919; Ex. P-41, at 351.)

C. Training of ESY Staff on Administration of Diastat

15.

Although L.B. expressed numerous concerns regarding both the proposed 2013-2014 IEP

---

meeting without the agreement or participation of School District members.

[14] L.B. had many demands on her time during this period, including obligations to testify in court and at depositions in connection with her employment, as well as a contested divorce proceeding with A.B.'s father. In reviewing the correspondence between the parties, it appears that L.B. expected the School District to accommodate her scheduling constraints without affording School District personnel the same courtesy. (Tr. 956; Ex. R-19; Ex. P-41, at 382-83.)

and ESY services, there is no evidence that she or any member of her team were concerned about the School District's handling of A.B.'s seizure disorder until the beginning of summer school. On June 3, when L.B. took A.B. to summer school for the first day, she discovered that the summer school staff had not been fully trained on how to administer Diastat. The following day, June 4, L.B. wrote a letter to Korngold, objecting to the lack of adequate training. Dr. Haver also wrote a letter to Korngold on June 4, which he later forwarded to the members of the Oconee County School Board, stating that school staff must be trained by appropriate medical personnel on how to administer Diastat and that "harmful effects" may result if the medication is not "administered timely and appropriately." (Tr. 856, 983-84, 1190; Ex. R-13, at 1346-49; Ex. P-22, at 277.)

16.

Korngold arranged to have A.B.'s summer school staff trained by a nurse the next day, June 5. For the remainder of the summer school session, there is no evidence that either Dr. Haver or L.B. made further inquiries regarding the School District's training or procedures relating to Diastat administration. A.B. attended summer school as planned and rode the school bus home from school one or two days per week. Nevertheless, the lack of advance training for summer school staff caused L.B. to question the School District's broader procedures relating to Diastat, including the training of personnel to administer Diastat on the school bus. When she met with her team on July 1, they agreed to include in their plan a provision that "[a]ll bus personnel should be trained on [A]'s medical and behavior plan[.]" (Tr. 608, 791, 988-89, 1191-93; Ex. P-11, at 182.)

D. School District's Procedure Regarding Administration of Diastat on Bus

1. A.B.'s Bus

17.

A.B. has been assigned to the same bus route for five years. Because of his behavior problems on the bus, the School District has minimized the time A.B. spends on the bus by making him the last student picked up in the morning and the first one dropped off in the afternoon. His bus route is along mostly rural roads, with four stop signs and seven turns. The School District's routing software calculates the distance between A.B.'s home and NOHS as 5.76 miles, and the trip time, based on a 45-mph speed, to be approximately eight minutes. Duane Peterson, OCSD's Director of Transportation, has driven a bus along this route and estimates the trip time to be between eight to ten minutes. Debbie Allen, the secretary for the transportation department and A.B.'s former bus driver, estimates the trip time to be about seven to eight minutes. L.B., who has been driving A.B. to school for most of this school year, testified that the drive takes her approximately ten to twelve minutes, depending on traffic and weather. According to the School District, barring any extraordinary circumstances, A.B. is less than five minutes from his home or the school at any point along the route. (Tr. 220, 238, 275-76, 278, 616, 620, 623, 885; Ex. R-18, at 1809-11.)

18.

A.B.'s bus is a special education bus, which is smaller than a typical bus, approximately 14 to 15 feet long. It has a wheelchair lift in the front, followed by three slots for wheel chairs, and then eight seats for other passengers. This year, there are five to seven students assigned to A.B.'s bus route, two of whom are in wheelchairs. The wheelchairs are secured to the floor of the bus with safety locks, which are built into the floor of the bus. The other students sit in the

seats behind the wheelchairs. All the students, including the students in wheel-chairs, wear seat belts. The aisles are somewhat wider than a typical school bus and the seats a little bigger. Also, since there are only two wheelchair-bound students assigned to the bus, there is some open floor space in the unused wheelchair slot. However, the available unobstructed floor space is fairly small, and the wheelchair safety locks jut out of the floor. (Tr. 226, 268-70, 598.)

2. School District's Procedure for Administration of Diastat on a Bus

a) August 2013

No formal written policy regarding treatment of seizures on bus

19.

In early August, when A.B. returned to NOHS for the start of the 2013-2014 school year, L.B. asked Heyen, A.B.'s teacher, and Warden, the school nurse, about the School District's procedures regarding administration of Diastat on school buses. The School District did not have a formal policy or written procedure on this issue so Heyen asked various individuals within the School District, including Warden and Allen, the transportation secretary, if they knew what the School District's procedure was. The responses were conflicting. Allen responded to Heyen on August 7, stating that bus personnel were not authorized to administer Diastat, but must call 911 and wait for emergency medical technicians ("EMTs") to arrive. The next day, August 8, Peterson, Allen's supervisor, stated that bus drivers were trained to administer Diastat, and that the OCSD procedure was to administer the Diastat as prescribed, and then call 911, the school and the parents.[15] (Tr. 244-45, 618, 639, 645-46, 712; 1784; Ex. P-19,

[15] Apparently, when Peterson made this statement he was mistakenly thinking of procedures relating to the use of "epi-pens," which are auto-injectable medical devices used to deliver epinephrine in the case of life-threatening allergic reactions. (Tr. 244-45. 315-16.) See O.C.G.A. § 20-2-776 (provision authorizing students to carry and self-administer epi-pen, and allowing school systems to receive and store epi-pens for students who are unable to self-

at 231-32.)

20.

These conflicting responses were passed on to L.B. – Heyen and Allen telling L.B. that the bus personnel would not administer Diastat, and Warden telling her that they would. On or about August 12, L.B. told Allen that until the issue was resolved, she would be driving A.B. to and from school. Around the same time, a number of School District administrators, many of whom were relatively new to OCSD and had little institutional knowledge of OCSD's unwritten procedures or protocols, attempted to determine whether there was a specific procedure relating to Diastat administration on buses, and, if so, what it was. Also on August 13, Korngold emailed L.B. to tell her that she was looking into the issue regarding the administration of Diastat on the bus and that she hoped to be back in touch with L.B. the next day.[16] Later on August 13, Korngold, Jake Grant, the new Chief Operations Officer ("COO") for the School District, and Lucho Varela, who oversees school nurses for OCSD, exchanged a series of emails about training bus monitors to administer Diastat. During these exchanges, the preliminary decision appeared to be to schedule the training and to develop a written procedure regarding Diastat on the bus. (Tr. 198, 609, 645-46; Ex. P-19, at 232; Ex. P-20, at 238, 241-42; Ex. P-41, at 348-49, 353.)

21.

On August 14, Warden notified Korngold, Varela, Peterson, and Heyen that she has been researching options relating to Diastat administration on the bus. Warden's understanding based

---

administer the medication if the students' parents provide, among other things, a written release for the school nurse to consult with the physician regarding any questions that may arise with regard to the medication).

[16] Korngold did not get back to L.B. with an answer the next day. Rather, Korngold notified L.B. of the School District's procedure on September 10, almost a month later. See *infra* at ¶ 27.

on her fourteen years of working as a school nurse in OCSD was that the School District's practice was to call 911 in the event of a seizure on a bus and wait for EMTs to arrive and administer Diastat. She believed that other local school districts followed the same policy due to safety concerns, including the lack of space on the bus, as well as concerns relating to traffic, privacy, and liability. She also noted the general recommendation against administering Diastat on a bus by Children's Healthcare of Atlanta ("CHOA"). (Tr. 694; Ex. P-20, at 243; Ex. R-22.)

CHOA recommendations

22.

The CHOA recommendations relating to administration of Diastat are part of a manual created by CHOA regarding school health programs. In Chapter 3 of the manual, entitled "Administration of Medications," CHOA cites to Georgia Code 20-2-771.2, which requires local boards of education to establish policies and procedures for a school health nurse program. In addition to general recommendations for school systems – such as having written policies regarding training of unlicensed school personnel who will be administering medications – the manual sets forth guidelines for the administration of emergency medications for severe allergic reactions, complications of diabetes, and prolonged seizures. (Tr. 639; Ex. P-22, at 3, 6, 20.)

23.

