

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.

PENNSYLVANIA SPECIAL EDUCATION HEARING OFFICER

DECISION

Child's Name: M.T.

Date of Birth: [redacted]

ODR File No. 15066-1314 AS

Dates of Hearing:

October 10, 2014

December 9, 2014

OPEN HEARING

Parties to the Hearing:

Representative:

Parent[s]

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Date Record Closed:

January 2, 2015

Date of Decision:

January 10, 2015

Hearing Officer:

Cathy A. Skidmore, M.Ed., J.D.

INTRODUCTION AND PROCEDURAL HISTORY

The student (hereafter Student)¹ is a mid-elementary school-aged student in the Fox Chapel Area School District (hereafter District) who is eligible for special education pursuant to the Individuals with Disabilities Education Act (IDEA).² Student's Parents filed a due process complaint against the District asserting that it denied Student a free, appropriate public education (FAPE) under the IDEA as well as the federal and state regulations implementing the statute.

The case proceeded to a due process hearing convening over two sessions, at which the parties presented evidence in support of their respective positions. The Parents sought to establish that the District failed to appropriately address Student's physical and mobility needs through the use of a specific device, a walker, at school. The District maintained that its special education programming for Student's physical and mobility needs was appropriate for Student.

For the reasons set forth below, I find in favor of the District.

ISSUES

1. Whether Student requires the provision of a walker at school at public expense;
2. Whether Student's Individualized Education Program (IEP) requires the inclusion of goals relating to use of the walker; and
3. If so, whether Student is entitled to compensatory education for the District's failure to provide the walker at school and relevant IEP goals addressing that need.³

¹ Even though this was an open hearing, in the interest of confidentiality and privacy, Student's name and gender are not used in the body of this decision.

² 20 U.S.C. §§ 1400-1482.

³ Because of the narrow issues presented, the findings and discussion will focus on Student's gross motor abilities and needs. References to the exhibits will be made as follows: Joint Exhibits as "J-"; Parent Exhibits as "P-"; School District Exhibits as "S-". Additionally, references to District staff may at times include employees of the local Intermediate Unit, who participated in providing related services to Student for the District. This hearing officer appreciates the cooperation of counsel in providing Joint Exhibits to the extent that was possible.

FINDINGS OF FACT

General Background

1. Student is a mid-elementary school-aged student who resides in the District and is eligible for special education under the IDEA category of multiple disabilities. (Notes of Testimony (N.T.) 21-22)
2. Student was developmentally delayed from birth and diagnosed with cerebral palsy at the age of one year. Student has also been diagnosed with epilepsy. Student began receiving early intervention services at the age of six months. (N.T. 152-53; J-7 p. 1, J-8 p. 2)
3. Student is nonverbal and uses an augmentative and alternative communication device in addition to gestures and some vocalizations. Student uses both a power wheelchair and a walker for mobility. (N.T. 152)
4. Student has experienced seizures at school, which sometimes caused fatigue. When seizures last more than five minutes in duration, Student requires medication from the nurse. (N.T. 103-05, 137-38; J-9 p. 4)
5. Student was initially evaluated by the District in the spring of 2011 in anticipation of Student reaching the age for a school-age program. The resulting Evaluation Report (ER) included assessment of cognitive, adaptive behavior, sensory processing, personal and social development, speech/language, and gross and fine motor skills, as well as assistive technology needs and behavior, in addition to classroom observations. Student was determined to be eligible for special education with multiple disabilities as the primary category and an intellectual disability as the secondary category of classification. (J-7)
6. Since Student was in preschool, Student has required the assistance of a full-time personal care assistant or aide for all activities at school. (J-7 pp. 2, 5 18; J-8 p. 4; J-9 p. 5; J-10 p. 77; J-11 p. 83; J-12 p. 59; J-13 p. 67; J-14 p. 69; J-15 p. 63)

