This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

DECISION
COVER SHEET

This cover sheet contains personally identifiable information and should be removed before any dissemination of the decision to the public.

DUE PROCESS SPECIAL EDUCATION HEARING

FILE NUMBER:	14254/13-14KE
RESPONDENT/SCHOOL DISTRICT (LEA):	Mifflinburg Area School District
SCHOOL DISTRICT COUNSEL:	Christopher Conrad, Esquire
STUDENT:	E.E.
PARENT:	[Parent]
COUNSEL FOR STUDENT/PARENT	None
INITIATING PARTY:	Parent
DATE OF DUE PROCESS COMPLAINT:	August 29, 2013
DATE OF HEARING:	January 27 and 28, 2014
PLACE OF HEARING:	Mifflinburg Area School District
OPEN vs. CLOSED HEARING:	Closed
STUDENT PRESENT:	No
RECORD:	Verbatim-Court Reporter
DECISION TYPE:	Electronic
DUE DATE FOR DECISION:	March 18, 2014
HEARING OFFICER:	James Gerl, Certified Hearing Official

DECISION

DUE PROCESS HEARING

14254/13-14KE

PRELIMINARY MATTERS

The hearing officer entered a provisional dismissal of the above-referenced case on October 1, 2013 based upon reports from counsel that the matter had settled. The provisional dismissal Order had an escape clause providing that if the matter had not settled, the case could be reopened within sixty days. At the time of the October 1, 2013 Order, both parties were represented by counsel. Subsequently, the parent notified the hearing officer near the end of the 60-day period for which that she was no longer represented by counsel and that she wished to have the hearing reinstated. On December 9, 2013, the hearing officer entered an Order reinstating the due process hearing. Said Orders are incorporated herein by reference.

On December 6, 2013, a prehearing conference by telephone conference call was conducted for the above-referenced matter. As a result of said conference, a

prehearing conference order was entered herein. Said Order is incorporated herein by reference.

Following the prehearing conference, counsel for the school district made an unopposed motion to extend the hearing officer's decision deadline which was granted. The deadline for the hearing officer's decision is March 18, 2014.

Prior to the hearing, the parties were ordered to file a joint prehearing memorandum. The parties failed to file such a joint prehearing memorandum. Both parties were at fault in not filing the prehearing memorandum.

Subsequent to the hearing, the parties were ordered to file written briefs and proposed findings of fact. The school district did file a written brief and proposed finding of fact. The parent did not file a written brief or proposed findings of fact. The parent has been proceeding pro se since the matter was reinstated as noted above.

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 as clarified by the hearing officer, are as follows:

1. Did the school district violate its child find obligations under IDEA and Section 504 of the Rehabilitation Act?

2. Did the school district's February 8, 2013 IEP deny FAPE to the student?

3. Did Respondent discriminate against the student in violation of Section 504 of the Rehabilitation Act?

FINDINGS OF FACT

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

1. The student's date of birth is [redacted] (S-2). (References to exhibits shall hereafter be referred to as "P-1," etc. for the Parent's exhibits; "S-1," etc. for the school district's exhibits; references to testimony at the hearing is hereafter designated as "T".)

2. The student was diagnosed with chronic fatigue syndrome by an infectious disease physician. In a note to the school district on March 27, 2012, a physician's assistant noted that chronic fatigue syndrome is a chronic illness that may have an extensive recovery period. (S-3)

3. The symptoms commonly associated with chronic fatigue syndrome which is also known as myalgic encephalomyelitis, are migraine headaches, cognitive impairments, sleep disturbances and pain. Because of [the student's] illness, the student is easily exhausted and fatigued. [The student] has frequent migraine headaches and flu-like symptoms. Walking down the stairs in [the student's] home exhausts the student. (P-11; T of mother; P-4)

4. The student was an 11th grade student during the 2011-2012 school year. (S-47)

5. On March 6, 2012, the parent requested homebound instruction for the student from the school's vice principal. On March 7, 2012, the parent provided a medical note from a physician's assistant requesting homebound schooling for the student. (S-2; P-12; T of mother)