With respect to seizure medications, the CHOA manual first advises that "[e]ach child is an individual and health needs vary, greatly. Specific instructions should be in place for the management of seizure medications. Physician orders may differ, so always follow the Seizure Action Plan." The manual also provides information regarding two specific emergency seizure medications – Diastat and Intranasal Versed. First, the CHOA manual gives specific instructions on how to administer Diastat when school personnel determine that Diastat is needed. However,

the manual contains the following caveat:

> The opinion of the Children's Epilepsy Center of [CHOA] is that the use of Diastat is usually not appropriate during transportation on school buses. This opinion was based on the following:
>
> - need for training of bus personnel
> - inability to administer safely, due to space on the school bus
> - global traffic safety issues
> - issues regarding student privacy and confidentiality
>
> The following procedures may be used as a guideline for school bus personnel when a child has a seizure.
>
> - If a seizure is observed on a school bus, the seizure should be timed.
> - If the seizure lasts longer than five minutes, 911 should be called for assistance.
> - Other instructions should be in place based on the Seizure Action Plan on file for the individual student.
>
> The Epilepsy Foundation provides a free inservice for school bus personnel called *A Guide To Better Understanding Seizures* for training purposes. It covers appropriate first aid for a student having a seizure within a school bus environment.

The CHOA manual also contains instructions on how to administer Intranasal Versed, but does not include a similar recommendation against administering it on the bus. (Tr. 1363, 1366, 1369, 1372-73; Ex. R-22, at 23.)

Student Health Plan

24.

While the School District was considering its position on the administration of Diastat on the bus, NOHS asked L.B. to complete an annual Student Health Action Plan in connection with A.B.'s seizure disorder. On the form, L.B. identified Dr. Morris as A.B.'s physician, but indicated, just as she had in 2012, that she did not give school health officials permission to

"dialogue with our physician."[17] The Student Health Plan provided that if A.B. seized, the school staff should note the time and duration, ease him to the floor, cushion his head, and turn him on his side. The plan further provided that "[i]f seizure lasts 5 minutes administer Diastat 15 mg according to school procedure. Call 911." Finally, before signing the Student Health Action Plan on August 15, L.B. crossed out wording that relieved the School District of liability if the medication was not administered. (Tr. 649-50, 944-48, 1032, 1048; Ex. 31.)

Superintendent's cabinet's consideration of Diastat procedure

25.

Dr. Jason Branch, OCSD's superintendent, meets with his senior administrators every Monday. This group, referred to as the Superintendent's cabinet, includes COO Grant, Dr. Claire Miller, Chief Academic Officer, OCSD's chief financial officer, and OCSD's chief human resources officer. During the cabinet meeting on August 20, the cabinet briefly discussed "the possibility of training our bus drivers and monitors on administering Diastat." Specifically, the cabinet discussed whether and under what circumstances the School District would consider changing its practice of calling 911 and waiting for medical personnel in the event of a prolonged seizure on a bus. The day after the cabinet meeting, after seeing a preliminary report on the practices followed by other school districts, Dr. Branch told Grant that the School District was still reviewing its options and would make a final determination on the issue in the near future. (Tr. 34-40, 50-51, 93, 118, 1750-51, 1785, 1787, 1789; Ex. P-20, at 247, 248, 255.)

---

[17] L.B. insisted that she told Warden that she could "go through" L.B. to speak to A.B.'s physicians and that she "just wanted to be a part" of any dialogue. In addition, L.B. testified that in case of an emergency, Warden was allowed to contact Dr. Morris directly. The Court does not find this testimony credible. Warden testified that L.B. never told her that she could talk to Dr. Morris as long as L.B. got to participate. In fact, if L.B. had made that offer, Warden testified that she would have felt the need to contact him. The Court finds that Warden reasonably believed that she was forbidden to contact Dr. Morris under any circumstances to discuss A.B.'s seizure disorder or treatment. (Tr. 692-93, 945, 948, 1048-50.)

26.

Less than a week after the cabinet meeting, around August 26, the cabinet made a decision to maintain its practice of calling 911 in the event of a seizure on the bus. Specifically, the cabinet adopted emergency procedures developed by Peterson, who in addition to being the Director of Transportation is a trained EMT. Peterson's procedure was that if a student begins to seize while on the bus to or from school, the bus driver will determine the closest location – either the student's home or the school – and call 911 to request that an EMT meet the bus at that location. Once there, either a trained person at the location, such as the child's parent or teacher, or an EMT, will administer the Diastat kit.[18] According to Dr. Branch, this decision was not a refusal to administer Diastat, but rather a determination of how, when and where it should be administered. In reaching its decision, the cabinet considered a number of factors, including the practices in place at other school districts and, more importantly, the CHOA recommendations. Drs. Branch and Miller testified that the cabinet was open to considering an exception to this general procedure based on additional information provided by an individual student, but that they had not received such information about A.B. (Tr. 52-53, 55, 63, 87, 96-97, 101, 1750, 1752, 1759, 1795, 1797-98.)

---

[18] At the hearing, Peterson acknowledged that traffic, weather and time of day can affect the response time for emergency medical services ("EMS"). He also acknowledged that EMS cannot guarantee any particular response time. He said he would hope they would get there within an hour. Captain Jimmy Williams, the director of E-911 for the Oconee County Sheriff's Department, testified that EMS in Oconee County averaged a ten-minute response time, but could not guarantee any particular response time. Consequently, although Peterson is concerned about the safety risks of trying to administer Diastat within the close confines of a bus, he testified that, given the uncertainty of EMS' arrival time, it would be a greater danger to stop the bus and wait for EMS to arrive than to attempt to administer Diastat on the bus. In Peterson's opinion, the safest option is to attempt to get A.B. back to either his home or school, whichever is closer, and take him off the bus to a safe location to administer the Diastat. (Tr. 209, 269-74, 773-76.)

b) September and October 2013

27.

The School District did not notify L.B. of the cabinet's decision until September 10, 2013, when Korngold emailed L.B. that the School District was maintaining its past practice "of calling 911 when a student has a seizure on the bus." Korngold told L.B. that "[t]he District's decision was based on student safety and how transportation could best meet the medical needs of students on a school bus. If you need further clarification or would like to discuss this further, I would be glad to speak to you about it." L.B. responded the next day, seeking clarification about the procedure[19] and expressing her dissatisfaction with the decision. (Ex. P-3; Ex. P-4.)

28.

On September 13, 2013, after consulting with the transportation department, Korngold provided additional details to L.B. on the cabinet's decision. She again offered to discuss the issue with L.B. further and also told her that she could contact Dr. Miller, Korngold's supervisor. L.B. did not find Korngold's response to be complete and demanded additional details about the School District's procedure, including whether it applied to all bus trips and who would be administering the medication. L.B. was deeply dissatisfied with Korngold during this time, and strongly expressed her belief that Korngold was violating A.B.'s legal rights. On September 17, Korngold emailed L.B. and again asked her to meet with Dr. Miller to discuss the matter further. L.B. would not agree to meet with Miller until she received the answers to all her questions about the cabinet's decision and other transportation-related issues. (Ex. R-1, at 208, 211, 910-11.)

---

[19] L.B.'s requests were reasonable. She sought clarification regarding whether the bus would pull over and wait for 911 or whether it would drive quickly to home or school. She also sought information about how the decision was made and additional information about A.B.'s bus route and trip times. (Ex. P-5; Ex. P-6.)

29.

At the same time Korngold was inviting L.B. to meet to discuss the transportation issue, Heyen and NOHS principal Brown were trying to get L.B. to attend an IEP meeting. L.B. resisted their efforts to schedule a meeting, repeating her earlier conditions for attending an IEP meeting and adding the condition that Korngold provide all the information that L.B. requested about the cabinet's Diastat decision. L.B. also said that she did not want Korngold to be part of any IEP team meeting because Korngold had "personally and intentionally discriminated against me and [A.B.]." On or around September 27, Principal Brown sent a notice to L.B. for an IEP meeting on October 8, but asked L.B. for alternative dates if October 8 was not available. Because of her busy schedule, L.B. did not respond until October 7, when she proposed November 5 or 7 as IEP meeting dates. She repeated her position that the School District must pay the expenses associated with the attendance of her consultants and attorney and must provide all requested information about the cabinet's Diastat decision. Finally, L.B. insisted that the "critical, life-threatening issue" relating to the administration of Diastat on the bus be the foremost issue discussed at the IEP meeting. (Tr. 742; Ex. P-41, at 384-85, 387-89.)