Physical and Mobility Background

7. Since Student was in first grade, Student has used a power wheelchair and two adaptive chairs that provided support, as well as the use of a stander (45 minutes per day) in the classroom during instructional time. (N.T. 106-07, 269-70)
8. Throughout Student's school career, Student has been provided opportunities for walking with physical assistance, for short distances only. The physical assistance is support of Student's trunk; Student bears Student's weight and walks with minimal to sometimes moderate assistance.⁴ (N.T. 265, 349, 351)

⁴ This level of support is consistent with that found by the private physical therapist during the September 2014 evaluation, discussed below. (P-3 p. 2)

9. Student's primary and most efficient means of transportation throughout the school building is the power wheelchair. This finding is not in dispute. (N.T. 53-54, 74, 164, 261, 286, 337)
10. Student has had different walkers since preschool and requires assistance to get into and out of those devices. Currently Student has a walker that Student uses in private therapy as well as at home, including outdoors. At times Student has used a walker at school, both inside and outside during recess.⁵ (N.T. 37, 108, 120-22, 153-55, 225-26, 228, 244, 350-51; P-12)
11. Student has and does socialize with peers while walking with physical assistance, standing, and sitting in and out of the wheelchair. (N.T. 268-69, 356-57)
12. Since kindergarten, Student has had both regular physical education and adaptive physical education classes. During kindergarten, regular physical education was once a week; for grades one through three, it was and is twice per week. Adaptive physical education has been once per week. (N.T. 295-96; J-10 p. 73; J-11 p. 76; J-12 p. 52; J-13 p. 59; J-14 p. 61; J-15 p. 55)
13. Student generally participates in regular physical education class using the motorized wheelchair. Student participates in all activities, although some activities and equipment are modified and/or adapted for Student. One example of such modification is the elevation of the wheelchair leg supports so that Student is able to kick an oversize ball. (N.T. 296-98, 301-02, 322)
14. Student is generally not able to kick a ball when using a walker, because the device stops the ball before it reaches Student's feet. Student can, however, kick a ball that is placed inside the walker just in front of Student's feet; while Student can be successful using this method, the ball only travels as far as the walker apparatus. (N.T. 173, 306, 308, 310; P-12)
15. Student participates in some regular physical education activities outside of the wheelchair, such as when a group of students, including Student, are using a scooter or during floor work on a mat. The aide assists Student as needed during those times. (N.T. 298-300, 317-23)
16. Student interacts with peers during regular physical education class. (N.T. 300-01, 323-24)
17. Student is currently working on all of the third grade Pennsylvania Academic Standards for Physical Activity⁶ for recognizing and using basic movement skills and concepts, with modifications: (locomotor movements, non-locomotor movements, manipulative movements, relationships, combination movements, space awareness, and effort); and those for promoting fitness and health. (N.T. 263-64, 300-06, 307-08, 314-15, 317, 325-26, 329-31; P-10 pp. 9, 11)

⁵ More specific descriptions of the use of the walker at school are set forth *infra*.

⁶ 22 Pa. Code Chapter 4, Appendix D (effective Jan. 11, 2003).

18. Student participates in adaptive physical education which is a time for students to prepare for the activities in regular physical education, and for the physical education teacher to determine what modifications and adaptations are necessary for individual students. (N.T. 309, 313)
19. Student has been and is provided with physical therapy as a related service. This therapy involves 45 minutes of individual, direct physical therapy and consultation with and training of other staff working with Student. (N.T. 334-35)

