**STATE OF CONNECTICUT**
**DEPARTMENT OF EDUCATION**

Student v. Newtown Board of Education

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| Appearing on behalf of the Parents: | Attorney Roger E. Bunker<br>28 Old Village Road<br>Bloomfield, Connecticut 06002 |
| Appearing on behalf of the Board: | Attorney Frederick Dorsey<br>Siegel, O'Connor, Schiff & Zangari, P.C.<br>171 Orange Street – Drawer 906<br>New Haven, Connecticut 06504 |
| Appearing before: | Attorney Scott P. Myers, Hearing Officer |

## FINAL DECISION AND ORDER

**ISSUES:**

The following issues were set for hearing at the Pre-Hearing Conference ("PHC"):

1. Does the Hearing Officer have jurisdiction to consider on the merits the Parents' claim for reimbursement for transportation expenses for N. for the 1998-1999 school year?

2. If the Hearing Officer has jurisdiction to consider that claim on the merits, are the Parents entitled to reimbursement for transportation expenses they incurred with respect to N.'s placement in the 1998-1999 school year?

3. Does the Hearing Officer have jurisdiction to consider on the merits the Parents' claim for reimbursement for transportation expenses for N for the 1999-2000 school year?

4. If the Hearing Officer has jurisdiction to consider that claim on the merits, are the Parents entitled to reimbursement for transportation expenses they incurred with respect to N.'s placement in the 1999-2000 school year?

**SUMMARY:**

N. is an eight year old child diagnosed with autism who has been receiving special education services from the Board. The Board proposed a placement in-district for the 1997-1998 school year. The Parents thereafter asked if the Board would be willing to apply the funds it had allocated for N.'s in-district placement to an out-of-district placement that the Parents were considering. The Board agreed and the parties ultimately reached an agreement that the Board would fund tuition costs at the out-of-district placement and the Parents would assume responsibility for transportation. Neither party sought to modify the terms of that agreement which continued in place for the 1998-1999 and 1999-2000 school years. The Parents claim that they did not know prior to January 2000 that they were entitled to transportation as a related service and now seek to recover the costs they incurred in transporting N. to and from the out-of-district placement for those school years. For the reasons set forth herein, the Parents are barred from recovering their transportation costs for the 1998-1999 school year by operation of Section 10-76h-4(a) of the Department's Regulations and Conn. Gen. Stat. Section 10-76h(a)(3). The Parents are further barred by the terms of the agreement they entered into with the Board from recovering their transportation costs in both the 1998-1999 and 1999-2000 school years.

**PROCEDURAL HISTORY:**

N.'s parents (the "Parents") commenced this proceeding on N.'s behalf by written request to the Department of Education (the "Department") dated March 8, 2001 and received by the Department on March 13, 2001. Counsel for the Parents and the Board participated in a PHC on March 21, 2001. At the request of the parties and pursuant to Section 10-76h-9(e) of the Department's Regulations, the date for the mailing of the Final Decision and Order was extended 30 days through and including May 29, 2001 to permit the parties an opportunity to resolve their dispute through a Department-sponsored mediation or otherwise. The March 26, 2001 Scheduling Order set a May 8, 2001 hearing date, as well as a schedule for the submission of witness lists, exhibits and proposed revisions to the statement of issues.

As of May 1, 2001, the parties had not advised the Hearing Officer that the matter had been settled or withdrawn, and had failed to comply with the schedule for submission of exhibits, witness lists and the statement of issues set forth in the March 26, 2001 Scheduling Order. By letter dated May 1, 2001 the parties advised the Hearing Officer that the mediation had not yet been scheduled and jointly requested a continuance of the scheduled hearing date until June 6, 2001 which, if granted, would also have extended the previously extended date for issuance of the Final Decision and Order. By order dated May 1, 2001, the Hearing Officer denied that request pursuant Section 10-76h-9(e) of the Regulations, continued the May 8, 2001 hearing until May 18, 2001, and set new dates for the submission of witness lists and exhibits.

As of May 14, 2001, the parties had not advised the Hearing Officer that the matter had been settled or withdrawn, and had failed to comply with the schedule for submission of

exhibits, witness lists and the statement of issues set forth in the May 1, 2001 order. By Notice and Order dated May 14, 2001, the Hearing Officer advised counsel for the Parents that this matter would be dismissed unless the Parents affirmatively notified the Hearing Officer of their intent to proceed with hearing. On May 16, 2001, counsel for the Parents advised that they intended to proceed with hearing. By Notice and Order dated May 16, 2001, the parties were directed to appear for hearing on May 18, 2001 unless the matter was settled or withdrawn, and further directed to present their exhibits and record at the commencement of hearing. The hearing proceeded on May 18, 2001. Each party was represented by counsel.

**EXHIBITS:**

Fourteen exhibits offered by the Parents (Exhibits P-1 through P-14) at the commencement of hearing were admitted into evidence. Two exhibits (marked "B-1" and "B-2") were offered by the Board during cross-examination of N.'s Mother. The Parents' relevancy objection to these documents was overruled and both documents were admitted into evidence.