30.

The IEP meeting was set for November 5. On or about October 21, Heyen met with L.B. for a monthly progress meeting. During the meeting, L.B. told Heyen that she wanted to discuss the Diastat on the bus procedure at the November 5 IEP meeting and requested that the ultimate decision maker, whom Heyen identified as the head of transportation, be there, as well as someone who could explain how the cabinet made its decision. LB. also wanted to invite three of A.B.'s physicians – Haver, Morris and Ahsan – to the IEP meeting. Finally, L.B. wanted Heyen to determine whether the procedure adopted by the cabinet applied to community-based

instruction ("CBI") trips. A.B. participated in CBI trips approximately three times per week, accompanied by Heyen and a para-professional, both of whom are trained in the administration of Diastat. (Tr. 722-29, 740-41, 746, 1213; Ex. 60.)

31.

After trying for many months to schedule an IEP meeting, Heyen wanted the IEP team to focus on reaching agreement on amending the IEP, rather than the Diastat issue. She suggested to Korngold and others that the School District notify L.B. that Peterson was not available for the meeting. Although it does not appear that anyone told L.B. that Peterson would not be available, he was not invited to the meeting and did not attend. (Tr. 722-29; Ex. P-60; Ex. P-41, at 402.)

32.

In the week prior to the November 5 meeting, the parties and their attorneys exchanged a series of emails and letters. On October 30, L.B.'s attorney, Jon Zimring, forwarded a letter from Dr. Morris, whom he identified as A.B.'s treating physician. Although Dr. Morris' brief letter unequivocally states that prolonged seizure activity greater than five minutes should be considered a medical emergency and treated with Diastat immediately, he did not address the issue of administration of Diastat on a school bus. On October 31, Korngold emailed L.B., acknowledging Dr. Morris' letter, but noting that it did not mention transportation. Korngold also referenced the CHOA recommendations. Korngold stated that the School District was willing to consider individual needs of students, but that it needed more information. She repeated her past offers to meet with L.B. and requested additional information from A.B.'s physician. (Ex. R-1, at 215, 220; Ex. P-27)

33.

Harold Eddy, the School District's attorney, sent a letter to Zimring on November 1. He reiterated Korngold's statements to L.B. – that the District was willing to consider Diastat on the bus, but needed additional information from L.B. and a release to speak to Dr. Morris. Eddy indicated that they might not be able to resolve this issue by Tuesday, the scheduled date of the IEP meeting, but the School District wanted to work with the family. (Ex. R-1, at 222; R-13 at 1537.)

E. November 5, 2013 IEP Meeting

34.

L.B. attended the November 5 IEP meeting, accompanied by Drs. Haver and Ahsan, as well as Hilary Stiff, A.B.'s private behavior specialist. Dr. Morris did not attend. In addition to other members of A.B.'s IEP team, Korngold and Heyen were also present on behalf of the School District. As noted above, Peterson was not invited and did not attend.[20] Moreover, neither Warden nor anyone else from the OCSD's school nursing program attended the IEP. (Tr. 202, 661; Ex. P-15.)

35.

After some preliminary discussions, Dr. Haver was introduced as A.B.'s primary care physician and gave a brief explanation about seizure disorders, the risks associated with SE, and the importance of Diastat, a medication he described as remarkably simple, which can be safely and easily administered by any adult or responsible teenager with minimal training. Dr. Haver emphasized that he and Dr. Morris had ordered Diastat for A.B., that their orders should be closely carried out, and that Diastat was potentially life-saving. After his five-minute

[20] The School District's medical expert, Dr. Anderson, testified that it seemed reasonable to have someone at the IEP meeting who could describe the physical layout of the bus. (Tr. 1488.)

presentation, L.B. stated that Dr. Haver had to leave to go to a class. However, before he left, Korngold asked L.B. whether it was possible for the School District to speak to Dr. Haver at a later time if they needed additional information. Dr. Haver volunteered to answer any further questions and noted that the neurologist, Dr. Morris, "would be a good resource too." Dr. Haver also said that he did not know if Dr. Morris had any more information in his medical records than Haver did, but "whatever you need, I'll be happy to provide." Notwithstanding Dr. Haver's unconditional offer to share his records and answer additional questions, L.B. would not allow the School District to have unfettered access to him or his records. Rather, in response to Korngold's request for a release to allow the School District to speak with Dr. Haver, L.B. stated that any questions for Dr. Haver should be given to her, and she would forward them on to the physician.[21] (Tr. 798; Ex. P-15.)

36.

At the November 5 meeting, L.B. explained that her refusal to sign a release for the School District to speak directly to A.B.'s physicians was because "A.B. has a lot of medical records that are private," and she preferred to have all questions go through her. However, based on L.B.'s testimony at the hearing and evidence in the record about A.B.'s cognitive and emotional functioning, the Court finds that L.B.'s refusal to sign the release and allow the School District access to A.B.'s medical records and doctors arose primarily from a desire to protect her own privacy interests and those of her other family members, rather than A.B.'s.[22] L.B. testified

---

[21] L.B., Stiff, and Ahsan all testified that Korngold agreed to L.B.'s proposed alternative to signing the release. However, the Court has listened to the recording of the November 5 IEP meeting, and based on Korngold's manner of speaking throughout the recording, does not interpret Korngold's utterance of the word "okay" while L.B. was talking to signify agreement with L.B.'s stance. Rather, it was merely an acknowledgement that Korngold heard and understood L.B.'s statement. (Tr. 798; Ex. P-15.)

[22] In fact, L.B. has been willing to sacrifice A.B.'s privacy when it comes to the

that A.B.'s extensive medical records contain private family medical history and other information about herself, her ex-husband, her two other children, and A.B.'s grandparents. Thus, despite L.B.'s protestations that she only wanted to be part of the process, her proposal put her in more of the role of gatekeeper, rather than conduit. Moreover, without specifying what criteria she would use to determine which information was too private to share with the School District or what questions she might deem to be unimportant or too invasive, she insisted that both the School District's questions and the physician's answers and records pass through her. (Tr. 926-32; Ex. 15.)

37.

Conversely, both Dr. Ahsan and Stiff had been given full and complete access to A.B.'s medical records in order to form their opinions about the appropriate treatment for A.B. Specifically, Dr. Ahsan testified that she reviewed A.B.'s medical records in preparing to testify at the hearing, including relevant information regarding A.B.'s increased seizure activity and medication changes. According to Dr. Ahsan, she relied on Dr. Morris, his orders, and his medical records to form her opinion, and she needed to review A.B.'s medical records in order to understand why Diastat was the appropriate treatment for him.[23] When asked why she should be permitted to speak to Dr. Morris to form her opinions, but the School District should not, Dr. Ahsan said that she did not know. Stiff, who opined that L.B. was just trying to protect A.B.'s

---

administration of rectal Diastat on the school bus. See Ex. P-29 (Letter from Dr. Morris dated December 2, 2013, which states that "[L.B.] is not concerned about privacy.").

[23] Based on the evidence in the record, it is clear that both Drs. Haver and Ahsan, as well as L.B., look to Dr. Morris on issues relating to the treatment of A.B.'s seizure disorder. As L.B. and her attorney have repeatedly stated, both in pleadings and correspondence, Dr. Morris is A.B.'s treating neurologist. He monitors A.B.'s seizure activity, prescribes and adjusts his AEDs, and was the initial prescriber of Diastat. The School District's request to speak directly to him regarding the administration of Diastat on the school bus was reasonable and proper.

dignity, testified that it was not necessary for the School District to have access to everything in A.B.'s medical history. Nevertheless, Stiff has been given access to A.B.'s medical records, has never had a parent refuse to allow her to review such records, and testified that the School District's desire to speak to Dr. Morris was reasonable.[24] (Tr. 411-12, 417-18, 433, 454, 467, 799, 818, 834.)

38.