2012-13 School Year

20. Student was in first grade for the 2012-13 school year. (N.T. 106)
21. Student was given opportunities to walk short distances with physical assistance of an aide at school. Student also had the use of a walker that the Parents sent in to school several days each week. At the beginning of the year, Student used an older device and needed encouragement to use the walker; later in the year, Student required less prompting. Prompts could be physical or verbal or both. Student occasionally used the walker outside at recess where Student was in a small group of students in an enclosed area made of concrete. No regular education students were part of that small group. (N.T. 107-09, 110-14, 139-42, 265, 153-54, 184-85, 335-39)
22. In December 2012, a private physical therapist recommended a specific, new walker for Student to allow Student adequate support to weight bear and take reciprocal steps in a quality walking pattern. Student had demonstrated success using that specific walker in private therapy sessions. (P-6 p. 15; S-3)
23. Student's IEP team met in January 2013 to discuss the Parents' request for the school to obtain a walker for Student to use at school. The team discussed a course of action to work together to acquire the suggested walker on a trial basis. (J-10 p. 8; P-6 p. 13)
24. Student had a newer walker on a trial basis in the spring of that school year. District staff assisted the Parents in procuring that walker. Student required less prompting than with the prior device, but sometimes needed verbal or physical prompts, and at times exhibited difficulties maintaining posture, positioning, and foot placement. After the trial period ended in May 2013, the Parents and District staff discussed revisions to Student's IEP goals for physical therapy, and the Parents asked about adding use of the walker to Student's IEP. (N.T. 113-16, 157, 161, 243-45, 277, 289, 339-41, 342-43; P-6 pp. 1-4, 8-12)
25. The District conducted a reevaluation of Student in the spring of 2013 and issued a Reevaluation Report (2013 RR). In addition to curriculum-based assessment (components of the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP)), classroom observation, teacher and therapist input, the RR included a summary of progress monitoring and an instrument to evaluate Student's adaptive behavior. Student remained eligible for special education in the same disability categories. (J-8)

26. The physical therapist's input into the RR described Student's progress on goals for transferring positions within the classroom and increasing independence with the power wheelchair. Information on Student's ability to sit with and without an adaptive chair and walk with physical assistance was also provided, as was Student's use of the stander (on a daily basis) and walker (travel to adaptive physical education and occasionally at recess). (J-8 pp. 14-15)
27. An Individualized Education Program (IEP) was developed for Student in May 2013. This IEP contained a number of goals and objectives as well as program modifications and specially designed instruction. As is relevant to this matter, there are two physical therapy goals: one for using the power wheelchair independently for transitions outside of the classroom, and one for physical transitions, with assistance, within the classroom (from sitting on carpet to sitting in a classroom chair; and from the wheelchair to sitting in a classroom chair). Related program modifications and specially designed instruction included a one-on-one personal care assistant for all daily activities (movement, sitting, positioning, standing, and others); adaptive physical education; assistance as needed for all transitions; assistance with the power wheelchair; and procedures for Student's transfer from the wheelchair to the classroom chair. (J-10)
28. During the summer of 2013, the Parents provided Student's walker at school during some days of the extended school year (ESY) services. (N.T. 192, 193-94; P-6 pp. 5-6, P-9)

2013-14 School Year

29. In November 2013, the Parents asked about adding goals to Student's IEP relating to the walker. District staff had not seen Student use a walker in school that school year at the time of that request. (N.T. 245-47, 343-44; P-6 pp.19-20; S-4)
30. The District convened a meeting of the IEP team and proposed an evaluation of Student using the walker to provide information for making any determination about adding such IEP goals. After several efforts at clarifying the need for this evaluation, the Parents ultimately gave consent in April 2014. (N.T. 246-48; J-1, J-2, J-3, J-4, J-5; P-6 pp. 19-20; S-4)
31. At a January 2014 meeting, Student's IEP was updated to provide current information and progress reporting on the existing IEP; the revision included the Parents' desire to add use of the walker at school to that document. In addition to some changes to goals and objectives in other areas, the team agreed to add, as an item of specially designed instruction, "opportunities to ambulate with appropriate assistive device throughout the school day ... 3-5 times per week as tolerated." (J-11 p. 75) Although the Parent wanted this addition to specify the walker, the District determined that broader language was necessary to also include walking with physical assistance. (N.T. 248-50, 251, 400-01, 402-03; J-11)
32. The Parent approved the revisions to the January 2014 IEP. (P-6 p. 17)
33. Student had a newer walker during the 2013-14 school year that was similar to the one from the previous spring but included an abductor bar. The Parents agreed to, and did,