**WITNESSES:**

Testimony was elicited from N.'s mother (the "Mother") and father (the "Father") during the Parents' case-in-chief and from the Board's Director of Pupil Personnel Services (the "Director") during the Board's case-in-chief. The Board identified as potential witnesses on its behalf the mother ("Mrs. X") of another student ("X") in the Board's jurisdiction who received special education services, and the director of the Connecticut Center for Child Development ("CCCD"), but did not call either of these people to testify.

**FINAL DECISION AND ORDER:**

This Final Decision and Order sets forth the Hearing Officer's findings of fact and conclusions of law. To the extent that findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *See, e.g.*, *Bonnie Ann F. v. Callallen Independent School District*, 835 F.Supp. 340 (S.D. Tex. 1993).

1. N., born on April 23, 1993 and now eight years old, was first diagnosed with autism shortly before his third birthday. At all relevant times, N was eligible to receive special education services pursuant to Conn. Gen. Stat. Section 10-76 *et seq.* and the IDEA, 20 U.S.C. 1401 *et seq.* (Exhibits P-1; P-2; P-3; P-4; Mother's Testimony; Director's Testimony)

2. There have been no prior due process proceedings with respect to N. (Mother's Testimony; Director's Testimony)

3. N.'s Mother and the Director attended all of the PPTs described herein. N's Father attended only the June 17, 1999 PPT. (Mother's Testimony; Father's Testimony)

4. N. began receiving special education services from the Board in the 1996-1997 school year, in accordance with an IEP developed on October 2, 1996 which provided for his participation in two in-district programs offered by the Board. N's Mother acknowledged receiving a copy of the "Procedural Safeguards" at this PPT. (Mother's Testimony) The PPT minutes were recorded on a standardized form. The section entitled "Education Program Summary" contains line items summarizing, among other things, the total number of hours per week of "Special Education" and "Related Services" that the Board was going to provide N under the IEP developed at this PPT, as well as a line item for "Transportation." As completed, the form indicates that N was to receive 30 hours per week of Special Education services, that N would spend 1 hour per week with "Regular Education Peers," that N's school day was to be 6 hours, and that N required "Special" "Transportation" with a "car seat" rather than "Regular" "Transportation." (Exhibit P-1, at 7 of 8) No testimony was elicited, however, as to who provided transportation for N in the 1996-1997 school year, or the content of any discussions between the parties regarding transportation issues for that school year.

5. An IEP for the 1997-1998 school year was developed at a PPT on June 12, 1997. The IEP provided that N would continue to attend the two in-district programs in which he had been placed in the 1996-1997 school year. (Exhibit P-2) N's Mother acknowledged receiving a copy of the "Procedural Safeguards" at this PPT. (Exhibit P-2, at 6 of 9; Mother's Testimony) Under the section of the standardized PPT minutes form entitled "Education Program Summary" the item labeled "Transportation" is checked off. (Exhibit P-2, at 3 of 9) No testimony was elicited, however, as to who provided transportation for N in the 1997-1998 school year, or the content of any discussions between the parties regarding transportation issues in connection with programming for that school year.

6. Shortly after the June 12, 1997 PPT, N's parents, along with X's parents, commenced discussions with the Director regarding a potential placement for their children at CCCD, a then newly established private day program for children with autism that was located out of the district and was scheduled to commence operations in September 1997. The CCCD was founded by the parents of a third child ("Y") residing in the district who would also attend CCCD in September 1997. As of the summer of 1997, the only four children scheduled toparticipate in the Board's in-district "Autistic Program" for the 1998-1999 school year were N, X, Y and another child. (Mother's Testimony; Director's Testimony)

7. Between June 12, 1997 and July 18, 1997, the Parents requested that the Director provide information regarding the anticipated cost to the Board of providing N the special education program contemplated in the June 12, 1997 IEP. (Mother's Testimony; Director's Testimony) The Director responded by letter dated July 18, 1997, which stated that the in-district placement for N as contemplated by the June 12, 1997 IEP would cost between $30,000 and $35,000. (Exhibit B-1) Nothing in the letter suggests that those estimated costs included any expense for transporting N. to

the in-district placement. That letter further states that if N.'s Parents "desire" to have N. attend an out-of-district placement in the 1997-1998 school year, the Board would fund that placement "at a total rate of $35,000 per year." The Director testified that the phrase "total rate" was intended to include transportation as well as tuition costs. (Director's Testimony)

8. The Director testified that at the time he wrote the July 18, 1997 letter he was aware that the Parents regarding N.'s continued placement in the in-district programs based on events that had occurred in that placement in the 1996-1997 school year, and was aware that the Parents were investigating CCCD as a potential alternative placement for N. for the 1997-1998 school year because of those concerns. (Director's Testimony)

9. On July 22, 1997, the Director met with the Parents and the parents of X to discuss the potential out-of-district placement of N and X at CCCD for the 1997-1998 school year. The meeting was initiated at parental request. All of the parties described this meeting as positive. (Witness Testimony)