Throughout the November 5 IEP meeting, Korngold told L.B. that the cabinet had made a final decision to follow CHOA's recommendation and not administer Diastat on buses, but that the cabinet was willing to consider exceptions to the rule based on new information, specific to individual students. In fact, some of the information brought out during the meeting was new to Korngold, such as the increased frequency and duration of A.B.'s seizure activity outside of school, and she said that the cabinet would consider this new information.[25] Korngold also stated that, from the School District's perspective, the November 5 IEP meeting was an opportunity for Korngold to gather information and take it back to the cabinet for its consideration. Korngold was not authorized at that time to make a decision on behalf of the cabinet to change the procedure without additional information from Dr. Morris. (Ex. P-15.)

---

[24] The Court credits Dr. Anderson's observation that making treatment decisions for a medically-involved patient like A.B. is a complex endeavor, requiring the consideration of a number of factors, such as seizure history and allergic reactions to AED medication. In fact, Dr. Anderson testified that it would be irresponsible to make medical recommendations without understanding some degree of a patient's medical history. Dr. Anderson also opined that in order to make a medical determination about appropriate treatment for seizure disorders, the School District would need to understand the nature of the child's seizures and his medical history. He also testified that it would be important to speak freely with the supervising doctor, and if someone tried to limit such communication, he would become suspicious. (Tr. 1402-03, 1433, 1504, 1572.)

[25] L.B. reported some of the increase in seizure frequency and intensity to Warden and Heyen. However, there is no evidence that Korngold or the cabinet members knew about it before the November 5 IEP meeting. (Ex. P-15.)

39.

Nevertheless, Korngold reported that the School District, without having received any additional information from L.B. or A.B.'s physicians, had recently decided to make an exception to the general procedure in the case of A.B.'s CBI trips.[26] Specifically, Korngold told L.B. that on CBI trips, either Heyen or A.B.'s para-professional would be authorized to administer Diastat on the bus. The School District justified this exception on two grounds. First, Heyen and the para-professional accompanying A.B. on the CBI trips are already trained on the administration of Diastat. Second, because CBI trips are to different locations, some relatively far away from NOHS and A.B.'s home, and at varying times of the day, driving back to the school or to home will not always be a feasible option. Heyen described the procedure she would follow if A.B. had a prolonged seizure on a CBI trip, which included evacuating the other students from the bus if possible, putting A.B. on a plastic mat on the floor of the bus, and administering Diastat if his seizure lasts longer than five minutes. (Tr. 332, 414, 708-10, 802; Ex. P-15.)

40.

More than once during the IEP meeting, L.B. asked why the same plan could not be adopted for A.B.'s bus rides to and from school. She reminded the team that Drs. Haver and Morris had offered free training for bus monitors "just in case" it needed to be administered on the bus and asked why the School District would not have them trained. Korngold did not offer

---

[26] Dr. Branch, the superintendent, indicated that this decision was not made at the cabinet level. He never directed anyone to allow Diastat administration on a CBI bus and his cabinet never discussed it. It was his understanding that the IEP team had decided to allow it. Similarly, Warden, the school nurse, was not consulted about the decision to allow administration of Diastat on CBI trips. She was told by the principal after the November 5 IEP meeting. Finally, Dr. Miller apparently was unaware that the School District had made an exception for CBI trips. She testified that her understanding was that the procedure was the same for CBI. Accordingly, it is unclear who exactly authorized the exception for CBI trips. (Tr. 57-61, 659, 710, 1684.)

a clear explanation for why administration on the bus was being authorized for CBI trips, but not A.B.'s bus trip to and from school. Moreover, when L.B. said to Korngold, "you would not be willing to take the risk with your own child," Korngold responded, "No, you're right." (Tr. 918-19, 1081, 1120; Ex. P-15.)

41.

In the face of Korngold's steadfast insistence that the decision had been made to maintain the general procedure for A.B.'s daily school bus route, at least for the time being, Dr. Ahsan requested that A.B. be provided nursing services while on the bus. Korngold said that Ahsan's request would be considered. Later, at the due process hearing, however, Korngold admitted that the School District has not considered or offered nursing services to A.B. since the November 5 IEP meeting. (Tr. 328, 796, 1270, 1704-05; Ex. P-15.)

42.

In addition to the Diastat issue, the IEP team considered a number of other issues relating to A.B.'s IEP team. However, L.B. insisted that they "were not going to walk out of this meeting with a completed IEP" because she need to take it home, review it with her team, including her attorney, who was not present, and prepare her parental concerns. (Ex. P-15.)

F. Due Process Complaint

43.

L.B. filed the due process complaint on November 12, 2013. In the complaint, L.B. raised claims relating to the development of the 2013-2014 IEP, the cabinet's role vis-à-vis the IEP team's in deciding whether and under what circumstances A.B. would receive Diastat during bus trips, and the appropriate related services, including transportation and nursing services, for A.B. under IDEA. In terms of resolution, L.B. has requested that the School District be required

to train and authorize bus personnel to administer Diastat, the cabinet be prohibited from interfering with or overruling the IEP team's decisions relating to transportation and nursing services for A.B., and the School District be required to reimburse L.B. for private transportation to and from school during the 2013-2014 school year.

44.

Following the filing of the due process complaint, the parties, mostly through their attorneys, had ongoing discussions regarding granting an exception to the School District's general procedure regarding administration of Diastat on A.B.'s school bus. Notwithstanding additional letters from Dr. Morris, which contained more detailed information and instructions on administering Diastat, the School District has not agreed to grant an exception to its general procedure and has not arranged for training of the bus monitor on A.B.'s bus. Moreover, despite numerous requests and offers by the School District to pay for Dr. Morris' time, limit its questions, and allow L.B. to listen to their discussion with Dr. Morris, there is no probative evidence in the record that L.B. has signed a release or otherwise permitted the School District direct access to Dr. Morris or his medical records. (Ex. P-43, at 448, 452, 456, 483; Ex. R-1, at 251-54; R-16, at 1669, 1677; Ex. P-29; P-41, at 409.)

III. CONCLUSIONS OF LAW

A. General Law

1.

The pertinent laws and regulations governing this matter include IDEA, 20 U.S.C. § 1400 *et seq.*; federal regulations promulgated pursuant to IDEA, 34 C.F.R. § 300 *et seq.*; and Georgia Department of Education Rules, Ga. Comp. R. & Regs. ("Ga. DOE Rules"), Ch. 16-4-7.

2.

Petitioners bear the burden of proof in this matter. Schaffer v. Weast, 546 U.S. 49 (2005); Ga. DOE Rule 160-4-7-.12(3)(l); OSAH Rule 616-1-2-.07. The standard of proof on all issues is a preponderance of the evidence. OSAH Rule 616-1-2-.21(4).

3.

The goals of IDEA are "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs" and "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(A) – (B). In addition to special education, FAPE includes related services, such as transportation and other supportive services that "may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A). "School health services" that are designed to enable a child with a disability to receive FAPE are considered related services under IDEA and may be provided by either a qualified school nurse or other qualified person. 34 C.F.R. 300.34(c)(13).

4.

The United States Supreme Court developed a two-part inquiry to determine whether a school district has provided FAPE: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982). "This standard ... has become known as the *Rowley* 'basic floor of opportunity' standard." C.P., 483 F.3d at 1153, citing JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1572-73 (11th Cir. 1991). See also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1280 (2008).

5.

In this case, Petitioners have claimed that the School District has failed both parts of the Rowley test. They have asserted that the School District has failed to follow IDEA's procedures for the development of a timely IEP with full parental participation, and have failed to offer A.B. related services necessary for him to receive education benefit. The Court will address Petitioner's procedural and substantive claims in turn below.

B. Procedural Claims

6.