send the walker into school several days a week “on an interim basis” (P-11) for a period of approximately 30 days after the January IEP meeting through the end of February 2014, but not before or after that period. (N.T. 117, 119, 123-24, 128-29, 160, 162-63, 184-85, 194-95, 249-50, 274-75, 343-47, 382, 403; P-11)

34. Student continued to require some encouragement or motivation to use the walker at school, and demonstrated more difficulties with using it toward the end of that trial period. (N.T. 119-20, 244-45, 352, 378-79)
35. The Parents made the decision to stop sending the walker to school at the end of February 2014, because of difficulties in ensuring its transport as well as concerns with Student not having a walker at home or at school should it become damaged. After that time, Student no longer had use of a walker at school except during a late spring evaluation. (N.T. 129, 133, 162-63, 165-66, 168)
36. The Parents filed a complaint with the state Bureau of Special Education in March 2014 that resulted in a Complaint Investigation Report (CIR). They alleged that the District failed to provide the “[o]pportunities to ambulate with appropriate assistive device throughout the school day” as provided in the specially designed instruction section of the then-current IEP from March 29, 2014. The Special Education Adviser who conducted the investigation agreed with the Parents that a person providing physical assistance was not a “device.” (N.T. 168-69; J-13; P-4)
37. Following the CIR, at an IEP meeting in April 2014,⁷ the members discussed the benefits of using the walker at school. The item of specially designed instruction which was the subject of the CIR was changed to state “opportunities to ambulate with physical assistance throughout the school day.” (J-14 p. 60) The Parents did not agree with this revision. (N.T. 166-67, 169-70, 251-52, 374, 401; J-14 pp. 6, 10, 60)
38. The District arranged for the use of two different walkers for the spring 2014 evaluation. The two devices selected were chosen based on Student’s height and weight through contact with a vendor for the geographic area. One device, the Meywalk, was the same type and brand of walker that Student had at home and had been used on a trial basis in the spring of 2013, but a larger size. The other, a Rifton Pacer, was similar to the Meywalk. (N.T. 253-57)
39. For the re-evaluation, The District issued another RR in June 2014 (2014 RR) that included summaries of the previous ER and 2013 RR as well as updated information and progress monitoring, but the focus was on assessing Student using the walkers and other means of ambulation at school. (J-9)
 - a. Parent input suggested that Student have the opportunity to ambulate with an assistive device, such as a walker, to participate in physical activities as independently as possible. (J-9 pp. 6-7)

⁷ The IEP was revised again on other occasions in the spring of 2014 to address matters such as ESY and occupational therapy including self-feeding needs. (J-12, J-13)

- b. The physical education teacher reported that Student was able to actively participate in class using the power wheelchair, adapted scooter, and a mat. That teacher also noted that “[p]hysical education activities are mostly fast paced and seldom consist of walking.” (J-9 p. 17)
 - c. The District reported on Student’s use of the Meywalk, the Pacer, the wheelchair, and walking with physical assistance during transitions over various distances throughout the school day. Data reflected the distance, speed, quality (number of stops and number of occasions off course), and amount of physical prompting necessary to complete each trial. Student required motivation and encouragement to use the walkers during the evaluation period, and significantly more physical prompting with the walkers than when using the wheelchair or walking with physical assistance. (N.T. 258-59, 285-86, 347-48; J-9 pp. 22-23)
40. Following the 2014 RR, the District determined that Student’s wheelchair was the most efficient means of mobility at school, with the two walkers requiring more time, more frequent stops, and the need for more prompting and direction than using the wheelchair or walking with physical assistance. Student also exhibited other difficulties using the walkers that were not present when walking with physical assistance: crying, leg scissoring, walking on toes, hanging on Student’s arms, not bearing weight, dragging feet, hopping, going in circles or backwards, and dropping Student’s head. (N.T. 259, 347-49; J-9 pp. 22-23)
41. Student’s IEP team met again on June 9, 2014 to review the 2014 RR and discuss the IEP. The team also considered the recommendations of Student’s pediatric rehabilitation physician and private physical therapist to use the walker at school. The resulting revised IEP incorporated updated current information, including a new administration of the VB-MAPP and progress monitoring. Many of the academic and related service goals and objectives were revised, with corresponding revisions to the program modifications and specially designed instruction; of significance is that the physical therapy goals and objectives were also revised to reflect Student’s increased independence using the power wheelchair and progress on transition movements. The item of specially designed instruction relating to opportunities for ambulation with physical assistance remained unchanged from April. (J-15)