10. Based on all of the testimony and documentary evidence presented, the Hearing Officer concludes as follows with respect to the July 22, 1997 meeting: (a) The Parents initiated the July 22, 1997 meeting to determine whether the Board would agree to apply toward the costs of a placement at CCCD the funds the Board would have used for N.'s placement at the in-district programs proposed in the June 12, 1997 IEP. (b) The Board was receptive to that proposal and committed at the July 22, 1997 meeting to fund $35,000 of the $49,500 cost of tuition for N.'s placement at CCCD for the 1997-1998 school year. (c) The Board secured an agreement or commitment from the Parents to fund a portion of the costs of tuition at CCCD, and proposed a mechanism by which that contribution could be made (a $15,000 "gift" by the Parents to the district for "special education" to be paid in three installments over a several month period). (Witness Testimony; Exhibit B-2)

11. These arrangements are memorialized in a document dated July 22, 1997. (B-2) Neither N.'s Mother nor his Father recall receiving this document, but each testified that the document accurately reflected the discussion of the parties at that meeting as to the Board's obligations with respect to CCCD. (Mother's Testimony; Father's Testimony) Specifically pertinent to the issues to be addressed in this due process proceeding are the following two excerpts from the July 22, 1997 letter:
    a. "As a result of our PPT held this morning, July 22, 1997, I thought it important to reiterate ***our agreement*** regarding the out-of-district placement of [N] ***for the school year 1997/1998.***" (Exhibit B-2; emphasis added.)
    b. "The [Board] will pay the ***tuition cost*** of $49,500 for the school year. In addition, you will agree to provide a 'gift' to the Board of Education in the amount of $15,000 to be allocated for special education [and to be paid in three installments over a several month period.]" (Exhibit B-2; emphasis added.)

    Other than the obligation to pay tuition costs, no other payment obligation of the Board was set forth in this letter. (Exhibit B-2)

12. At the July 22, 1997 meeting, the parties did not discuss the adequacy or the appropriateness of the IEP developed at the June 12, 1997 PPT for the 1997-1998 school year. At no time did the Parents claim that that IEP failed to satisfy the requirements of the IDEA. The Director stated that the in-district program offered to N. for the 1997-1998 school year was appropriate, and that his agreement to fund the CCCD placement did not reflect any belief to the contrary. (Director's Testimony)

13. At some point after the July 22, 1997 meeting and prior to September 1997, the Board agreed to pay for the entire cost of tuition at CCCD for the 1997-1998 school year. (Witness Testimony)

14. The issue of who would transport N. to the CCCD program and who was responsible for the costs of that transportation was not discussed prior to the July 22, 1997 meeting. (Witness Testimony)

15. All parties agree that transportation arrangements were discussed at the July 22, 1997 meeting and further agree that by the conclusion of that meeting the Parents stated that they would provide transportation for N to CCCD. (Witness Testimony) The Parents in their testimony focused primarily on the Director's suggestion to them and the X family that they share transportation arrangements. (Father's and Mother's Testimony) The Director testified further that, in the course of the discussion as to what the Board would agree to fund with respect to a placement at CCCD, he advised the Parents, as well as the X family, that the Board had not budgeted for an out-of-district placement for N and X at CCCD and that the costs of transporting N and X to CCCD could be "substantial." (Director's Testimony)

16. At no time prior to or during the July 22, 1997 meeting did the Board advise the Parents that transportation to and from an out-of-district placement such as CCCD at the Board's expense could be considered a related service to which N was entitled. (Director's Testimony)

17. N. attended CCCD for the 1997-1998 school year. Transportation to and from CCCD for N. was provided by the Parents at their own expense. (Mother's Testimony)

18. By agreement of the Parties, N attended CCCD in the 1998-1999 school year. These arrangements are reflected in the minutes of an October 19, 1998 PPT. (Exhibit P-3, Mother's Testimony; Director's Testimony) The Director testified that the issue of ***whether*** N. would continue at CCCD in the 1998-1999 school year was not discussed at the PPT because the parties understood that the placement would continue based on communications that they had had prior to the PPT. The Director, who was the staff member responsible for preparing the minutes, completed the line item marked "Transportation" on the standardized PPT minutes form by checking off the blank marked "N/A" (Director's Testimony; P-3, at 7 of 10) The Director testified that the

issue of transportation was not discussed at the PPT, and that he marked that item as "N/A" based on his understanding that the transportation arrangements in place to that point (i.e., transportation being provided by the Parents at parental expense) were to continue given that the placement remained unchanged. That understanding was not based on any communications with the Parents. (Director's Testimony)
19. The Parents received the completed PPT minutes shortly after the October 19, 1998 PPT meeting and reviewed them. They also timely received the "Procedural Safeguards" document. (Mother Testimony)

20. By agreement of the Parties, N. attended CCCD in the 1999-2000 school year. These arrangements are reflected in the minutes of a June17, 1999 PPT. (Exhibit P-4; Mother's Testimony; Director's Testimony) The Director testified that the issue of ***whether*** N. would continue at CCCD in the 1999-2000 school year was not discussed at the PPT because the parties understood that the placement would continue based on communications that they had had prior to the PPT. The Director, who was the staff member responsible for preparing the minutes, completed the line item marked "Transportation" on the standardized PPT minutes form by checking off the blank marked "N/A" (Director's Testimony; P-4, at 5 of 8). The Director testified that the issue of transportation was not discussed at the PPT, and that he marked that item as "N/A" based on his understanding that the transportation arrangements in place to that point (i.e., transportation being provided by the Parents at parental expense) were to continue given that the placement at CCCD was to continue. That understanding was not based on any communications with the Parents. (Director's Testimony)