6. Beginning on March 16, 2012, the student began receiving homebound instruction from the first tutor of Respondent to work with [the student]. (S-4; P-12; T of first tutor)

7. A second tutor from Respondent began working with the student on March 31, 2012. The second tutor worked with the student through June 8, 2012. The student was very successful and made substantial educational progress while working with the second tutor. Some of the reasons why the second tutor was so successful with the student were that he developed a good rapport with [the student], took frequent breaks and that he would "chunk off" [the student's] work. In other words, he would make assignments smaller, breaking the educational material into smaller parts. The second tutor also found that it was helpful to take frequent short breaks (of two to ten minutes) while working with the student to allow [the student] to refocus on [the student's] school work. (T of mother; T of second tutor; S-5; S-20; P-12)

8. Upon the recommendation of the PEAL Center, with which the mother had consulted, the student's mother requested a Section 504 evaluation for the student

by letter on June 7, 2012. The PEAL Center is a parent/student advocacy organization. (S-8; T of mother; T of special education director)

9. On August 15, 2012, a §504 meeting was conducted. (S-10; P-12)

10. On August 21, 2012, a physician provided a note, which the mother provided to the school district, stating that the student could return to school but should return at reduced hours. The note requested the option for homebound services as well. (S-11; P-12)

11. On August 20, 2012, a Section 504 service agreement was developed for the student. A representative of the PEAL center participated by telephone. The §504 plan anticipated that the student would attend school and provided accommodations such as permitting [the student] to leave class early and to have a water bottle in class. (S-13; P-12; T of special education director)

12. The student only attended school for a few days at the end of August 2012 and then [the student] had to return to homebound instruction. (T of assistant principal; T of special education director; T of mother)

13. The assistant principal was unable to find anyone to deliver educational services as a homebound instructor to the student from the end of August through October 15, 2012. (T of assistant principal)

14. The student was gradually recovering from [the student's] illness until the middle of October. On October 17, 2012, on the way home from a doctor's appointment, the student and [the student's] mother had a car accident. The stress from the accident caused the student to suffer a serious relapse of [the student's] physical symptoms. (T of mother; P-12)

15. The student missed a large number of appointments with the third tutor, who was to work with [the student] on homebound instruction because the student was ill. (T of third tutor; S-14)

16. On December 13, 2012, a meeting was held concerning the student. The PEAL center participated by telephone. At the meeting, the Respondent's superintendent threatened that he could expel the student given the large number of absences. At the meeting, the superintendent also noted that the student could withdraw from school. The student's mother and the PEAL center representative rejected the notion of the student withdrawing from school. Instead, the mother requested that the student be evaluated for special education. (T of mother; P-12; S-16)

17. On December 18, 2012, the student's mother signed a Permission to Evaluate consent form. (S-18)

18. On January 21, 2013, Respondent's school psychologist issued an evaluation report for the student. In the report, the evaluator noted that the parent

stated that the student suffers from nausea, headaches, debilitating fatigue, brain fog and limited endurance. During the first half of 11th grade, the student was sick and missed a lot of school. During the second half, [the student] was placed on homebound. The evaluator conducted an individual assessment of the student on December 18th. He administered the Woodcock Johnson test of cognitive abilities. The results of the test indicate the student's general intelligence was high average and that [the student's] other scores ranged from low average to superior. He also administered the Woodcock Johnson test of achievement in which the student scored average reading, average in math and average to high average in writing. The evaluation included an interview of the second tutor who worked successfully with the student on homebound instruction. The tutor indicated that [the student's] level of concentration improved as he was working with [the student] in May and June, and that when [the student] was not focusing well, they would take a short break. During the breaks, which would last from two to about 10 minutes, they would talk about movies [the student] had seen or [the student's] friends. After the break, [the student] was able to refocus well. (S-20)