2014-15 School Year

42. The Parents arranged for a private physical therapy evaluation in September 2014, to determine whether Student needed a walker for ambulation at school. (N.T. 32-33)
43. The private physical therapist conducted an observation of Student at school, in the regular classroom and the regular physical education class. Student had the use of both Student’s personal walker and motorized wheelchair for that observation. The therapist and District staff observed that Student was not motivated to use the walker except when moving back toward the wheelchair. (N.T. 34-42, 60-61, 65, 309-10, 386-91)

44. The classroom portion of the evaluation consisted of a six-minute walk test, during which the distance Student was able to travel was measured. Student walked 20' in the six-minute time period, exhibiting reluctance to do so and requiring frequent stops as well as verbal and physical cues and prompting. At the conclusion of the test, Student ambulated more independently to return to the wheelchair, which Student used, with minimal assistance, to go to the gymnasium. (P-3 p. 2)
45. In the gymnasium, Student again demonstrated reluctance to use the walker and required motivation and verbal and physical prompting. Student ambulated more independently and with fewer prompts for the return to the wheelchair in this environment as had occurred in the classroom. (P-3 p. 3)
46. During the physical education portion of the observation, Student did not interact with other students when using the walker, and instead remained off to the side of the gymnasium away from the other students. After Student returned to the wheelchair, Student participated in an activity moving throughout the gymnasium as did the other students. (N.T. 312-13, 391-92)
47. The private physical therapist recommended that Student begin using the walker at school, in adaptive physical education class, in order to provide promote physical fitness and health. Although she acknowledged that using the walker did not appear to be an efficient or preferred means of mobility for Student, she opined that by using the walker for assistance, Student would gain independence, have increased opportunities for social interaction, and avoid potential injury from physical assistance. (N.T. 49, 54-56; P-3 pp. 3-4)
48. A pediatric rehabilitation physician with whom Student has been treating since August 2012 recommended that Student use a walker at school for thirty minutes each day in order to provide "the greatest degree of muscle activation" using this device (p-5), which would also provide opportunities to change position and receive environmental stimulation in a novel way as well as assist Student with maintaining breath support and heart fitness. She concluded that providing the opportunity for such voluntary movements would help develop Student's coordination and motor planning skills, and allow Student to make choices and decisions. (N.T. 219-20, 222, 234; P-5)
49. Student has opportunities for exercise, including strengthening Student's arms, back, and legs, throughout the school day: in the wheelchair, in an adapted chair, on the carpet or a mat, while walking with physical assistance, and while in the stander, as well as during transitions to and from each of these positions. Student also participates in physical and occupational therapy and physical education. All of these activities serve to help Student maintain respiratory and cardiac functioning as well as to weight bear. (N.T. 81-83, 269-72, 353-56, 367-69)

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

Generally speaking, the burden of proof consists of two elements: the burden of production and the burden of persuasion. At the outset, it is important to recognize that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). Accordingly, the burden of persuasion in this case rests with the Parents who requested this hearing. Nevertheless, application of this principle determines which party prevails only in cases where the evidence is evenly balanced or in “equipoise.” The outcome is much more frequently determined by which party has presented preponderant evidence in support of its position.