21. The Parents received the completed PPT minutes shortly after the June 17, 1999 PPT meeting and reviewed them. They also timely received the "Procedural Safeguards" document. (Mother Testimony)

22. Shortly after the June 17, 1999 PPT, N's Father discussed with N's Mother the possibility of asking the Board to pay for the costs of transporting N. to and from CCCD. (Father's Testimony)

23. During the 1998-1999 and 1999-2000 school years, N. was transported to and from CCCD by his parents. According to N.'s Mother, transporting N. involved two round trips per day for a total of 112 miles per day. A few times per month during the 1998-1999 school year, N. would be transported to CCCD in the morning by the parents of one of the other children attending CCCD. (Mother's Testimony)

24. The Parents state that they did not know until January 2000 that transportation could be considered a related service and that they had the legal right to have the Board provide it at its own expense or pay for such transportation. (Mother's Testimony) Based on the record as a whole, the Hearing Officer finds that the credibility of that statement is questionable.

25. By agreement of the parties, N. attended CCCD in the 2000-2001 school year, as reflected in the minutes of the May 17, 2000 PPT. (Exhibit P-6; Mother's Testimony;

Director's Testimony) As with the two prior PPT minutes, the line item marked "Transportation" on the page entitled "Summary: Special Education, Related Services, and Regular Education" is marked "N/A" on the May 17, 2000 PPT minutes (Exhibit P-6, at 5 of 8)

26. On May 17, 2000, after the May 17, 2000 PPT had been concluded, N.'s Mother asked Director for the first time about reimbursement for transportation to and from CCCD. Her request was specifically limited to the 2000-2001 school year, which was the subject of that PPT. (Mother's Testimony; Director's Testimony)

27. At no time prior to May 17, 2000 did the Parents make any request for the Board to fund the costs of transporting N. to CCCD or to provide such transportation. (Mother's Testimony; Director's Testimony)

28. All parties testified that at no time between the July 22, 1997 meeting and May 17, 2000 did the Board explain that transportation to and from an out-of-district placement at Board expense could be considered a related service to which the Parents were entitled. The testimony of the parties suggests that they had no communications with each other between July 22, 1997 and May 17, 2000 regarding transportation arrangements for N.'s placement at CCCD. (Witness Testimony)

29. Although N.'s Mother testified that she did not reach closure with the Board on the issue of transportation on May 17, 2000, there were no further communications between the Parents and the Board on that subject until October 13, 2000 when N.'s Mother contacted the Director. That contact was followed by an additional contact with Board personnel on October 25, 2000 and a letter sent by the Parents to the Director dated October 31, 2000. (Mother's Testimony; P-8)

30. In that October 31, 2000 letter, the Parents requested reimbursement for transportation expenses for the 2000-2001 school year. Two excerpts of that letter pertinent to this proceeding are as follows:
    a. "As you know, my son [N] has been placed at [CCCD] since 1997. ***During his first year, it was my wish to drive my son to school because of his young age, as a result, we agreed that I would transport him. It was an arrangement that worked out for everyone.*** At that time, however, I did not know that my son was entitled to transportation." (Exhibit P-8; emphasis added.)
    b. "And now, 3 ½ years later, our family's circumstances have changed. Thus, our transportation needs have changed." (P-8; emphasis added.)

31. During this period, the Parents had retained a "child advocate" who spoke to the Director on October 25, 2000 about the Parents' request for reimbursement for transporting N. The letter records that the Director expressed to the advocate his "disappointment" with the Parents for "breaking the deal," referenced the "high cost of transporting [N.]" and suggested that the Board would seek to have N. return to the district if the Board were to be asked to provide transportation for N as requested. (Exhibit P-8) N.'s Mother offered no testimony to indicate that she agreed or

disagreed with the Director's statements that there was a "deal" in place regarding transportation for N. to and from CCCD in the 1998-1999 and 1999-2000 school years. During his testimony, the Director did not disagree with the characterization of his statements to the advocate as set forth in this letter.

32. The Board has reimbursed the Parents at the rate of $0.32/mile for transporting N. 112 miles per day in connection with his attendance at CCCD during the 2000-2001 school year through January 2001. Since that time, the Board has been providing transportation to N. at a cost of approximately $175/day to the Board. (Mother's Testimony; Director's Testimony)

33. At a PPT held on February 12, 2001, the Parents raised for the first time at a PPT the issue of reimbursement for the costs of transportation incurred by the Parents during the 1998-1999 and 1999-2000 school years. The Board denied that request. (Stipulation of the parties on the record at hearing; Exhibit P-11.)