19. The evaluation by Respondent included the student's mother completing the Connors current rating scale. In this test, the student received abnormal range scores on the inattention and executive functioning scales. The student also completed the Reynolds Adolescent Adjustment Screening Inventory. This test

indicated that the student felt more anxious and worried and depressed than 96 per cent of [students who are the student's gender and] age. In the section titled "Developmental Needs of the Child," the evaluator noted that the student should maintain [the student's] basic and applied reading and writing skills, as well as [the student's] applied math skills and that [the student] should remediate [the student's] basic math skills. In addition, he noted that [the student] should have short-term educational goals, build endurance for educational tasks, take initiative to learn something new in an area of interest, and become a more forceful advocate for [the student's] wishes and needs. In the summary and interpretation of results portion of the evaluation, the evaluator notes that the student's educational instruction has been limited and sporadic for the past year and that [the student] has developed secondary symptoms of anxiety and depression. The evaluator recommended that educators when instructing the student: take time to develop a rapport, break activities down, take small steps at a time, take frequent breaks, avoid time limits, learn and appeal to [the student's] interests, build on previous successes, and be patient. The evaluator recommended that the student be found eligible for special education under the other health impairment category. (S-20)

20. The IEP team met for the student on February 8, 2013. In attendance were the parent, the student, the school psychologist who conducted the evaluation of the student, Respondent's special education director, a special education teacher, the

vice principal and a regular education teacher. At the IEP team meeting, the school psychologist who evaluated the student discussed the need to remediate the student's basic math skills. (S-24, S-25; P-12)

21. On February 8, 2013, an IEP was developed for the student. The IEP states that the student does not need assistive technology devices and/or services. The IEP notes under academic needs that the student needs to remediate [the student's] basic math skills, but the IEP only contains only one annual goal: that the student will complete all necessary work to obtain a passing grade and credit for two high school courses. The IEP allows for certain courses to be taken on the Moodle, a type of computer software. The IEP also allows extended time to complete certain courses. The IEP provides no related services or other accommodations. The IEP is silent concerning chunking down or reducing educational materials to smaller units. The IEP is silent as to taking small steps at a time and developing a rapport with the student. The IEP is silent as to taking frequent breaks and avoiding time limits. The IEP mentions the student's need to remediate [the student's] basic math skills, but it contains no goals or specially designed instruction to meet that need. (S-25)

22. A fourth homebound instruction tutor met with the student approximately nine times between March 1, 2013 and April 23, 2013. During that timeframe, a number of appointments had to be cancelled because the student was sick. (S-27; P-12; T of mother)

23. The student did not make educational progress during the third and fourth marking periods of the 2012-2013 school year. [The student] had not completed the two credits [the student] was working on in homebound instruction during that timeframe. (S-29)

24. At the request of the student's mother, the student's IEP team was convened on May 9, 2013. Present at the meeting were a special education teacher, the assistant principal, the student, the student's mother and Respondent's special education director. At the meeting, the student's mother noted that the fourth tutor assigned to work with the student for homebound instruction often wore a headset to listen to music while he was supposed to be tutoring the student and that it sent the wrong message. The assistant principal confronted and reprimanded the tutor in front of the student and [the student's] mother for listening to music while working with the student. The student's need for remedial math was brought up again at this meeting. No new IEP or amendments to the existing IEP resulted from said meeting. The team did agree that homebound instruction would continue during the summer. (S-30; P-12; T of mother; T of special education director)

25. The parent requested another IEP team meeting on May 30, 2012, but the Respondent's special education director stated that she could not convene an IEP team meeting because the case manager, who was also the special education teacher, did not live in the area during the summer. The special education director was not

able to honor the parent's request to assign a different case manager but did agree to assign a different tutor. (P-12; T of mother)