Petitioners claim that the School District has violated the IDEA's "comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children." Honig v. Doe, 484 U.S. 305, 308 (1988). However, "'[v]iolation of any of the procedures of the IDEA is not a per se violation of the Act.'" K.A. v. Fulton County Sch. Dist., 741 F.3d. 1195, 1205 (11th Cir. 2013), quoting Weiss v. Sch. Bd., 141 F.3d 990, 996 (11th Cir. 1998). Under IDEA, in order to prove a denial of FAPE based on a procedural violation, Petitioners must show that the procedural inadequacies "(i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit." See 34 C.F.R. § 300.513(2); 20 U.S.C. § 1415(f)(3)(E). In Weiss, the Eleventh Circuit held that where a family has "full and effective participation in the IEP process . . . the purpose of the procedural requirements are not thwarted." 141 F.3d at 996. See also K.A. v. Fulton County Sch. Dist., 741 F.3d at 1205 (relief not warranted where no evidence of prejudice to student or parents from defects in notice or delay in furnishing records).

1) Timeliness of 2013-2014 IEP

7.

IDEA requires that "[a]t the beginning of each school year, each local educational agency ... shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program...." 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. 300.112, 300.324(b). IDEA specifies that the IEP must contain, among other things, "a statement of the special education and related services and supplementary aids and services . . . to be provided to the child." Id. at 1414(d)(1)(A). Finally, the school district must ensure that the IEP team "reviews the child's IEP periodically, but not less frequently than annually," and revises the IEP as appropriate. Id. at 1414(d)(4). Once an IEP is in effect, it may be amended either by the entire IEP team or, if the parent and the school district agree, through a written amendment. Id. at 1414(d)(3)(D).

8.

A.B.'s annual IEP expired on May 21, 2013, a technical violation of the IDEA's procedural safeguards. Moreover, although A.B.'s teacher, Heyen, testified that she finalized his IEP for the 2013-2014 school year before she left for summer break at the end of May, she did so without the parties reaching consensus on all of the required components of the IEP. Pretermitting whether the School District may fulfill its obligations to develop, review and revise an IEP by marking it as "final" even though the parent has not agreed to all its terms,[27] the

[27] See generally Bd. of Educ. of Montgomery County v. Brett Y, 1998 U.S. App. LEXIS 13702 (4th Cir. 1998) (regulation's requirement that IEP be "in effect" at beginning of each school year does not mean that it must be an IEP that the parents ultimately agreed-upon; otherwise, parents could simply refuse to agree to IEP, thereby preventing the IEP from ever being properly "in effect"); K.A. v. Fulton County Sch. Dist., 2012 U.S. Dist. LEXIS 136327 (N.D. Ga. 2012)(in considering the process of amending an IEP, court held that IDEA does not require that parents consent to or approve amendment for it to be valid).

evidence in the record shows that the failure to complete the review and revision of A.B.'s IEP before it expired was attributable to both parties. That is, although it is the School District's obligation to ensure that a finalized IEP is in place before the start of the new school year, under the circumstances in this case, where the School District held an eight-hour IEP meeting a month before the IEP's expiration, and thereafter the parent requested that the rest of the IEP be developed informally between the parent and the child's teacher, the School District did not violate IDEA when it agreed to do so rather than schedule another IEP meeting with the entire team. See Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990)(although IDEA requires IEP to be in place at the beginning of the school year, where there was no IEP for a student until November because the student's father requested that the school allow student to perform on his own for a while, parent could not claim that the school, in honoring his request, failed to comply with IDEA), cited by Loren F. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1312-13 (11th Cir. 2003). When L.B.'s preferred method for completing the IEP did not produce a finalized IEP before the expiration date, the School District's proposal to meet during the pre-planning period before school began was reasonably calculated to result in a completed IEP before the start of the 2013-2014 school year.[28]

[28] The Court does not reach the issue of whether the School District, as a general rule, has a right to refuse to hold IEP meetings during the summer months. See Myles S. v. Montgomery County Bd. of Educ., 824 F. Supp. 1549, 1554 (1993) (regulations make clear that the IEP must be established before the school year, even if that requires meeting with the child and the parents during the summer). In Myles S., the court held that notwithstanding the technical violation of IDEA, where the school system made a good faith effort to follow the regulations, but relied on a preparatory or interim IEP, rather than the actual IEP, which was not developed until after the first two weeks of school, there was no harm shown to the student because of the violation, and the parents fully participated in the development of both the preparatory and actual IEP. Id. at 1555.

9.

Even assuming *arguendo* that the delay in finalizing the IEP was attributable to the School District, "[d]elays are procedural violations of the IDEA" and only rise to the level of a denial of FAPE if they result in substantive harm to the child or his parents. K.C. v. Nazareth Area Sch. Dist., 806 F. Supp. 2d 806, 830 (E.D. Pa. 2011) (citations omitted). Accordingly, even when a school district fails to have an IEP in place on the first day of classes, such a violation is not actionable unless there is evidence of educational deprivation. See G.A. v. River Vale Bd. of Educ., 2013 U.S. Dist. LEXIS 133911 (D.N.J. 2013), quoting C.H. v. Cape Helopen Sch. Dist., 606 F.3d 59, 69 (3d Cir. 2010)("While we do not sanction a school district's failure to provide an IEP for even a *de minimis* period, we decline to hold as a matter of law that any specific period of time without an IEP is a denial of FAPE in the absence of specific evidence of an educational deprivation."). Although it may have been advisable for the School District to have scheduled a second IEP team meeting earlier, just in case the informal process did not produce a final IEP before the expiration date, Petitioners are not entitled to relief unless they show that they were harmed by the procedural violation.

10.

They have not done so. Rather, the evidence shows that L.B. was a full and active participant in the April 2013 IEP meeting, as well as in the subsequent efforts to finalize the IEP informally with Heyen. Before leaving for the summer, Heyen attempted to address and incorporate all of L.B.'s parental concerns into the final IEP, with the exception of ESY issues.[29] In addition, Korngold offered to continue the informal review process through the summer months, and both Heyen and Korngold offered L.B. dates during the pre-planning period, prior to

[29] Petitioners did not assert claims or seek relief relating to the School District's provision of ESY services in their due process complaint.

the start of the school year, to meet with the full IEP team to complete the review and revision of A.B.'s IEP for the 2013-2014 school year. The Court concludes that L.B.'s right to participate in the decision-making process was not impeded.

11.

Moreover, Petitioners failed to prove any deprivation of educational benefit or an impediment to A.B.'s right to FAPE due to the delay in finalizing A.B.'s IEP. Petitioners did not raise any claims in the pending due process complaint of deprivation of educational benefit, and their claims regarding a denial of FAPE relate solely to the issue of the administration of Diastat on the school bus. As this issue did not arise until after school started, the delay in having a finalized IEP in place by that time is immaterial. That is, even if the parties had finalized the IEP by that time, the IEP team would have had to reconvene to address this new issue, which they could not do because L.B. refused to participate in a meeting unless the School District acceded to her unreasonable conditions.[30] Accordingly, the failure of the School District to finalize A.B.'s IEP before school started was a procedural violation that did not cause substantive harm or significantly impede L.B.'s right to participate in the decision-making process. With respect to the delay in convening an IEP team meeting between pre-planning and November 5, 2013, the

---

[30] L.B.'s conditions for participation in an IEP meeting after pre-planning were unreasonable, as well as inconsistent with her current claim that the School District deprived the IEP team its right to decide the transportation issue, at least prior to the meeting on November 5, 2013. See Kasenia R. v. Brookline Sch. Dist., 588 F. Supp. 2d 175, 194 (D. N.H. 2008) (the IEP process was derailed by student's parent's refusal to cooperate with its attempts to have her evaluated by trained professionals); citing Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379, 382 (8th Cir. 1998) (noting that where the school district was denied an opportunity to formulate an appropriate IEP, "it cannot be shown that it had an inadequate plan under IDEA."). If a parent's action significantly hinder or frustrate the development of an IEP, courts may be justified in denying equitable relief on that ground alone. Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d at 1319 n. 10. Thus, even if Petitioners had proven that the delay caused substantive harm, the Court concludes that L.B.'s refusal to schedule an IEP meeting and her imposition of unreasonable conditions would be grounds to deny her relief on this claim.

Court concludes that such delay was attributable solely to the refusal of L.B. to do so and is not grounds for relief under IDEA.

2) Teachers' Meeting in Early August

12.