34. The Parents in this proceeding request reimbursement for the costs of transporting N. to and from CCCD during the 1998-1999 and 1999-2000 school years at the rate of $0.32/mile for two daily round trips of 56 miles each, or a total of 112 miles per day. Based on documentation submitted by the Parents regarding N.'s attendance at CCCD, these costs are $7,025 for the 1998-1999 school year (196 days * 112 miles/day * $0.32/mile; *see* Exhibit P-5) and $7,670 for the 1999-2000 school year (214 days * 112 miles/day * $0.32/mile; *see* Exhibit P-7)

35. The Parents requested due process with respect to reimbursement for these expenses by letter dated March 8, 2001 and received by the Department on March 13, 2001. (Exhibit P-12)

36. At all relevant times, N.'s level of cognitive, social and intellectual functioning, judgment, impulse control, self-help and communication skills have been either moderately or significantly impaired by his autism such that he needs a high level of supervision and structure. (Mother's Testimony; Father's Testimony; Exhibits P-1, P-2, P-3, P-4)

37. The Hearing Officer makes no findings of fact or conclusions of law as to whether any of the IEPs included in the record provided N. with a free and appropriate education (" FAPE") in the least restrictive environment ("LRE") as those terms are defined in the IDEA.

**CONCLUSIONS OF LAW:**

1. N. is a student with disabilities eligible to receive special education and "related services" pursuant to the IDEA and Connecticut law. Transportation to and from CCCD paid for by the Board is a "related service" to which N is potentially entitled under the IDEA and Connecticut law.

The IDEA provides for transportation as a related service if transportation is necessary for a disabled child to benefit from special education even if that child has no ambulatory impairment that directly causes a unique need for some form of specialized transport. *See Donald B. v. Board of School Com'rs of Mobile County*, 117 F.3d 1371 (11th Cir. 1997); 20 U.S.C. Section 1401(3)(A), 1401(8) and 1401(22). With respect to Connecticut law, Section 10-76d-19 of the Regulations provides, in pertinent part, that "Each board of education shall provide, as a related service, safe and appropriate transportation as required to implement the individualized education program for each child requiring special education and related services . . ." Section 10-76d-19(e) further provides that the local educational agency ("LEA") cannot require parents to provide transportation, but can ask the parents to do so and must reimburse the parents for the costs of providing transportation if the parents agree to provide transportation.

Accordingly, the Board may discharge its obligations under the IDEA and Connecticut law to provide transportation as a related service by either transporting N to and from CCCD at Board expense or reimbursing the Parents for transporting N to and from CCCD.

2. This action is not barred by Section 10-76h-3 of the Department's Regulations. Section 10-76h-3(g) provides that "[n]o issue may be raised at a hearing unless it was raised at a PPT meeting." Section 10-76h-3(h) provides that a Hearing Officer does not have subject matter jurisdiction to consider issues raised in due process that "have not been raised at a PPT meeting prior to a hearing." At the time of the PHC, it was unclear whether the request for reimbursement for transportation expenses for both the 1998-1999 and 1999-2000 school years had been previously raised at a PPT. That uncertainty was resolved through a stipulation at hearing that the request as to both years had been raised at the February 12, 2001 PPT.

3. Absent the terms of the agreement, the Board would have been obligated to provide N. with transportation as a related service for the 1998-1999 and 1999-2000 school years. Since the issue has not been raised, the Hearing Officer makes no finding of fact or conclusion of law as to whether a placement at CCCD in the 1998-1999 or 1999-2000 school years did or did not provide N with a FAPE in the LRE. However, regardless of where N was placed the Board had a potential obligation to provide transportation as a related service. The factors relevant to determining whether a child needs transportation as a related service include, among others, the child's age, the nature of the disability, the distance he or she must travel, the nature of the area through which the child must pass, access to private assistance in making the trip, and the availability of other forms of public assistance en route such as crossing guards and public transit. *See, e.g.*, *Donald B.*, 117 F.3d at 1371. Considering those factors on the facts in the present case, absent the provisions of the agreement reached by the parties in the summer of 1997 and extended into the 1998-1999 and 1999-2000 school years, N would have been entitled to transportation to and from CCCD as a related service.

4. Assuming that the Parents are entitled to reimbursement for transportation they provided during the 1998-1999 and 1999-2000 school years, by application of Section 10-76h-4(a) of the Regulations and Conn. Gen. Stat. Section 10-76h(a)(3) to the facts, they are precluded from recovering their transportation costs prior to October 19, 1998. Section 10-76h-4(a) provides, in pertinent part, that the Parents "shall have two years to request a hearing from the time the [Board] refused to initiate . . . the provision of a free appropriate public education placement to [N.], provided if [the Parents are] not given notice of the procedural safeguards, in accordance with regulations adopted by the state board of education, including notice of the limitations contained in this section, such two-year limitation shall be calculated from the time notice of the safeguards is properly given." Although Section 10-76h-4(a) did not become effective until July 1, 2000, it applies to this action which was commenced on March 13, 2001. Moreover, Section 10-76h-4(a) mirrors the requirements of Conn. Gen. Stat. Section 10-76h(a)(3) which was in effect at all pertinent times.
The issue of the preclusive effect of these statute of limitations provisions was raised but could not be resolved at the PHC. At hearing, the Board moved for a determination of the preclusive effect of the Regulation and argued that the Parents are not entitled to reimbursement for expenses they incurred prior to March 8, 1999, which is two years prior to the date on which they commenced due process. However, the pertinent date on which the Board "refused to initiate" FAPE with respect to the CCCD placement for the 1998-1999 school year was the October 19, 1998 PPT at which the IEP for the 1998-1999 school year was developed. Accordingly, the Parents had through and including October 18, 2000 to commence due process with respect to the 1998-1999 school year. They did not do so, and are therefore barred by these provisions from recovering their costs incurred with respect to the 1998-1999 school year. Similarly, the pertinent date on which the Board "refused to initiate" FAPE with respect to the CCCD placement for the 1999-2000 school year was the June 17, 1999 PPT at which the IEP for the 1999-2000 school year was developed. Accordingly, the Parents have through and including June 16, 2001 to commence due process with respect to the 1999-2000 school year. Their claims for reimbursement for the 1999-2000 school year are therefore not barred by these provisions.

