DECISION

DUE PROCESS SPECIAL EDUCATION HEARING

FILE NUMBER:	13855/12-13KE
RESPONDENT/SCHOOL DISTRICT (LEA):	Midd-West School District
SCHOOL DISTRICT COUNSEL:	Sharon O'Donnell, Esquire
STUDENT:	E.S.
PETITIONER/PARENTS:	Parents
COUNSEL FOR STUDENT/PARENT	Drew Christian, Esquire
INITIATING PARTY:	Parents
DATE OF DUE PROCESS COMPLAINT:	May 8, 2013
DATES OF HEARING:	June 21 and August 28, 2013
PLACE OF HEARING:	Middleburg Elementary School
OPEN vs. CLOSED HEARING:	Closed
STUDENT PRESENT:	No
RECORD:	Verbatim-Court Reporter
DECISION TYPE:	Electronic
DUE DATE FOR DECISION:	October 2, 2013
HEARING OFFICER:	James Gerl, Certified Hearing Official

DECISION

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PRELIMINARY MATTERS

A prehearing conference by telephone conference call was convened herein on May 31, 2013. As a result of said conference, a prehearing conference Order was entered herein. Said Order is incorporated herein by reference.

At said prehearing conference and thereafter, counsel for the school district made two motions to extend the decision deadline of the hearing officer which were granted. The deadline for the hearing officer's decision is October 2, 2013.

Prior to the hearing, counsel for the parents filed a motion to recuse the hearing officer. Said motion was denied by written order. Said Order is incorporated by reference herein.

Prior to the hearing, counsel for the parties filed a joint prehearing memorandum. Such memorandum contained stipulations of fact and it defined the

issues presented for purposes of this due process hearing. Said memorandum also contained information concerning exhibits and witnesses. The parties' joint prehearing memorandum is incorporated by reference herein.

Subsequent to the hearing, both parties filed written briefs and proposed findings of fact. All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

Personally identifiable information, including the names of parties and similar information is provided on the cover sheet hereto which should be removed prior to distribution of this decision to the public. FERPA, 20 U.S.C. § 1232(g) and IDEA § 617(c).

ISSUES PRESENTED

The issues presented in this due process hearing, as identified by the parties in the prehearing conference and confirmed in their joint prehearing memorandum, as clarified by the hearing officer, are as follows:

1. Did the school district fail to implement the student's IEPs by failing to provide assistive technology devices listed in the IEP?

2. Did the school district fail to provide the student a free and appropriate public education by failing to develop appropriate IEPs for the student for (a) the 2011-2012 school year and (b) the 2012-2013 school year?

3. Did the school district fail to provide the student a free and appropriate public education by failing to provide adequate related services for the student in the 2011-2012 and 2012-2013 school years?

4. Did the school district deny a free and appropriate public education to the student by failing to provide adequate transportation services for the 2012-2013 school year?

FINDINGS OF FACT

Based upon the parties' stipulations of fact as contained in their joint prehearing memorandum, the hearing officer makes the following findings of fact:

1. The student resides within the school district. (Stip-1) (References to stipulations of fact in the parties' joint prehearing memorandum are hereby referenced as "Stip-1," etc.)

2. The student resides with [the student's] parents. (Stip-2)

3. The student's [is pre-teenaged]. (Stip-3)

4. The student has been eligible for special education services and continues to be eligible under the IDEA category of multiple disabilities. (Stip-4)

5. The student is diagnosed with cerebral palsy, quadriplegia, dystonia and anxiety. (Stip-5)

Based upon the evidence in the record, the hearing officer makes the following findings of fact:

6. In addition to [the student's] other disabilities, the student suffers from chronic hip dislocation. [The student] has no ability to access [the student's] environment. [The student] is unable to speak orally. [The student] is dependent upon others for all aspects of self-care. The student nods [the student's] head for "yes," and

looks to the side for “no.” [The student] uses yes/no cards. [The student] uses eye gaze to make choices. [The student] also uses a communication book. (T of student’s mother). (References to exhibits shall hereafter be referred to as "P-1," etc. for the Parents' exhibits; "S-1," etc. for the School District's exhibits and "HO-1," etc. for the hearing officer exhibits; references to testimony at the hearing is hereafter designated as “T”.)