Petitioners contend that the School District violated the IDEA's procedural requirements by denying her notice and an opportunity to participate in a meeting of A.B.'s teachers in early August 2013. The purpose of this meeting was to review the July 1 plan adopted by L.B. and her team, which L.B. insisted be recognized as A.B.'s legally-enforceable IEP. The evidence in the record shows that A.B.'s teachers gathered to review this document and to determine whether any of its components could be incorporated into the School District's IEP. Thereafter, Heyen and the NOHS' principal attempted to get L.B. to participate in a meeting with A.B.'s entire IEP team to discuss, among other things, the issues raised in L.B.'s July plan. The teachers' meeting was appropriate and permissible under IDEA. Although IDEA regulations provide that parents must be afforded notice of and an opportunity to participate in meetings with respect to the identification, evaluation, educational placement, and the provisions of FAPE to their child, the regulations specifically exclude from this requirement "preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting." See 34 C.F.R. 300.501(b)(3). The early August meeting to review L.B.'s July plan falls squarely within this exception and does not constitute a procedural violation under IDEA.

3) Failure to Ensure Attendance of Required Members of IEP Team

13.

Petitioners claim that the School District violated their procedural rights by failing to

invite the head of transportation to the November 5 IEP meeting as L.B. requested. Specifically, L.B. requested that the ultimate decision-maker attend the meeting, and Heyen identified that individual as the head of OCSD's transportation department.

14.

There are five required members of an IEP team, and the School District must ensure that they attend the IEP team meetings unless they are excused by the parties. 34 C.F.R. 300.321. Those five individuals are the parent, a special education teacher of the child, a general education teacher of the child, a representative from the school district,[31] and an individual who can interpret results of evaluations. 34 C.F.R. 300.321(a). "At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate," may attend the IEP meeting. 34 C.F.R. 300.321(a)(6).

15.

The head of transportation is not a required member of the IEP Team, and the School District was not obligated to ensure his attendance at the November 5 meeting. Rodrigues v. Fort Lee Bd. of Educ., 458 F. App'x 124, 127 (3d Cir. 2011) (expert on child's specific disability is not required participant in IEP meeting because not one of the five listed individuals). Nevertheless, IDEA provides that either the parent or the School District can designate an individual with special expertise to attend the meeting at the party's discretion, and neither party has the right "to veto the attendance by a person whom another party wants to have

---

[31] The school district representative must be someone who –

(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
(ii) Is knowledgeable about the general education curriculum; and
(iii) Is, knowledgeable about the availability of resources of the public agency.

34 C.F.R. 300.321(a)(4).

present." Horen v. Bd. of Educ., 655 F. Supp. 2d 794 (N.D. Ohio 2009). The evidence in the record does not prove that the School District "vetoed" Peterson's attendance at the meeting, but it certainly did not facilitate it. It is clear that L.B. wanted Peterson to attend for his expertise in transportation and his apparent authority to make a decision on behalf of OCSD, but that Heyen preferred that Peterson not attend and did not invite him.

16.

Petitioners have not identified any provision of IDEA that requires the School District to invite and arrange for the attendance of an individual designated by a parent as a discretionary member of the IEP team. Nevertheless, the Court agrees with Dr. Anderson that it was reasonable for L.B. to want a person with expertise in transportation to attend the IEP meeting, and the Court does not condone the School District's actions in ignoring L.B.'s request that Peterson be invited. More importantly, although the School District was not required to have the head of transportation at the meeting, it was obligated to bring a representative who was "knowledgeable about the availability of resources of the public agency." Korngold, who served as the School District's representative at the meeting and was clearly its spokesperson regarding the administration of Diastat on the bus, did not appear to have specific knowledge about the physical design of the bus, the bus route, the availability of health services or emergency medical response services during bus trips, or the cabinet's criteria for determining when to grant an exception to the general procedure regarding the administration of Diastat on a bus.[32]

[32] Korngold acknowledged at the hearing that OCSD's transportation department had more information than she regarding routes, measurements, and safety concerns and that she did not handle special education bus routes. (Tr. 1230-35.) Moreover, it does not appear that her knowledge of the bus routes was wholly accurate. For example, Korngold stated during the November 5 IEP meeting that A.B.'s bus ride was five to seven minutes. None of the witnesses at the hearing with knowledge of the route testified of a trip time as low as five minutes. Peterson testified that the time was approximately eight to ten minutes. (Ex. P-15.)

Accordingly, the Court concludes that the School District violated the procedural requirements of IDEA by failing to have a representative present at the November 5 IEP meeting with knowledge of the relevant resources available to the agency.

17.

Moreover, Korngold was not the ultimate decision-maker for the School District. She repeatedly stated during the November IEP meeting that her role was a gatherer of facts, to be taken back to the Superintendent's cabinet. In fact, she stated that she had been "granted" the authority to tell L.B. that the decision of the School District had been made, which was to call 911 rather than administer Diastat on the school bus to and from school, and that Korngold would take the new information, as well as a new request for nursing services, back to the cabinet for its consideration. Although this may not violate the letter of IDEA's procedural provisions relating to who must attend an IEP meeting, it violates the spirit of the Act. Admittedly, IDEA does not specifically require a school district to send someone to an IEP meeting who can authorize a proposed placement or service. See M.B. v. Hamilton Southeastern Sch., 668 F.3d 851, 861 (7th Cir. 2011) (statute does not require the presence of one who can authorize a proposed placement, but merely a representative who is knowledgeable about the availability of resources). However, the Secretary of Education, in the comments to the federal regulations, found that it was important "that the agency representative have the authority to commit agency resources and be able to ensure that whatever services are described in the IEP will actually be provided." 71 F.R. 46540, 46670 (August 14, 2006). The Secretary determined that it was unnecessary to include such language in 34 C.F.R. 300.321(a)(4) "as the public agency will be bound by the IEP that is developed at an IEP Team meeting." Id.

18.

In this case, there was not a representative present at the November 5 IEP team meeting with either the authority to commit the School District to train its bus personnel to administer Diastat on the bus for A.B., or the knowledge of the School District's transportation resources, health services, or emergency response capabilities such that the IEP team could make an informed, collaborative decision regarding whether A.B.'s unique needs required an exception to the School District's general procedures on administration of Diastat on the school bus. This constituted a violation of IDEA's procedural safeguards and denied L.B. a meaningful opportunity to participate in the decision-making process for the provision of FAPE to A.B. In fact, it removed her from the decision-making process entirely.

4) Pre-Determination

19.

Petitioners claim that the School District violated the procedures of IDEA by "pre-determining" the appropriate procedure for responding to A.B.'s seizure disorder during transportation, which denied L.B. the right to meaningfully participate in the development of A.B.'s IEP. Greer v. Rome City Sch. Dist., 950 F.2d 688, 696 (11th Cir. 1991)(school officials must share their considerations regarding the appropriate placement and services with the child's parents during the development of the IEP, not just after the parents have challenged the proposed IEP). In Deal v. Hamilton County Bd. of Educ., the Sixth Circuit Court of Appeals found that the school system had an unofficial policy of refusing to provide one-on-one behavioral therapy and that the school system personnel thus did not have open minds and were not willing to consider the provision of such therapy. 392 F.3d 840, 857-58 (6th Cir. 2004), cert. denied 546 U.S. 936 (2005). In finding that predetermination was a procedural violation of

IDEA, the Deal court held that "[p]articipation must be more than a mere form; it must be *meaningful*." Id. (emphasis in original). Moreover, meaningful participation will not be assumed just because the parents were present and allowed to speak. Id. Thus, although school officials are permitted to form opinions prior to IEP meetings, they must come the meeting with open minds, not a required course of action. N.L. v. Knox County Schs., 315 F.3d 688, 693 (6th Cir. 2003); K.D. v. Dep't of Educ., 665 F.3d 1110, 1123 (9th Cir. 2011) ("Predetermination violates the IDEA because the Act requires that the placement be based on the IEP, and not vice versa"); Doyle v. Arlington County Sch. Bd., 806 F. Supp. 1253, 1262 (E.D. Va. 1992) (although school officials need not come to an IEP meeting with blank minds, only open ones, where the "school system has already fully made up its mind before the parents ever get involved, it has denied them the opportunity for any meaningful input"); B.K. v. New York City Dep't of Educ., 2014 U.S. Dist. LEXIS 44985 (E.D.N.Y. 2014) (citations omitted); Shafer v. Whitehall Dist. Sch., 2013 U.S. Dist. LEXIS 44336 (W.D. Mich. 2013) (*per se* preclusion of services almost always impedes student's right to FAPE, and very frequently significantly impede the parents' opportunity to participate in the decision-making process).