26. A fifth and final homebound instruction tutor was assigned to work with the student for the summer of 2013. The tutor had difficulty scheduling appointments with the student. Many of the appointments had to be cancelled because the student was sick. On two occasions, the tutor showed up thirty minutes late for an appointment. On June 20, 2013, the tutor never showed up at all despite having scheduled an appointment with the student. The tutor spent much of his time preparing a to-do list rather than providing academic instruction to the student. On June 24, 2013, the tutor arrived at the home of the student and the mother, although he was not scheduled for an appointment that day. On July 10, 2013, the tutor was scheduled for 1:00 and called to ask if he could come at 3:00 instead, although he did not show up until 3:30. The tutor said to the student at some point on that night "…if a fine teacher like (the second homebound tutor) could not get you to complete your work, how will I be able to do it?" The mother at one point during that night noted that the student was teaching the tutor how to use the Moodle system, and the mother stated that the school should have trained the tutor on how to use the software. In response, the tutor said in a belligerent tone that he did not want to hear about the past two years of history. The mother then objected to the tutor making to-do lists rather than instructing the student. The tutor responded by saying that he did

not have to be there and that he did not need this job as a tutor. He then angrily and in a belligerent tone asked the mother, "do you want me to make the list or not." He repeated the question in a loud voice two more times. (P-6, P-4; T of mother; T of final tutor; S-31)

27. After the July 10, 2013 incident with the final tutor, the student's mother stopped communicating with the tutor. The student's mother never informed the school district of the incidents on that date with the tutor, except in general terms by email on November 1, 2013. The reason the parent did not tell the school district of the specifics involved post-traumatic stress disorder of dealing with abusive men in positions of authority. (T of mother; S-41)

28. The parent requested an IEP team meeting by e-mail to the special education director on August 20, 2013. In the email, the parent mentioned the possibilities of instruction in the home, taping of the student's classes and cyber school. (S-32)

29. Before the special education director was able to schedule an IEP team meeting, the parent filed for due process on August 29, 2013. (T of special education director)

30. Through the IDEA resolution process, four additional draft IEPs were developed and the parties corresponded concerning potential changes to the IEPs. (T of special education director; S-34, S-35, S-36, S-38, S-39,S-40, S-41, S-46)

31. The parent notified the special education director on October 4, 2013 by e-mail that she was no longer represented by her previous legal counsel and requested that all communications be directed to her. (S-37)

32. Among the changes offered by Respondent in the resolution process were the provision of assistive technology for the student and an increase in the number of hours of instruction from five to 10, and the use of a private tutoring firm to provide instruction services. (S-34, S-36, S-40; S-46; T of special education director)

33. One sticking point in the negotiations and the resolution process was the insistence of the parent and the student that the student could handle a full class load. Given the student's problems with fatigue and focus and concentration, it is extremely unlikely that [the student] would be able to handle a full load of courses. The expectation of the parent and the student in this regard is unrealistic. Another point of contention was that the student asked for specific help in math, but [the student's] request was not addressed. (T of special education director; P-4; T of mother)

34. As of the date of the hearing herein, the student had completed only one credit in the 12th grade. (S-49)

35. The student would benefit from the use of a laptop computer with: Dragon Speaking or some similar word to text software and other appropriate software. (T of mother)

36. Respondent has not conducted an assistive technology evaluation of the student. (record evidence as a whole)

37. The February 8, 2013 IEP developed by the school district for the student was not reasonably calculated to confer meaningful educational benefit (record evidence as a whole)

38. The school district did not violate its child find duties with respect to its handling of the student. (record evidence as a whole)

39. The school district, except as aforesaid, has not discriminated against the student on the basis of [the student's] disability. (record evidence as a whole)

CONCLUSIONS OF LAW

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

1. Under Individuals With Disabilities Education Act and Section 504 of the Rehabilitation Act, school districts have a child find obligation which means that they must ensure that children with disabilities or children who are reasonably suspected of having disabilities are identified, located and evaluated and that a practical method is developed and implemented to determine whether children with disabilities are currently receiving special education and related services. IDEA §

612(a)(3); 34 C.F.R. § 300.111; 34 C.F.R. § 104.32; 22 Pa. Code §§ 14.121 through 14.125; Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012); PP by Michael P & Rita P v. Westchester Area School District, 585 F.3d 727, 53 IDELR 109 (3d Cir. 2009).

2. Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall solely by reason of her or his disability be excluded from participation and/or be denied the benefits of or be subjected to discrimination under any program that receives federal funds. 29 U.S.C. § 794; 34 C.F.R. § 104.33; 22 Pa. Code § 15.1. In order to prove a violation of Section 504, parents must show that "1) that the student is disabled, 2) that the student was otherwise qualified to participate in school activities, 3) that respondent receive federal financial assistance, and 4) that the student was excluded from participation and/or denied the benefits of education as a result of discrimination by the Respondent." Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012); 29 U.S.C. § 794; 34 C.F.R. 104.33(b)(1); 22 Pa. Code § 15.3. In order to be eligible, a student's disability must substantially impair a major life activity; such as learning. 34 C.F.R. § 104.3(i) and (j); 22 Pa. Code § 15.2; Macfarlan v. Ivy Hills SNF, LLC, 675 F.3d 266, 112 L.R.P. 16588 (3d Cir. 2012).

3. 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 individualized educational plan (sometimes hereafter referred to as "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., 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).

4. Where there has been a violation of IDEA, the hearing officer has broad equitable discretion to fashion an appropriate remedy. School Committed Town of Burlington v. Bd. of Educ., 471 U.S. 358, 369, 105 S. Ct. 1996, 556 IDELR 389 (U.S. 1985); Forest Grove Sch. Dist. v. T. A., 557 U.S. 230, 129 S. Ct. 2484, 52 IDELR 151 (U.S. 2009); Garcia v. Bd. of Educ. of Albuquerque Public Schools, 530 F.3d 1116, 49 IDELR 241 (10th Cir. 2008); In re Student with a Disability, 111 L.R.P. 40544 (SEA WV 2011); District of Columbia Public Schools 111 L.R.P. 76506 (SEA D.C. 2011)

5. Compensatory education should follow a flexible approach in order to remedy the educational harm caused by the denial of FAPE. Some students may require only short intensive program to target specific deficiencies despite a long denial of FAPE, while other students may require more extended programs, although they had a relatively short denial of FAPE. See Reid ex rel. Reid v. District of

Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005). In many cases, an hour to hour award of compensatory education for loss of educational services is not appropriate. Central School District v. KC by SC and SC, 61 IDELR 125 (E.D. Penna. July 3, 2013); Reid ex rel. Reid v. District of Columbia, supra; Ferren C. v. School District of Philadelphia 612 F.3d 712, 54 IDELR 274 (3d Cir. 2010).

6. In the instant case, the school district did not violate its child find duties under IDEA or Section 504.

7. In the instant case, except to the extent that the February 8, 2013 IEP was not reasonably calculated to confer meaningful educational benefit, Respondent has not discriminated against the student in violation of Section 504.

8. In the instant case, the February 8, 2013 IEP developed for the student is not reasonably calculated to confer meaningful educational benefit, and, therefore, denies the student a free and appropriate public education.

DISCUSSION

1. Merits

Issue No. 1: Did the school district violate its child find obligations under IDEA or Section 504?

The parent's due process complaint alleges that the school district should have evaluated the student for either special education or a Section 504 plan as of April 2012. Unfortunately, although the due process complaint was drafted by an attorney, the parent proceeded pro se at the hearing and she failed to file a post hearing brief. The allegation was never fleshed out. It is difficult to understand this allegation without a brief.

The evidence in the record, however, does not support the parent's contention. In particular, it should be noted that the second homebound tutor who worked with the student was very successful, and the student progressed while he was working with [the student], especially during May and June of 2012. This was prior to the development of the 504 plan and the student's IEP and just after the April 2012 date asserted in the complaint.

Once the parent made requests for a 504 plan and a special education evaluation, the school district complied with those requests in a timely manner. There is no evidence in the record, with the exception of the student's large number of absences, which would lead the school district to reasonably suspect that the student had a disability. But not every failing grade or absence from school triggers a child find obligation to evaluate a student. See, Ridley School District v. MR and JR ex rel. ER, 680 F.3d 260, 58 IDELR 271 (3d Cir. 2012). The evidence reveals that the school

district became aware that the student was sick and appropriately provided homebound instruction during that period of time. Thereafter, the school district timely complied with parent requests for a §504 plan and a special education evaluation.