7. The student's IEPs for the 2011-2012 school year and 2012-2013 school year identify [the student’s] TOBII as an accommodation to be used as an assistive technology device. (P-3; P-5)

8. The TOBII device is an augmentative communication device that utilizes eye gaze in which it captures, via a camera, the eyes of the student and allows the computer mouse to be run with the student's eyes. When the student looks at a part of the computer screen with [the student’s] eyes, depending on what's on the screen, then the TOBII device will activate a button that could possibly speak. Although the student sometimes did not use the TOBII device, [the student] was able to communicate better with the TOBII device than without it, and having the TOBII device available to [the student]benefited [the student’s] education. The school district staff who worked with the student were trained on the use of the TOBII device, but the training was not sufficient. School district staff did not model the use of the TOBII for the student. The student frequently utilizes [the student’s] TOBII

device while at home. (T of assistive technology consultant; T of the student's mother; T of home instruction teacher).

9. The TOBII was broken on two occasions; once for approximately one month during the 2011-2012 school year and once for approximately one month during the 2012-2013 school year. (T of student's mother; T of assistive technology consultant).

10. The parent paid for the TOBII warranty at a cost of $1,213.70 each year for two years. The warranty was used to fix the TOBII device when it malfunctioned. The cost of purchasing the TOBII device itself was paid for by the student's medical card. (P-6; T of student's mother).

11. The TOBII augmentative communication device was a material part of the student's IEPs for the 2011-2012 and 2012-2013 school years. (P-5, P-3; T of student's mother; T of assistive technology consultant; T of home instruction teacher).

12. The parent provided an iPad that the student used during [the student's] school work. The iPad was listed as an accommodation on the student's August 15, 2012 IEP. The parent paid $845.00 for the iPad. The iPad was not a material portion of the student's IEP. (P-5; T of student's mother).

13. During the 2011-2012 school year, the student was in the school building from approximately 10:00 a.m. to 12:45 p.m. [The student] received academic subjects, math and language arts, at home from the home instruction

teacher from approximately 7:30 to 9:30 am. (T of school district's special education director; P-5)

14. The student made progress in math during the 2011-2012 school year, finishing the 2nd grade curriculum in just one year and the student made very good progress in reading during the 2011-2012 school year, mastering all of the 3rd grade curriculum and starting the 4th grade curriculum all in one school year. (T of home instruction teacher; T of school district's special education director).

15. The student's parents stated at a subsequent IEP team meeting that the 2011-2012 school year was the student's most successful year both academically and socially. (P-5; T of school district's special education director).

16. During the 2012-2013 school year, the student attended a general education 5th grade classroom. [The student] was pulled out for math instruction. The student's day generally ended an hour and 10 minutes early, but sometimes [the student] had to leave earlier than that due to fatigue. When the student was fatigued during the school day, [the student] would make vocalizations or become disruptive. (T of school district's special education director; T of student's 5th grade general education teacher; T of student's mother; P-5).

17. The student was placed in a general education 5th grade classroom for the 2012-2013 school year based upon [the student's] parent's desire expressed at an IEP meeting that [the student] have more interaction with same age non-disabled

peers. The student did not make progress during the 2012-2013 school year. (T of school district's special education director; T of student's mother; S-11; record evidence as a whole).

18. The student's 2011-2012 individualized educational plan was reasonably calculated to and did result in meaningful educational progress for the student. (Record evidence as a whole).

19. The student could not keep up with [the student's] 5th grade regular education class because [the student] was not academically prepared for the 5th grade level material when [the student] began in the class. The student did not make educational progress during the 2012-2013 school year. (S-11; T of school district's special education director)

20. The student's 2012-2013 IEP was not reasonably calculated to confer educational benefit and did not confer meaningful educational benefit upon the student. (Record evidence as a whole).

21. The student's individualized educational plans for the 2011-2012 and 2012-2013 school years provided for 90 minutes per month of physical therapy, 90 minutes per month of occupational therapy, 120 minutes per week of speech language support services and vision support 45 minutes per month. (P-3, P-5; T of two occupational therapists; T of physical therapist; T of speech language therapist; S-5; S-7; S-6).

22. The student received 90 minutes of direct physical therapy services each month. The student would not benefit from additional physical therapy services. (T of physical therapist; S-7).

23. The student did not need additional occupational therapy services or additional physical therapy services or additional speech/language therapy services in order to benefit from [the student's] education plan. (Record evidence as a whole).