20.

Based on the Findings of Facts above, the Court concludes that the School District did not come to the November 5 IEP meeting with an open mind. Rather, the School District sent a spokesperson who repeatedly stated that the "decision had been made" and it was just one that L.B. did not like. Although Korngold offered to take back new information to the Superintendent's cabinet, it was clear that the cabinet would be the ultimate decision-maker about the administration of Diastat on A.B.'s school bus to and from school. In fact, upon reviewing the audio recording of the November 5 IEP, it is clear that no matter what transpired at

the meeting, the School District was not going to allow an open, collaborative discussion between team members on the issue of whether a trained person should be authorized to administer Diastat to A.B. on the bus to and from school.[33] The Court concludes that the School District's actions denied L.B. her right to meaningfully participate in the decision-making process regarding the appropriate related services[34] to be included for A.B. in his IEP.

C. Substantive Claims

21.

In order to prove a substantive violation of IDEA in this case, Petitioners must show that the School District failed to develop an IEP for A.B. that conforms to the requirements of IDEA. Rowley, 458 U.S. at 206, n. 27. Specifically, the School District was obligated to develop an IEP that contained the related services that A.B. required to benefit from special education.

---

[33] For example, when L.B. or Dr. Ahsan attempted to question Korngold about the cabinet's decision, including whether the cabinet was aware of the risks to A.B. of delayed administration of Diastat or the inability of EMS to guarantee a particular response time, Korngold responded that she would take any new information back to the cabinet for their consideration. When L.B. asked Korngold why the School District would not grant the same exception for A.B.'s daily bus route as it had done for CBI trips, Korngold again responded that she would take all the questions and information back to the cabinet. When L.B. asked why the School District could not, at a minimum, train the bus monitors on A.B.'s bus, Korngold responded that the decision had been made, but was not "closed." (Ex. P-15.) This was not a dialogue between team members. It was more in the nature of a press conference, with the School District's spokesperson repeating approved talking points and brooking no dissent.

[34] The School District does not appear to dispute that both transportation and school health services are "related services" under IDEA, and as such, are within the domain of the IEP team to decide on an individual basis for a child with a disability. See generally Irving Independent School Dist. v. Tatro, 468 U.S. 883 (1984) (clean intermittent catheterization ("CIC") was a related service, which could be performed in a few minutes by a layperson with less than an hour's training, and was required under IDEA because without it the student could not attend school and thereby benefit from special education). See Donald B. v. Bd. of Sch. Commissioners of Mobile County, Ala., 117 F.3d 1371 (11th Cir. 1997) ("IDEA requires transportation if that service is necessary for a disabled child 'to benefit from special education'"); Skelly v. Brookfield LaGrange Park Sch. Dist. 95, 968 F. Supp. 385 (N.D. Ill. 1997) (suctioning a tracheostomy tube during bus rides to and from school can be done by a properly trained individual and is a related service under IDEA).

Tatro, 468 U.S. at 890, n. 6. In Tatro, the United States Supreme Court held that school health services, such as CIC, that permit a child to remain at school during the day are no less related to the effort to educate the child as those services that enable the child to reach, enter, or exit the school, such as specialized transportation or wheelchair accessible walkways. Id.

22.

Administration of Diastat by a qualified person may be a required school health service if it is necessary to enable a child with a disability to receive FAPE. The Second Circuit has held that the concept of FAPE includes accommodating the safety concerns that disabled children may have due to conditions that make them more vulnerable to injury. Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ., 379 F.3d 77 (2nd Cir. 2005) ("For example, whatever arrangements a school may make to provide for non-disabled children to exit a classroom in case of fire or other hazards, if a non-ambulatory child is placed in the same room, further exit arrangements may be necessary to ensure that he can be educated safely."). See also A.S. & W.S. v. Trumbull Bd. of Educ., 414 F. Supp. 2d 152, 177-78 (D. Conn. 2006)(issues of student safety may properly be raised in a substantive challenge under IDEA if proposed placement threatened student's health in a manner undermining their ability to learn). In a federal district court case in Ohio, the court held that a severely-disabled child with a seizure disorder required the administration of Diastat because her seizures, though infrequent and occurring mostly at night, could still occur at any time. Bd. of Educ. of the Toledo City Sch. Dist. v. Horen, 2010 U.S. Dist. LEXIS 98231 (D. Ohio 2010), aff'd, 2011 U.S. App. LEXIS 26644 (6th Cir. 2011). Moreover, because none of the staff at the school district's proposed placement was willing to administer Diastat rectally, the student required the availability of a nurse in the event of a seizure. Id. The court in the Horen case found that the school district's proposed placement was inappropriate because the IEP did

not include nursing services to administer Diastat. Id. Thus, the court concluded that the IEP was not "reasonably calculated to enable [the student] to receive educational benefits." Id., quoting Deal, 392 F.3d at 853-54.

23.

In this case, the School District has not refused to administer Diastat to A.B. if he has a seizure on the school bus to and from school. Rather, as of the November 5 IEP meeting, it had refused to include as part of A.B.'s IEP a trained aide or other qualified person to accompany A.B. on the bus to administer Diastat if A.B.'s seizure reached the five-minute mark before the bus reached school or home.[35] Although the School District did not rule out the possibility that it would, at some point, include this service in A.B.'s IEP,[36] its official position at the time of the November 5 IEP meeting was that it did not have sufficient information to justify a deviation from its current procedure, which consisted of putting A.B. on the bus without a trained aide, calling 911 if he has a seizure, and then hoping that the bus can travel to the closest safe location, a trained person can be located, and A.B. can be removed from the bus and prepared for the

---

[35] Although both Heyen and Peterson testified that they had the training and the authority to administer Diastat on the bus in an emergency (presumably when the seizure reaches five minutes and the bus had not reached a safe location), neither Heyen nor Peterson will be on the school bus with A.B. to and from school.

[36] A school district's "theoretical ability to provide services will not save an otherwise inappropriate IEP if these services are not explicitly included in the written IEP." Horen, 2010 U.S. Dist. LEXIS 98231, * 67, citing Knable v. Bexley City Sch. Dist., 238 F.3d 755, 768 (6th Cir. 2001). As the School District argued, "actions of school systems cannot . . . be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective."). Roland M. v. Concorde Sch. Comm., 910 F.2d 983, 992 (1st Cir. 1990). There is no evidence that the School District, at the time of the November 5 IEP meeting, had any evidence regarding appropriate and alternative emergency medications for prolonged seizures or the risks associated with SE, other than the CHOA manual. Although it shared excerpts of the CHOA manual with Petitioners shortly before the IEP meeting, the School District did not have anyone present at the IEP meeting qualified to address the CHOA guidelines. Moreover, by its own terms, the CHOA recommendations apply only as general guidelines, and were not designed to take precedence over the specific seizure action plan of the child's physician.

administration of Diastat, all within five minutes.

24.

The Court concludes that, based on the information available to the School District as of the November 5 IEP meeting, its general procedure was not reasonably calculated to assure A.B. the emergency treatment he needed should his seizures last beyond five minutes. Although Peterson testified that "at least the majority of the time" the procedure would result in administering Diastat to A.B. off the bus and within five minutes,[37] he acknowledged that weather and traffic could affect the drive time to the nearest location, that EMS could not guarantee a response time of five minutes, and that he was unaware of any efforts by the School District to notify L.B. that, in case of emergency, a trained person must be available at A.B.'s home every day for some period after his bus departs in the morning. All these factors were known by the School District and acknowledged by Korngold at the November 5 IEP meeting. The School District also was aware, as of November 5, that Drs. Morris and Haver both had prescribed Diastat for A.B. after five minutes of continuous seizure, that Dr. Haver, A.B.'s primary care physician, believed there was an unacceptable risk associated with failing to promptly treat a prolonged seizure, and that A.B.'s seizures were increasing in frequency and duration. In addition, there is no evidence that, as of November 5, the School District had any medical information to support delaying the administration of Diastat past five minutes, or that it shared such information with L.B. and the IEP team for its consideration. Accordingly, the Court concludes that the School District's insistence on maintaining its general procedure denied

[37] Offering an IEP that only meets the child's health needs some of the time is not sufficient under IDEA. See Bd. of Educ. of the Toledo City Sch. Dist. v. Horen, 2010 U.S. Dist. LEXIS 98231, at * 66 (school district's proposed placement only had a qualified person available to administer Diastat two days per week, which meant that the student "would have to have a seizure on a day when the nurse would be present, which is, of course, not something that is predictable").