5. Neither the IDEA nor Connecticut law precludes an LEA and an eligible child's parents from entering into an agreement that relieves the LEA of its obligation to provide transportation as a related service.

   Both the IDEA and Connecticut law provide parents of eligible children with the ability to challenge an IEP with which they disagree through due process. Nothing in the IDEA or Connecticut law, however, provides that due process is the exclusive (or even a preferred) mechanism for resolving issues or disputes between LEAs and parents. Both the IDEA and Connecticut law provide, for example, for formal mediation of disputes. Mediation is a voluntary, consensual process which, if successful, results in a mutually satisfactory agreement between the parties in which one or both parties may waive or otherwise relinquish a right or entitlement they have to avoid the risks and burdens of resolving the dispute through litigation at hearing. The parties are also free to settle due process proceedings rather than litigate them to

conclusion, and free to waive or otherwise relinquish a right or entitlement that they may have as part of that settlement.

The Parents in this case initiated discussions with the Board to explore their options with respect to a proposed unilateral, out-of-district placement that they thought would benefit their son. Those discussions took place outside of the context of the dispute resolution mechanisms available in the IDEA and applicable Connecticut law. Nothing in the IDEA or Connecticut law precludes the parties from reaching an agreement on their own to resolve concerns or a potential dispute. In fact, such an effort is consistent with the collaborative emphasis of the IDEA.

6. The Board and the Parents reached an agreement in the summer of 1997 with respect to their mutual responsibilities for N's placement at CCCD for the 1997-1998 school year: the Board would fund the costs of tuition for the CCCD placement and the Parents would provide transportation at their own expense.
   The Parents agreed that exhibit Exhibit B-2 accurately reflected the discussions they had had with the Director on July 22, 1998. Exhibit B-2 recited that the agreement of the parties with respect to the placement at CCCD provided that the Board's obligation to fund that placement would extend only to tuition costs. While the amount of the funding that the Board would provide had not been agreed to on July 22, 1997, the fact remains that an agreement had been reached that the obligation would extend only to tuition costs, and that the Parents would assume responsibility for transportation.

7. The parties implicitly agreed to extend the terms of their agreement reached in the summer of 1997 to the 1998-1999 and 1999-2000 school years.
   The Parents do not deny that they reached an agreement with the Board in the summer of 1997 regarding arrangements for a placement at CCCD for the 1997-1998 school year. The record as a whole suggests that neither party objected to continuing the terms of that agreement through the 1998-1999 and 1999-2000 school year and, accordingly, that agreement remained in place during those years. The parties were free, however, to enter different arrangements in subsequent years. The Parents did not request that the terms of that agreement with respect to transportation arrangements be modified for the 1998-1999 school at the October 19, 1998 PTT (or at any point during that school year) and/or for the 1999-2000 school year at the June 17, 1999 PPT (or at any point during that school year). Their failure to raise the issue at the October 18, 1998 and June 17, 1999 PPTs could reasonably have been deemed by the Board to be, and in fact reflected, an implicit agreement to continue the then currently in place arrangements.

8. Pursuant to the terms of the agreement, the Parents are precluded from the relief they seek in this proceeding.
   See discussion under Conclusion 5 above.

9. The Hearing Officer has the jurisdiction to enforce the terms of that agreement.

No party has raised the issue of whether a Department due process hearing officer has the authority to enforce the terms of an agreement between an LEA and the parents of a student eligible for special education services which discharges potential obligations of the LEA under the IDEA or Connecticut law. The court in *Mr. J. v. Board of Education*, 98 F.Supp.2d 226 (D. Conn. 2000), *citing D.R. v. East Brunswick Board of Education*, 109 F.3d 896 (3d Cir. 1997), held that a Department due process hearing officer has jurisdiction to enforce the terms of an agreement between an LEA and a parent settling a due process proceeding reached before hearing commenced. Although the agreement in this case did not settle a pending due process proceeding, the Hearing Officer concludes based on these cases that he has the authority to enforce the terms of the agreement reached between the parties in this case in accordance with the standards set forth in those cases.