24. The school district's proposal for transportation for the student for the 2012-2013 school year was originally a bus ride that would have lasted approximately 40 minutes. The mother requested a shorter route be provided, and in response the school district reconfigured the route to reduce the time to an approximately 30 minutes bus ride. The parent refused the school district transportation proposal. The student had ridden the bus for longer than a half hour on the way home in a previous school year and the student tolerated the longer bus ride without problem. The school district's transportation offer was appropriate and adequate. (T of school district's special education director; T of student's mother).

25. The student's IEPs for 2011-2012 and 2012-2013 school years did not contain traditional baseline information. It is very difficult to obtain baseline information for the student because of [the student's] inability to speak or move [the student's] hands or express [the student's] self in writing, therefore, making it impossible for [the student] to take even a modified standardized test. In addition,

the parents had requested that the student not be subjected to statewide educational testing based upon religious reasons. Despite the lack of a standard "baseline", the student's IEP for the 2012-2013 school year clearly states [the student's] present levels of academic achievement and functional performance based upon the somewhat inexact estimates made by the student's home instruction teacher. (P5, P3; T of school district's special education director; T of home instruction teacher; T of speech language therapist).

26. One of the goals in the student's 2012-2013 IEP was identical to a goal in a previous IEP. The student had not yet mastered the goal in question. (P-3; P-5; T of special education director).

27. Many of the goals in the student's IEPs for the 2011-2012 and 2012-2013 school years were difficult to measure. Because of the inability to obtain traditional baseline information, in view of the student's disabilities, it is impossible to create goals that are measurable in the traditional sense. (T of special education director).

28. The failure to provide traditional baselines, the repetition of an IEP goal, and the failure to provide measurable goals did not result in a loss of educational opportunity, a denial of educational benefit for the student, or a significant impairment of the parent's right to participate in the IEP process. (Record evidence as a whole).

CONCLUSIONS OF LAW

Based upon the arguments of the parties, and upon all of the evidence in the record, as well as legal research conducted by the hearing officer, the hearing officer makes the following conclusions of law:

1. IDEA requires a school district to implement all material portions of a student's individualized educational plan (hereafter sometimes referred to as "IEP"). Van Duyn v. Baker School District, 481 F.3d 770, 47 IDELR 182 (9th Cir. 2007); Sumter County Sch Dist 17 v. Heffernan ex rel TH 672 F.3d 478, 56 IDELR 186 (4th Cir 2011).

2. To determine whether a child with a disability has been provided a free and appropriate public education (hereafter sometimes referred to as "FAPE"), the United States Supreme Court has developed a two-part test. The two part test involves first whether or not the school district has substantially complied with the procedural safeguards in the Act and second an analysis of whether the student's IEP is reasonably calculated to confer meaningful educational benefit. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); LE and ES ex rel. MS v. Ramsey Bd. of Educ., 433 F.3d 384, 44 IDELR 269 (3d Cir. 2006); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. March 3, 2012).

3. For a procedural violation to be actionable under IDEA, the parent must show that the violation results in a loss of educational opportunity for the student, seriously deprives the parents of their participation rights, or causes a deprivation of educational benefit. Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012).

4. The law does not require a school district to maximize the potential of a student with a disability or to provide the best possible education; rather, it requires that the student's educational plan to provide the basic floor of educational opportunity. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. March 3, 2012).

5. Under Individuals With Disabilities Education Act (hereafter sometimes referred to as "IDEA"), "related services" is defined as transportation and such developmental, corrective and other supportive services as are required to assist the child with a disability to benefit from special education. 34 C.F.R. § 300.34(a).

5. Where there has been a violation of IDEA, the hearing officer has broad discretion to fashion an appropriate remedy. School Committee Town of Burlington v. Department of Educ., 471 U.S. 358, 369, 105 S. Ct. 1996, 556 IDELR 389 (1985); Forrest Grove Sch Dist v. TA 557 U.S. 230, 129 S.Ct. 2484, 52 IDELR 151 (2009); Garcia v. Bd. of Educ. of Albuquerque Public Schs, 530 F.3d 1116, 49 IDELR 241

(10th Cir. 2008); Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp.3d 815, 46 IDELR 252 (C. D. Calif. 2008); Bishop v. Oakstone Academy, 47 IDELR 125 (S.D. Ohio 2007); In re Student with a Disability 111 LRP 40544 (SEA WV 5/31/11); Dist of Columbia Public Schs 111 LRP 76506 (SEA DC 9/23/11). The compensatory education award should match the period of deprivation of FAPE. MC v Central Regional Sch Dist 81 F.3d, 389, 23 IDELR 1181 (3d Cir 1996) Compensatory education also should follow a flexible approach based upon the educational needs of the child who has been denied FAPE. For example some students might require only short intensive compensatory programs targeting specific deficiencies. Other students may require more extended programs, perhaps requiring even more hours than the number of hours of FAPE denied. See, Reid ex rel Reid v. District of Columbia 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005).