To the extent that the testimony of the parent and the testimony of the school district staff may vary as to this issue, it is concluded that the testimony of the school district staff is more credible and persuasive that the testimony of the parent. The parent's argument that the school district violated its child find obligations is rejected.

Issue No. 2: Does the February 11, 2013 IEP provide a free and appropriate public education to the student?

The hearing officer has consolidated and restated a number of issues from the parent's due process complaint into this second issue. The posthearing brief submitted by the school district also states this issue in the same manner. The parent has unfortunately not filed a brief.

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 individualized educational plan (sometimes hereafter referred to as "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., 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).

Although the parent failed to file a posthearing brief, there does not appear from the evidence in the record to be any procedural violations alleged herein by the parent. Accordingly, we turn to analysis of the student's IEP.

The February 8, 2013 IEP for the student was not reasonably calculated to confer meaningful educational benefit. The IEP contains a single annual goal which is extremely overbroad. The goal simply notes that the student will complete all necessary work to obtain passing grades and credit for the courses [the student] is taking. In addition, said IEP largely ignores the recommendations contained in Respondent's own evaluation report which was issued on January 21, 2013. In said evaluation report, Respondent's school psychologist concludes in the section labeled "Related Developmental Needs of the Child" that the student needs to maintain [the student's] basic and applied reading and writing skills, as well as [the student's] applied math skills while [the student] remediates [the student's] basic math skills. The

February 8, 2013 IEP mentions remediation of basic math skills, but provides no goals or specially designed instruction to achieve said remediation.

In addition, the evaluation report prepared by Respondent recommends that the IEP team develop viable short-term educational goals. The single general goal contained in the IEP does not come close to accomplishing this task. The evaluation report also suggests that the student build endurance for educational tasks. The IEP is silent as to this recommendation as well.

In the section of the evaluation report in which the findings and interpretation of the assessment results are summarized, the evaluator makes a number of specific recommendations including: take time to develop a rapport; break activities down; take small steps at a time; take frequent breaks; avoid time limits; learn and appeal to [the student's] interests; build on previous successes; and be patient. The February 8, 2013 IEP includes nothing with regard to these recommendations. It should be noted here that the second homebound instruction tutor that worked with the student, prior to the adoption of [the student's] IEP, successfully utilized many of the techniques recommended by the school psychologist in his evaluation report. In particular, he was very good about breaking activities down and taking small steps at a time. In her testimony, the student's mother referred to this as his "chunking down" of the educational materials by the second tutor. The evaluation report by Respondent's

school psychologist notes that the successful second tutor also utilized the technique of taking frequent breaks in order to refocus the student on the educational task at hand. The notes of the February 8, 2013 IEP team meeting show that the school psychologist noted that the student's basic math skills needed to be remediated at the meeting, yet the IEP does not contain any goals or specially designed instruction related to remediation of [the student's] basic math skills.

In addition, Respondent's implementation of the February 8, 2013 IEP was lacking in material respects. In particular, the last tutor assigned to work with the student as a homebound instructor was not competent to perform the tasks assigned. He worked with the student on developing to-do lists instead of teaching [the student] the course material. When confronted about this by the student's mother, the final tutor became abusive and made unkind statements to the student and [the student's] mother. The fourth tutor listened to music while he was supposed to be tutoring the student.

Unfortunately, the student's mother simply stopped communicating with the final tutor as a result of his abusive behavior. More importantly, the parent never communicated the specifics of the misconduct of the final tutor to the school district. If she had reported his abusive behavior to the school district and it had not been addressed, this case would present a much more serious a violation of IDEA. As it is,

however, it cannot in fairness be concluded that the school district was aware of the abusive and incompetent behavior by the final tutor.

To the extent that the testimony of the school district staff conflicts with the testimony of the student's parent concerning the appropriateness of the February 8, 2013 IEP, it is concluded that the testimony of the student's parent is more credible and persuasive than the testimony of school district staff. It should be noted, in particular, that the final tutor admits in his testimony that he made some of the statements attributed to him by the mother. His admission in this regard corroborates the mother's persuasive and credible testimony.