Hearing officers, as fact-finders, are also charged with the responsibility of making credibility determinations of the witnesses who testify. *See J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008); *see also T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014). This hearing officer found each of the witnesses to be credible, testifying to the best of their individual recollection; and, with one exception, there was remarkably little inconsistency or contradiction in the testimony presented. The sole circumstance on which the testimony varied was the extent to which the Parents sent the walker to school during the first half of the 2013-14 school year, a circumstance certainly attributable to the memory of one of the parents rather than candor. Furthermore, the Parents presented as devoted, loving parents and passionate advocates for Student; and, the District personnel working with Student are clearly qualified, professional, and committed to Student and to their field. In sum, all of the individuals who participated in the hearing exhibited

true interest in and consideration for Student and Student's educational strengths and need, despite their conflicting positions at the hearing.

In reviewing the record, the testimony of every witness, and the content of each exhibit, were thoroughly considered in issuing this decision, regardless of whether there is a citation to particular testimony of a witness or to an exhibit. The parties' closing arguments were also given careful attention.

IDEA Principles

The IDEA requires the states to provide a "free appropriate public education" (FAPE) to a student who qualifies for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court held that the FAPE requirement is met by providing personalized instruction and support services to permit the child to benefit educationally from the instruction, providing the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood v. Board of Education*, 172 F.3d 238, 247 (3d Cir. 1995).

Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an Individualized Education Program (IEP), which is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). First and foremost, of course, the IEP must be responsive to the child's identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. Nevertheless, while a child must

be provided with a “basic floor of opportunity,” the IEP need not “provide ‘the optimal level of services,’ or incorporate every program requested by the child's parents.” *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3d Cir. 2012) (citation omitted); *see also Rowley, supra*.

The Parents’ Claims

The first issue is whether the District’s special education program that does not include specific provision for a walker to address Student’s physical and mobility needs amounts to a denial of FAPE.

The record establishes that Student has had the opportunity to ambulate in a variety of ways throughout the school day, without a walker, that require weight bearing and promote physical fitness. (Findings of Fact (FF) 7, 8, 12, 13, 15, 17, 18, 19, 21, 49) Student physically transitions each day in a number of different ways at school, and is gaining independence in demonstrating those physical skills. (FF 26, 27, 41) Student participates in all activities in physical education class, with and without modifications and adaptations to address Student’s unique needs, through a variety of positions that are not limited to use of the wheelchair. (FF 12, 13, 15, 17, 18) Student is working on the state Academic Standards for Physical Activity. (FF 17) Student has been and is working on speech/language/social skills, as well as a number of goals for increased independence, throughout the school day, and engages in social interactions with peers across settings. (FF 11, 16; J-11, J-12, J-13, J-14, J-15) There is no evidence that Student is excluded from any activities at school, or that Student is unable to access any part of the curriculum. All of the foregoing points to a conclusion that Student has not been denied FAPE due to the absence of a walker from Student’s program.

The Parents raised a number of concerns with the District’s refusal to provide a walker for Student and incorporate its use into the IEP. They contend that Student cannot be as

independent when the aide is providing physical assistance as Student would be in the walker; that Student would have the opportunity for more natural social interactions using the walker than in the wheelchair or with physical assistance; that Student would gain self-confidence by using the walker independently; that Student could better participate in physical activities in the walker rather than the wheelchair; and that Student would experience improved health benefits through regular use of the walker at school. (N.T. 171-72; 179-80) They also were concerned that if they continued to provide Student's own walker at school and it became damaged, there would be questions about who would be responsible for repairs during what might be a lengthy period of time within which Student would have no walker to use at home or at school. (N.T. 195-96; P-6 p. 17; S-5 p. 1) The private physical therapist also expressed an opinion that providing physical assistance while walking would become more difficult as Student gets older, and that Student would receive more cardiovascular benefit from using the walker compared to having physical assistance while walking. (N.T. 77-78, 90-91) Student's pediatric rehabilitation physician further provided a number of reasons for her recommendation that Student be provided with a walker at school. (FF 48)