6. In the instant case, the school district failed to properly implement the material provisions of the student's 2011-2012 and 2012-2013 IEPs to the extent that in each school year the student's material TOBII augmentative communication device was unavailable to the student.

7. In the instant case, the school district did not fail to implement the student's IEP by failing to pay for an iPad that was provided by the student's parents.

8. In the instant case, the school district's IEP for the 2011-2012 school year was reasonably calculated to and did confer meaningful educational benefit upon the student.

9. In the instant case, the IEP developed by the school district for the 2012-2013 school year was not reasonably calculated to confer meaningful educational benefit and did not cause the student to receive educational benefit.

10. In the instant case, the student did not require additional related services in the form of occupational therapy, physical therapy and speech/language therapy beyond those specified by [the student's] 2011-2012 IEP and [the student's] 2012-2013 IEP in order to benefit from [the student's] education.

11. In the instant case, the school district did not violate IDEA by failing to provide adequate transportation services as a related service for the student.

DISCUSSION

1. Merits

Issue No. 1: Did the school district fail to implement the student's IEP by failing to provide assistive technology devices listed in the IEP?

IDEA requires that a school district implement any portion of a student's IEP that is material. See Van Duyn v. Baker School District, 481 F.3d 770, 47 IDELR 182

(9th Cir. 2007); Sumter County Sch Dist 17 v. Heffernan ex rel TH 672 F.3d 478, 56 IDELR 186 (4th Cir 2011).

Both parties phrase this issue as a FAPE issue. It is apparent from the evidence in the record, however, that what is in issue is whether or not the student's IEPs were implemented with regard to the availability of [the student's] TOBII device. It is the uncontested testimony of witnesses for both parties that the student assistive technology device, the TOBII, was unavailable to [the student] for a period of approximately one month during both the 2011-2012 and 2012-2013 school years because the device had malfunctioned. Because the device was specifically required by the IEPs, the device must be provided to the student if it is a material portion of the student's IEP.

In the instant case, it is apparent that the student's TOBII device is material to [the student's] education. It was the testimony of the student's home instruction teacher for the 2011-2012 school year that the student received a significant educational benefit from the TOBII device in that [the student's] communication was better and more thorough with the TOBII device. The testimony of the home instruction teacher in this regard is extremely credible and persuasive. It is noteworthy that the home instruction teacher carefully phrased her testimony in this regard.

In addition, the testimony of the home instruction teacher is corroborated by the testimony of the assistive technology consultant from the intermediate unit, as well as the testimony of the parent. It is concluded that the credible and persuasive evidence in the record supports the conclusion that the student's TOBII assistive technology device was an important and material part of [the student's] IEPs.

In terms of relief, the testimony of the parent was that she had to pay a specific sum of money for a warranty for the TOBII device that was used to fix the device when it malfunctioned. It would be appropriate to remedy this violation of IDEA, therefore, by requiring the school district to reimburse the parent for the amount of money she paid for the warranty for the TOBII device.

Concerning the allegations in the complaint involving the student's iPad, it is clear from the testimony of the parent and the other witnesses who testified at the hearing that the parent purchased the iPad and later the IEP team included the iPad in the student's program after it learned that the parent had already purchased it. Given that the parent purchased the iPad and offered it for the student's use, it is clear that the school district should not be required to pay for the iPad. The parent in its post-hearing documents provides no legal authority to support its position that the school district should be required to pay for the iPad other than the general provisions requiring a free and appropriate education. The evidence in the record does not

support the parent's claim that the school district has an obligation to pay for the iPad, and, therefore, the parents have not met their burden with regard to the issue involving the iPad.