Finally, it should be noted that the student made little, if any, educational progress under the February 8, 2013 IEP through the end of the 2012-2013 school year. It is concluded that the February 8, 2013 IEP for the student was not reasonably calculated to confer meaningful educational benefit. Accordingly, it is concluded that Respondent denied FAPE to the student for the period from February 8, 2013 through the end of the 2012-2013 school year.

Issues No. 3: Whether Respondent discriminated against the student in violation of Section 504.

The parent's due process complaint alleges that the school district discriminated against the student on the basis of Section 504 because of [the student's] disability.

Unfortunately, although the due process complaint was drafted by an attorney, the parent proceeded pro se at the hearing and she failed to file a post hearing brief. It is difficult understand from the record evidence without a brief how the school district may have discriminated against the student. Except to the extent that the February 8, 2013 IEP denied FAPE, there is no merit to the allegation.

To the extent that the testimony of the parent and the testimony of the school district staff may vary as to this issue, it is concluded that the testimony of the school district staff is more credible and persuasive that the testimony of the parent.

Because no cogent argument is presented and because no evidence of discrimination appears from a thorough review of the record evidence, the parent's argument is rejected. Accordingly, it is concluded that, except to the extent that the February 8, 2013 IEP was not reasonably calculated to confer meaningful educational benefit as is more fully discussed in the discussion of the previous issue, the school district did not discriminate against the student in violation of Section 504.

2. Relief

In the instant case, the school district has been found to have violated IDEA by developing an IEP on February 8, 2013 that was not reasonably calculated to confer meaningful educational benefit. When there has been a violation of IDEA, a hearing officer has broad equitable discretion to fashion an appropriate remedy.

The first item of relief to be ordered in this case, therefore, will require that the student's IEP be rewritten so that it properly reflects the evaluation report prepared by Respondent's own school psychologist. In particular, the IEP must have appropriate and specific short-term educational goals. Among such goals would be goals tailored to the remediation of the student's basic math skills. In addition, the IEP must have goals and/or accommodations and/or or specialized instruction and/or other strategies related to building endurance for educational tasks, providing work in the student's area of interest, taking time to develop a rapport, breaking activities down or "chunking down" of educational materials, taking small steps at a time, taking frequent breaks, avoiding time limits, learning to appeal to the student's interests, building on previous successes and being patient. The IEP should provide that the student receives the instruction in [the student's] home, at least at first, from a private tutoring company. It may be more appropriate for the student to receive instruction conducted in the home, as opposed to homebound instruction, to avoid

artificial or bureaucratic restrictions on the availability of competent tutors to instruct the student.

In addition, the IEP for the student must include more than five hours of instruction. Although the student suffers from fatigue when [the student] works too much, the in home instruction should begin with 12 hours of instruction per week. If the student does not tolerate that much instruction, then the IEP team should be reconvened to determine an appropriate lower number. Respondent should also ensure that the in home instruction given to the student be delivered or implemented by teachers qualified to teach the subjects being taught; a private tutoring firm should be used to provide instruction to the student given the implementation difficulties experienced by some of Respondent's homebound tutors.

At some point during the attempts to resolve this claim, the student and parent took the position that the student should carry a full-time load of courses. Based upon the student's clear difficulties with fatigue, this position is not appropriate. Twelve hours is a sufficient amount of study with a tutor for the student at first. If [the student] improves in terms of strength and vitality, the number should later be increased.

The most common form of relief under IDEA for denial of FAPE is compensatory education. Compensatory education is designed to compensate the

student for the educational harm done to them by a denial of FAPE. Ferren C. v. School District of Philadelphia, 612 F.3d 712, 54 IDELR 274 (3d Cir. 2010). A compensatory education award should aim to place the student in the same position he would have occupied but for the school district's violations. Central School District v. KC by SC and SC, 61 IDELR 125 (E.D. Penna. 2013); Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. March 25, 2005). In awarding compensatory education, an hour for hour formula that replaces lost education with additional education is not always the most appropriate method of compensation. Central School District v. KC by SC and SC, supra.