In *Mr. J.*, the child's father disagreed with the proposed in-district placement offered by the LEA, unilaterally placed the child in an out-of-district placement and requested that the LEA fund that placement. Shortly thereafter, the parties "agreed to mediate their dispute instead of proceeding to a due process hearing" and eventually entered into a written agreement which provided, among other things: (1) that the LEA would "assume responsibility for the education and clinical program" for the child for the 1996-1997 school year, then estimated by the parties to cost $32,000; (2) that the father would pay the costs of the "residential portion" of the placement; and (3) that the agreement was in "full and final settlement of all issues which were raised or could have been raised in a due process hearing through the 1996-97 school year. . ." *Mr. J.*, 98 F.Supp.2d at 226.

Several months later, another disagreement between the parties arose and the father eventually commenced due process with respect to both the 1996-1997 and 1997-1998 school years. The hearing officer concluded that the father was barred by that agreement from litigating issues concerning the 1996-1997 school year: the terms of the agreement were clear, the LEA had fulfilled its obligations under the agreement, there was no merit to the father's claim that the agreement was "void by reason of mistake," and, viewed prospectively as of the date the agreement was reached, the agreement was fair and equitable to the parties. *Id.* On appeal, the District Court agreed that the hearing officer had jurisdiction to enforce the terms of the agreement and that the father was barred by that agreement from litigating the adequacy of the program for the 1996-1997 school year. The Court ultimately rejected claims by the father that the agreement should be voided on the ground: (1) that the father was "fraudulently induced" into accepting the LEA's settlement offer based on the LEA's "fraudulent representation . . . that it could not pay for educational placements in residential facilities for students who were not a threat to themselves or others and could care for themselves;" (2) that there was a mutual mistake as to the LEA's funding obligations; and (3) that there was no consideration because "the [LEA], in agreeing to pay for the educational and therapeutic portions of [the child's] placement . . . was only doing what [it] was obligated to do" and provided no consideration for the father's agreement to pay the "residential costs" of that placement. *Id.* These themes are all suggested by the Parents' testimony.

In reaching its decision, the *Mr. J.* Court noted that the Second Circuit had not yet addressed the issue and found persuasive the Third Circuit's analysis in *D.R.* In that case, the parents unilaterally placed their child in an out-of-district residential program. To resolve a dispute between them with respect to funding for that placement, D.R.'s parents and the LEA entered into a settlement agreement defining the LEA's obligations to fund the placement and providing that the LEA "was not responsible for other costs, related services or transportation." That agreement was reached in a mediation effort undertaken after the parents had requested due process but before hearing had commenced. Several months after the agreement was executed, another dispute arose between the parties and the parents commenced a due process proceeding seeking an order that the LEA was responsible for the full costs of the placement including the costs of one-to-one aides that were now required to enable D.R. to participate in the placement. Relying on the terms of the settlement agreement, the LEA refused to pay any portion of the cost of the personal aides. At the initial due process hearing, the administrative law judge ("ALJ") agreed that the settlement agreement was binding on the parties and dismissed D.R.'s petition. D.R.'s parents appealed to the District Court which ultimately set aside the settlement agreement based on its finding that D.R.'s circumstances had changed since the parties had entered the agreement such that the personal aides had become "educationally necessary" for him to obtain a FAPE as guaranteed by the IDEA. The District Court reasoned that a disabled individual has a right to such necessary services which "cannot be waived by a contract to provide something less." *D.R.*, 109 F.3d at 896.

The Third Circuit disagreed, holding that a settlement agreement reached through mediation is as binding as an agreement reached during litigation and that D.R.'s parents were precluded, by the terms of the agreement, from obtaining the relief they sought.

> Once a school board and the parents of a disabled child finalize a settlement agreement and the board agrees to pay a certain portion of the school fees, the parents should not be allowed to void the agreement merely because the total cost of the program subsequently increases. A party enters a settlement agreement, at least in part, to avoid unpredictable costs of litigation in favor of agreeing to known costs. Government entities have additional interests in settling disputes in order to increase the predictability of costs for budgetary reasons. We are concerned that a decision that would allow parents to void settlement agreements when they become unpalatable would work a significant deterrence contrary to the federal policy of encouraging settlement agreements . . . Settlement agreements are encouraged as a matter of public policy because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the courts. . . . When the parties entered the settlement agreement at issue in this case, they entered a contract. *D.R.*, 109 F.3d at 901 (citations omitted).
>
> The reasoning and public policy issues that formed the basis of the decisions in *Mr. J. and D.R.* are not limited to cases in which the parties reach a settlement agreement to resolve a currently pending proceeding, and are wholly applicable in

this case. Both *Mr. J.* and *D.R.* establish that the fact that the agreement has been entered into in a context governed by the IDEA or state special education laws is no bar to the enforceability of the agreement.

10. The Parents have failed to establish any basis for retroactively voiding or modifying the terms of the agreement.

There is no indication that the Parents entered into or extended the agreement with the Board under duress or threat by the Board, and every indication that they entered into and extended the agreement willingly and voluntarily because it met their needs at the time. Among other things, the Parents acknowledged in the October 31, 2000 letter to the Director that the arrangements in place for the 1998-1999 and 1999-2000 school years met their needs and were satisfactory.