Issue No. 2: Did the school district fail to provide a free and appropriate public education to the student by failing to develop appropriate IEPs for the student?

a. 2011-2012 School Year

To determine whether a child with a disability has been provided a FAPE, the Supreme Court has developed a two part test: first, whether or not the school has substantially complied with procedural safeguards in the act and second, whether the student's IEP is reasonably calculated to confer meaningful educational benefit. Bd. of Educ, etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 555 IDELR 656 (1982); LE and ES ex rel. MS v. Ramsey Bd. of Educ., 435 F.3d 384, 44 IDELR 269 (3d Cir. 2006); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012). The law does not require that the school district maximize the potential of a student with disability or provide the best education possible; rather, it requires that an IEP be reasonably calculated to provide the basic floor of educational opportunity. Bd. of Educ, etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR

656 (1982); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012).

As to alleged procedural problems, the parent claims that the 2011-2012 IEP was deficient because it contained no baseline information and because some of the goals were not measurable. For a procedural violation to be actionable under IDEA, the parent must show that the violation results in a loss of educational opportunity for the student, seriously deprives the parents of their participation rights, or causes a deprivation of educational benefits. Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012). In the instant case, the parents did not link the alleged procedural violations to any deprivation of educational opportunity or otherwise demonstrate that the alleged procedural violations harmed the parents' participation rights. Indeed, it is apparent from the record evidence that the student made substantial progress during the 2011-2012 school year and, therefore, it is concluded that the school district provided FAPE to the student.

As to the substantive adequacy of the student's IEP for the 2011-2012 school year, the record evidence clearly indicates that the student made substantial and meaningful educational progress during the 2011-2012 school year. It was the credible and persuasive testimony of student's home instruction teacher for the 2011-2012 school year that the student made good progress in both math and reading in the

2011-2012 school year. This testimony was corroborated by the credible and persuasive testimony of the school district's special education director that the student made educational progress during the 2011-2012 school year. The documentary evidence provides further support for the progress made by the student in the 2011-2012 school year: at a subsequent IEP team meeting, the parents stated that the 2011-2012 was the student's most successful year both academically and socially. Accordingly, it is concluded that the student's 2011-2012 IEP was reasonably calculated to confer meaningful educational benefit and that the student received FAPE during the 2011-2012 school year.

b. 2012-2013 School Year.

Concerning alleged procedural violations, the parents argue that the student's 2012-2013 IEP failed to contain baseline information and that some of the goals were not adequate and that at least one of the goals was repeated from the previous year. For a procedural violation to be actionable under IDEA, the parent must show that the violation results in a loss of educational opportunity for the student, seriously deprives the parents of their participation rights, or causes a deprivation of educational benefits. Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012). In the instant case, the parents did not attempt to link the alleged procedural violations to any deprivation of educational opportunity or

otherwise demonstrate that the alleged procedural violations harmed the parents' participation rights. The parents' argument concerning these procedural violations is rejected.

Concerning the substantive adequacy of the student's 2012-2013 IEP, however, it is extremely clear from the evidence in the record that the IEP was not reasonably calculated to confer meaningful educational benefit. The student was in a general education classroom, with the exception of math, at a 5th grade level that [the student] clearly did not belong in. As the school district special education director candidly testified, the student was not prepared for the grade level of the material [the student] was being taught. In order to provide FAPE, it is apparent that the school district needs to design an IEP that is much closer in form and substance to the previous year's IEP.

In contrast to the previous school year, it is apparent from the totality of the evidence in the record that the student did not make educational progress during the 2012-2013 school year. It was the credible and persuasive testimony of the school district's special education director that the student was placed in a general education class at the 5th grade level for the 2012-2013 school year because at an IEP team meeting the mother felt that the student needed more interaction with [the student's] same age peers. It was the further candid testimony of the special education director

that the IEP developed for the student's 2012-2013 school year was not working out for anyone involved.

That the student did not make meaningful educational progress during the 2012-2013 school year is also corroborated by the documentary evidence. One exhibit offered by the school district was a series of 174 pages of progress reports and charts for the student from August 21, 2012 to March 8, 2013. Nowhere in the very large document is there any indication that the student was progressing during the school year. Instead the notations mostly document trips by the student to the school nurse or events relating to the student being tired/fussing/being fatigued. Particularly revealing is the notation for February 5, 2013 in which the student communicates that [the student] did not want to be in the classroom; and when [the student] was asked why not, [the student] said that the work was "…too hard."