A.B. supportive services that were necessary for him to receive FAPE.

D. Remedy

25.

As set forth above, Petitioners proved, by a preponderance of the evidence, that the School District violated IDEA's procedural safeguards by failing to ensure that the required members of the IEP Team were present at the November 5 IEP meeting and by pre-determining the appropriate related services to be include in A.B.'s IEP. In addition, Petitioners proved, by a preponderance of the evidence, that the School District violated Petitioners' substantive right to necessary health services during transportation by failing to include in his IEP a trained aide to administer Diastat if A.B. seizes for over five minutes while on the bus. These violations denied L.B. the opportunity to participate in the decision-making process and denied A.B. related services that were required to assist him to benefit from special education.

26.

The IDEA provides that when a court finds a statutory violation, it "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). See Cobb County Sch. Dist. v. A.V., 961 F. Supp. 2d 1252, (N.D. Ga. 2013). The courts have interpreted this to mean that a court has "broad discretion" to "fashion discretionary equitable relief." Florence Cnty Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 15-16 (1993) (internal quotations and citations omitted); Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1285 (11th Cir. 2008), quoting Sch. Comm. Of the Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 374 (1985). Remedies for a violation of FAPE may include compensatory education, reimbursement, declaratory relief and injunctive relief. See generally Thomas A. Mayes et al., Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with

Disabilities Education Act, 108 W. Va. L. Rev. 27, 41 (2005). The Eleventh Circuit has held that reimbursement of expenditures for private special education and related services made by parents pending review is also available under IDEA if such services are deemed appropriate. Draper, 480 F. Supp. 2d at 1352-53, citing G. v. Fort Bragg Dependent Schs., 343 F.3d 295, 309 (4th Cir. 2003). Reimbursement for transportation expenses is appropriate if transportation was necessary and the school district failed to provide it. Bd. of Educ. of the Dist. 130 Pub. Sch. v. Illinois State Bd. of Educ., 1997 U.S. Dist. LEXIS 12921 (N.D. Ill. 1997).

27.

The amount of reimbursement and prospective relief to be awarded are questions "determined by balancing the equities. Factors that should be taken into account include the parties' compliance or noncompliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters." Burlington v. Department of Educ., 736 F.2d 773, 801-801 (1st Cir. 1984), aff'd Burlington, 471 U.S. 359. See also B.G. v. Cranford Bd. of Educ., 702 F. Supp. 1158 (D.N.J. 1988) (whether reimbursement is appropriate and in what amount should be determined by balancing the equities, including the general cooperative or uncooperative position of the parties), aff'd, 882 F.2d 510 (3d Cir. 1989), citing Jenkins v. Fla., 815 F.2d 629 (11th Cir. 1987). In B.G., the district court held that the conduct of the parties is extremely relevant when a court is authorized to apply equitable considerations. Id. at 1166. The B.G. court denied reimbursement to the parent who refused to participate in the IEP process. Id. See also C.G. v. Five Town Cmty Sch. Dist., 513 F.3d 279 (1st Cir. 2008) (where parents' actions disrupted the IEP process, stalled its consummation and prevented the development of a final IEP, parents were denied reimbursement completely). In a recent case in Georgia, the district court held that the where there was equal fault on both sides leading up to a final, "IDEA-

infirm" IEP, a fifty-percent reduction in the amount of reimbursement was the appropriate equitable remedy. Cobb County Sch. Dist. v. A.V., 961 F. Supp. 2d at 1271-72.

28.

In this case, the School District argues that L.B.'s unreasonableness, both in refusing to meet with the IEP team until November 5 and refusing to sign a release for the School District to speak with Dr. Morris or to access A.B.'s medical records, warrants a denial of relief. The Court agrees with the School District that L.B.'s conduct should be taken into account when determining the appropriate relief for the violations of IDEA by the School District. The School District has a reasonable expectation of access to a child's medical history and his physician when it is called upon to provide health services to a medically-involved child with a disability. In this case, the evidence was clear that Dr. Morris was A.B.'s treating physician for his seizures, and that Dr. Morris was directing his care and medications with respect to this condition. As early as August 2013, the School District sought permission to talk to Dr. Morris, but L.B. declined. Moreover, L.B.'s subsequent limitation on the School District's access to both Drs. Haver and Morris and their records, based in large part on her own personal privacy concerns, unreasonably hindered the collaborative process at the heart of the IDEA.

29.

In Shelby S. v. Conroe Indep. Sch. Dist., the Fifth Circuit Court of Appeals held that in order for a school district to formulate an IEP consistent with a child's extreme medical conditions, the school needed access to the child's medical history and specialist. 454 F.3d 450, 454 (5th Cir. 2006). The child's guardian only permitted the school district to pose fourteen pre-approved questions to the child's specialist, and the guardian edited the physician's answers. Id. In the face of such limited information, the school district sought to conduct its own medical

evaluation, but the guardian refused. Id. The Shelby S. court affirmed an order that the school district be permitted to conduct a medical evaluation of the child despite the guardian's objections, although the guardian was free to decline special education under IDEA rather than submit the child to medical evaluation. Id. at 455. See also G.J. v. Muscogee County Sch. Dist., 2010 U.S. Dist. LEXIS 28764 (M.D. Ga. 2010).

30.

In the instant case, both parties acted unreasonably and share the blame for derailing the cooperative IEP process. The Court has weighed the School District's role in denying L.B. her right to fully participate in the decision-making process against L.B.'s continued denial of access to A.B.'s medical records and to Dr. Morris. The Court concludes that although L.B. is entitled to reimbursement of her driving expenses from November 5, 2013 – the time she first agreed to meet with the IEP team after the Diastat issue was raised – to the time the School District provides a trained aide to accompany A.B. on his daily bus ride, such reimbursement should be reduced by 50% to reflect the parties' equal fault in impeding the development of an appropriate IEP for A.B. Accordingly, the Court hereby **ORDERS** L.B. to submit to the School District, within one week of this Final Decision, a statement of the number of miles she actually drove to and from NOHS, from November 6 to present. Within one week of this submission, the School District is hereby **ORDERED** to pay to L.B. reimbursement of 50% of the total mileage reported, at the Georgia Statewide Accounting Office's Tier 1 Mileage Rate of $0.565 per mile.

31.

In terms of prospective relief, the Court concludes that A.B. is entitled to an amended IEP, which provides for the prompt training of a qualified person on the administration of Diastat, who will accompany A.B. on his bus to and from school and be prepared to administer

Diastat after five minutes of continuous seizure, as ordered by his physicians. However, unless and until L.B. signs a release to allow the School District to (i) review A.B.'s medical records and (ii) consult directly with Dr. Morris (at the School District's expense), the School District is not required to alter its general procedure of calling 911 and attempting to reach either school or home within five minutes in order to access a safer location. However, if the bus is unable to reach either location after five minutes, the trained aide must be prepared to administer the Diastat to A.B. immediately, following the same procedures developed by Heyen and Peterson for administration of Diastat on CBI trips, or other procedures developed by A.B.'s IEP team. The School District is hereby **ORDERED** to convene an IEP team meeting of all required members within two weeks of the date of this Final Decision to amend the IEP consistent with the Court's orders.

32.

All other requested relief not specifically granted above, is hereby denied.

IV. DECISION

For the reasons stated above, the Court finds that the Oconee County School District violated Petitioners' procedural and substantive rights under IDEA. Petitioners are entitled to the relief set forth above.

SO ORDERED, this 30th day of April, 2014.

KIMBERLY W. SCHROER
Administrative Law Judge