In the instant case, it is apparent that an hour for hour award of compensatory education would not benefit the student. The student in this case easily suffers from fatigue. Additional stressors make [the student's] physical condition worse. To award compensatory education which would be delivered in addition to the education [the student] receives during normal school instruction would be burdensome and inappropriate for this student. Indeed, in this case, additional tutoring, beyond [the student's] school work, would only make the student's physical condition worse. Nonetheless, the student is entitled to be made whole for the denial of FAPE by Respondent.

Instead of additional tutoring, therefore, the order in this case will require Respondent to make the student whole by providing other avenues to help [the student] recover from the educational harm [the student] has suffered because of the denial of FAPE. The record evidence in this case indicates that the student would benefit from a laptop computer. Accordingly, Respondent will be ordered to purchase a laptop computer for the student to use. Said computer should be loaded with Dragon Speaking or some similar language to text software, as well as other software that will help the student remediate [the student's] basic skills, "chunk down" or to make smaller units of the educational material, to enable [the student] to utilize audio or video recordings of classroom lectures or presentations, and any other software that would effectuate implement the recommendations of Respondent's evaluation report for the student. If Respondent cannot identify such computer software, it should provide other appropriate computer software to the student that would be beneficial to [the student's] education.

In addition, the compensatory education award in this case will require Respondent to eliminate any artificial limits on the student's education. This would include providing instruction in the home to the student during the summer months and during school breaks, as well as during the normal school year if the student can tolerate such instruction without developing fatigue. In addition, if the student needs

additional time to complete school work, Respondent will be ordered to flexible to allow same.

Also, the compensatory education award in this case will include a requirement that the school district conduct a thorough assistive technology evaluation of the student. The relief ordered above concerning a laptop computer and related software is based upon items already identified in the record evidence presented by the parent that the student needs in order to succeed. However, the student's mother should not be expected to be an assistive technology expert. Significantly, Respondent conceded during the IDEA resolution process that the student likely needs Assistive Technology. The record evidence, however, contains no assistive technology evaluation of the student. Accordingly, assistive technology evaluation to be ordered as a part of the compensatory education award should include a review of other possible assistive technology that may help the student to successfully complete [the student's] high school courses.

It should be noted that the compensatory education award herein does not provide relief for the period of time that the student and parent were harassed by the fifth and final homebound tutor. For whatever reason, the parent did not inform the school district of the specifics of tutor's actions. She simply stopped responding to his emails and phone calls. If she had done so, the relief awarded would be larger.

Because the school district was not aware of the tutor's misconduct, the district cannot be held responsible for his misconduct.

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. Shaffer v. Weast, 546 U.S. 49; 126 S. Ct. 528, 44 IDELR 150 (November 14, 2005).

ORDER

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

1. Unless the parties agree otherwise, the school district is ordered to rewrite the student's IEP consistent with the directions set forth herein;

2. Unless the parties agree otherwise, the school district is ordered to provide to the parent as compensatory education for its denial of FAPE the following:

   a. Unless the parties agree otherwise, the school district shall purchase and provide to the student, within the 20 days of the date of this decision, a laptop computer, and

   b. Unless the parties agree otherwise, the school district shall purchase and load onto said laptop computer: Dragon Speaking

or some similar word to text software; software that will help the student remediate [the student's] basic math skills; software that will help the student "chunk down" or break [the student's] educational materials into smaller parts, and any other software that might help implement the recommendations contained in the January 21, 2013 evaluation report prepared by Respondent's school psychologist, pursuant to directions set forth above, as well as any hardware that would be useful in order to operate such software;

c. Unless the parties agree otherwise, the school district shall follow the instructions set forth herein in rewriting and implementing the student's IEP; and

d. Unless the parties agree otherwise, Respondent shall, within 30 days after the date of this decision, conduct a thorough assistive technology evaluation of the student to determine whether it may provide any additional assistive technology to the student that may help [the student] finish [the student's] high school work and incorporate the results of said evaluation into the student's IEP; and

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

ENTERED: March 18, 2014

James Gerl

James Gerl, Certified Hearing Official
Hearing Officer