Although it is an important component of IDEA that students be placed in the least restrictive environment that is appropriate for their education, IDEA, § 612(a)(5). See, 34 C.F.R. §§ 300.114 to 300.119, a school district is nonetheless required to provide a free and appropriate public education for each student. In the instant case, the student was clearly placed into a classroom where [the student] would receive no educational benefit. Clearly, [the student] could not make progress on 5th grade work when [the student] was functioning at a much lower level than that.

Although it is noble that the school district was sympathetic to the parents' concerns for more interaction with the student's same age non-disabled peers, the school district nonetheless is required to provide a free and appropriate public education to the student, and in this case, it clearly failed to do so. It was the testimony of a number of witnesses that the student had to be removed from school on a number of occasions because [the student] had had outbursts that were making it difficult for [the student] and others to learn. It appears that many of these were related to fatigue issues inasmuch as [the student] could not sit in the classroom for the period of time that [the student] was required to do so under [the student's] IEP.

It is not absolutely clear from the evidence in the record how long it took the school district personnel to realize that the student needed a different education program and to fix the program, but it is assumed that the school district should have known that the 2012-2013 school year IEP was not working and been in a position to correct the problem at least half way into the school year. Accordingly, the period of deprivation of FAPE was approximately from the mid-point to the end of the 2012-2013 school year. Five months of compensatory education shall be awarded at two hour days because the student received two hours per day of academic instruction the previous successful school year.

It should be noted that the parent also argues that certain behavior issues were handled improperly by the school district, causing a denial of FAPE. The behavior issues alleged by the parent were not mentioned in the due process complaint filed herein and, therefore, it is beyond the scope of this proceeding to address any such issues. IDEA § 615(f)(3)(B). The behavior arguments are rejected.

Issue No. 3: Did the school district deny FAPE to the student by failing to provide adequate related services for the 2011-2012 and 2012-2013 school years?

Related services under IDEA means transportation and such developmental corrective and other supportive services as are **required to assist** a child with a disability **to benefit from special education**. 34 C.F.R. § 300.34(a)(emphasis added).

In the instant case, the parent argues that the student should have received additional occupational therapy and physical therapy.

In support of its argument, the parents cite Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 441 IDELR 130 (3d Cir. 1988) for the proposition that a related service may itself form the core of a student's special education program. The facts in Polk, however, are distinguishable from the facts of this case. The parents here have not shown that the student in the instant case requires physical therapy or occupational therapy or speech language therapy as the

"core" of [the student's] educational program. Indeed, it is apparent from the successful 2011-2012 school year educational program administered by the school district that the student made substantial educational progress in both academic fields with the same amounts of related services.

The parents did not present any testimony or other evidence to the effect that the student required additional amounts of related services in order to benefit from [the student's] education. Instead, the parents' argument appears to be that the student would do even better with more related services. A school district, however, is not required to maximize the potential of a student with disability or provide the best education possible; rather, it requires that an IEP be reasonably calculated to provide the basic floor of educational opportunity. Bd. of Educ, etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012). Accordingly, the evidence in the record does not support the parent's argument that the student required additional occupational therapy or physical therapy or other related services in order to benefit from [the student's] education. 34 C.F.R. § 300.34(a). The parent's argument with regard to related services is rejected.

Issue No. 4: Did the school district deny FAPE to the student by failing to provide adequate transportation services?

Transportation is also a related service under IDEA, and it must be provided by a school district, if necessary, for the student to benefit from [the student's] education. 34 C.F.R. § 300.34(a). See discussion above.

The evidence in the record, however, reveals that the school district modified its original transportation offer which would have required the student to spend 40 minutes on the bus to a program that would have required [the student] to ride the bus for 30 minutes. The reduction was in response to the parent's concern that the student would be fatigued by the longer bus ride. The subsequent transportation offer that required a 30-minute bus ride was shorter than the bus ride that the student had tolerated without problems during a previous school year.

The parents have not met their burden of showing that the transportation offered by the school district was insufficient to permit the student to benefit from [the student's] special education. It is concluded that the related service of transportation offered by the school district was appropriate and adequate. The parent chose to bring the student home herself, and her choice is valid, but that does not require compensation on the part of the school district under IDEA. The parents' arguments in this regard are rejected.