The primary argument made by the Parents in support of retroactively modifying or voiding the agreement is that they did not know until January 2000 that they were entitled to transportation at Board expense. The Parents suggest further that the agreement is invalid because it was reached in violation of the IDEA's procedures – more specifically that the July 22, 1997 meeting was not a "legal" PPT and that the Board failed to disclose to the Parents that they were potentially entitled to transportation at Board expense as a related service. These claims are addressed below.

a. Whether the July 22, 1997 meeting was or was not a "legal" PPT is irrelevant.

Whether or not the July 22, 1997 was a "legal" PPT (by which the Hearing Officer assumes the parties mean a properly noticed and staffed PPT in which an IEP was discussed and minutes were taken) is not pertinent to any issue in this case because the issue of transportation for N for the 1998-1999 and 1999-2000 school years was open for review and modification, respectively, at the October 19, 1998 and June 17, 1999 PPTs. The Parents have raised no claim of any violation of the procedural Requirements of the IDEA with respect to either of those PPTs, much less any procedural violations so gross as to support a finding that N was denied FAPE. Nor is there any evidence to support such a finding.

b. The Board had no obligation or duty to the Parents to assure that the Parents were fully informed of their substantive rights or entitlements under the IDEA.

Also implicit in the Parents' argument is a claim that the Board had a legally enforceable duty under the IDEA or Connecticut law to affirmatively assure that the Parents fully understood all of their substantive rights and entitlements under the IDEA and Connecticut law, including their potential entitlement to transportation to and from CCCD provided at Board expense.

The IDEA and Connecticut law require that the Board provide the Parents with information regarding the procedural safeguards available to them. There is no dispute

that the Board complied with that requirement at each of the four PPTs that were convened prior to May 17, 2000. However, there is no specific or express legal duty or obligation of the Board to provide the Parents with information about their substantive rights and entitlements under either the IDEA or applicable Connecticut law.

The Parents make no claim that the Board, in response to an inquiry about the availability of transportation funded by the Board, lied or otherwise misled them. The Board did not hide the fact that it may have been obligated to provide transportation to and from CCCD for N. For example, what the Board was willing to fund with respect to an alternative placement at CCCD, budgetary constraints and issues and potential for the costs of transportation to be substantial were discussed by the Director at the July 22, 1997 meeting and the parties explored ways to reach a mutually satisfactory arrangement. The PPT forms all indicate the potential for transportation as a related service. While an LEA may have to exercise greater care when negotiating with a parent who is cognitively or intellectually impaired to such a degree that the parent is not capable of understanding the PPT process or their rights under the IDEA, there is no evidence or claim that such circumstances were present in this case.

c. Even assuming the Parents did not know all of their rights under the IDEA, that lack of knowledge does not warrant voiding or modifying the agreement.

The Parents emphasized at hearing that they did not know prior to January 2000 that they were entitled to transportation as a related service and are therefore entitled to the relief they seek. The Hearing Officer finds the credibility of that claim questionable based in part on the testimony offered by the Parents about critical events leading to the agreement reached in the summer of 1997. In any event, lack of knowledge of the extent of their substantive rights under the IDEA or Connecticut law provides no basis for granting them the relief they seek here. This issue was before the District Court in *Malehorn v. Hill City School District,* 987 F.Supp. 772, 780 (D.S.D. 1997). In ruling on a parent's request for reimbursement for transportation, that court applied to both the LEA and the parent the maxim "ignorance of the law is no excuse."

> Malehorn urges that she is entitled to reimbursement after the December IEP meeting [because] she was incorrectly informed [by the District] that the school board was the forum to use in addressing her transportation issue . . . The law

provides that the old IEP be used until a new IEP is enacted. This occurred in December. As the old saying goes, ignorance of the law is no excuse. The District was ignorant in telling Malehorn to go to the school board, and as a result of that ignorance it is required to reimburse Malehorn for mileage until the new IEP was enacted. Malehorn was ignorant that she should have requested a meeting by the IEP committee to consider transportation, and as a result of that ignorance, she will only be reimbursed for the full cost of transportation through December.

d. The agreement is not contrary to public policy.

As set forth above, the decisions in *Mr. J.* and *D.R.* make clear that simply entering into an agreement in which the LEA is relieved of an obligation it otherwise may have under the IDEA or applicable Connecticut law does not violate the IDEA or Connecticut law, or the public policies underlying those laws. Parties are free to enter into agreements in which they waive or relinquish a right or entitlement, and the Parents in this case did so voluntarily and willingly. Nothing in the record suggests that the Parents were coerced into entering the agreement initially, or extending it subsequently.

**FINAL DECISION AND ORDER:**

1. By operation of Section 10-76h-4(a) of the Regulations, and Conn. Gen. Stat. Section 10-76h(a)(3), and regardless of whether N. was entitled to transportation as a related service during that period, the Parents are precluded from recovering from the Board the expenses they incurred in transporting N to and from CCCD in the 1998-1999 school year.

2. By operation of the terms of an agreement reached between the parties in the summer of 1997 concerning their mutual responsibilities with respect to tuition and transportation arrangements for the placement at CCCD, and regardless of whether N. was entitled to transportation as a related service during that period, the Board is not obligated to reimburse the Parents for the expenses they incurred in transporting N. to and from CCCD in either the 1998-1999 or 1999-2000 school years.