2. Relief

Where there has been a violation of IDEA, the hearing officer has broad equitable discretion to fashion an appropriate remedy. School Committee Town of Burlington v. Department of Educ., 471 U.S. 358, 369, 105 S. Ct. 1996, 556 IDELR 389 (1985); Forrest Grove Sch Dist v. TA 557 U.S. 230, 129 S.Ct. 2484, 52 IDELR 151 (2009); Garcia v. Bd. of Educ. of Albuquerque Public Schs, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 2008); Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp.3d 815, 46 IDELR 252 (C. D. Calif. 2008); Bishop v. Oakstone Academy, 47 IDELR 125 (S.D. Ohio 2007);); In re Student with a Disability 111 LRP 40544 (SEA WV 5/31/11); Dist of Columbia Public Schs 111 LRP 76506 (SEA DC 9/23/11) .

In the instant case, the remedies involving reimbursement of the money spent by the parents for the warranty and the rewriting of the student's IEP are fairly clear. The compensatory education award, however, is more difficult.

The parent's brief cites the Third Circuit decision in MC v Central Regional Sch Dist 81 F.3d, 389, 23 IDELR 1181 (3d Cir 1996) for the proposition that the compensatory education award should match the period of deprivation of FAPE. In addition, however, compensatory education should follow a flexible approach based upon the educational needs of the child who has been denied FAPE. For example some students might require only short intensive compensatory programs targeting

specific deficiencies. Other students may require more extended programs, perhaps requiring even more hours than the number of hours of FAPE denied. See, Reid ex rel Reid v. District of Columbia 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005).

In the instant case, the parties agree that this student suffers from problems related to fatigue. To the extent that an educational program is selected by the parents, it would not make sense to award compensatory education that prolonged the student's school day. Instead, the compensatory education awarded should be provided to the student over the course of the next two summers or during school breaks. The compensatory education will not constitute extended school year services designed to prevent regression. Rather the timing of the compensatory education recognizes the fatigue that the student suffers during a normal school day already. The parties should avoid fatiguing the student in providing the compensatory education.

The compensatory education award is subject to the following conditions and limitations: Subject to the foregoing discussion and requirements, the parents may decide how the hours of compensatory education will be spent. Because the student would receive two hours per day of academic instruction during the successful 2011-2012 school year when [the student] received FAPE, the compensatory education award will be calculated at two hour days for the five month period of deprivation of FAPE. The compensatory education may take the form of any appropriate

developmental, remedial or enriching educational service, product or device. The compensatory education shall be in addition to the student's current educational program. There are financial limits to the compensatory education award. The cost to the school district of the compensatory education may not exceed the full cost of the services denied during the period of deprivation of FAPE. Full costs are the hourly salary and fringe benefits that would have been paid to school district professionals during the period of deprivation of FAPE.

Concerning the student's IEP, it is clear from all the evidence in the record that the general education fifth grade class is not the right place for this student. [The student's] IEP must be rewritten to approximate the program that worked so well in the 2011-2012 school year. That is not to say that the academic subjects must be delivered at the student's home, but the general education classroom on the grade level of [the student's] same-aged peers is not yet going to work for this student. [The student's] IEP must reflect an appropriate environment and school-work level for [the student] to be able to learn. A program roughly based upon the 2011-2012 model, subject to any necessary modifications, should suffice.

Because compensatory education and other IDEA relief should be flexible and because IDEA is a collaborative process, the parties shall have the option to agree to

alter the relief awarded, so long as both parties agree. Schaffer v. Weast 546 U.S. 49, 126 S.Ct. 528, 44 IDELR 150 (11/14/5).

ORDER

Based upon the foregoing, it is HEREBY ORDERED as follows:

1. Unless the parties agree otherwise, the school district is hereby ordered to pay the parent the sum of $2,427.40 which is reimbursement for two years of warranty paid by the parents for the student's TOBII device;

2. Unless the parties agree otherwise, the school district is hereby ordered to rewrite the student's IEP to provide an educational program that approximates the successful 2011-2012 educational program for the student;

3. Unless the parties agree otherwise, the school district is ordered to provide five months compensatory education (calculated at two hour school days for the five month period of deprivation of FAPE) to the student over the course of the next two calendar years to be delivered over the summer months and/or during other substantial breaks during the school years, subject to the directions and guidance provided in this decision.

4. All other relief requested by the instant due process complaint is hereby denied.

ENTERED: October 2, 2013

James Gerl

James Gerl, Certified Hearing Official
Hearing Officer