The Parents' concerns are unquestionably sincere and, from a parental perspective, perfectly understandable. Nevertheless, the record as a whole does not support these claims under the IDEA. Many of these concerns have been addressed above: Student's independence, social interaction, and participation in physical activities. Significantly, as noted in the foregoing, the District is doing much more than allowing Student to stay seated throughout the day and remain in the wheelchair. While also including provision for Student to have access to and use a walker at school might prove to be of additional benefit to Student, requiring the District to do so would be tantamount to denying it the opportunity to select an appropriate

educational methodology, something that the law permits it to do. *See, e.g., M.M. v. School Board of Miami-Dade County, Florida*, 437 F.3d 1085, 1102 (11th Cir. 2006); *Ridley, supra*. In other words, the fact that Student might obtain more benefit from use of the walker, when compared with physical assistance with ambulation, does not mean that the absence of that device from the program renders it inappropriate.⁸

With respect to potential future concerns such as staff difficulty with providing the physical assistance while walking, the record does not establish that such currently exists (N.T. 265-67, 352); and, there is no reason to believe that, should this technique become too challenging or pose a risk to Student, the District would not make appropriate revisions to Student's program. Additionally, each of the benefits to the walker that the Student's physician described are appropriately addressed in other ways throughout the school day through implementation of Student's IEP.⁹ (FF 48, 49) The risk of damage to the walker if transported to and from home, while certainly a valid consideration, is inherent in any device that a child uses whether inside or outside of school; school districts cannot be obligated to completely guard against this possibility in all circumstances. In sum, notwithstanding the Parents' concerns, the District has provided an appropriate program with respect to Student's physical and mobility needs without having to procure a walker and include goals for its use in Student's IEP.¹⁰

⁸ The Parents did acknowledge that the law does not require that Student be provided with the "best" special education program. (N.T. 151)

⁹ It is noteworthy that while this witness' opinion was phrased in terms of a (not unreasonable physician's) desire for "optimal" services from her perspective (N.T. 220, 222), this is not the same as the appropriateness standard under the IDEA. The same can be said of the testimony of the private physical therapist. (FF 47)

¹⁰ The District did suggest that Student's resistance to using a walker at school lends support to its decision not to include it in Student's program. (District's Closing at 6, 10-12; FF 21, 24, 34, 39, 40, 43, 44, 45) Although Student may not be currently motivated to use the walker at school, a student's preference not to engage in a particular activity, while certainly relevant, cannot provide the basis for omitting it from a program. This hearing officer does not interpret this argument to imply that the District would refuse to program for Student based solely on whether an activity is preferred or unpreferred by Student; and is confident that Student's IEP team will continue to consider whether to include the walker as part of Student's special education program in the future.

The Parents also suggested that the District's 2014 evaluation of the walker was unduly focused on efficiency. (Parents' Closing at 3, 5-6) While it is true that efficiency was an aspect of the assessment, the evaluation was sufficiently comprehensive to assess Student using various means of ambulation and to enable the IEP team to make the determination requested by the Parents; namely, whether Student should be provided with a walker at school and have the IEP revised to address its use. This hearing officer further concludes that the District's choice of the walkers used in the evaluation was well supported and reasonable. Moreover, as set forth above, Student's physical and mobility needs have been appropriately addressed by the prior and most recent IEPs without making the revisions sought by the Parents. For all of these reasons, the District's evaluation of Student's use of a walker at school cannot be deemed flawed.

Next, the Parents assert that the walker should be considered assistive technology and, thus, is necessary for the provision of FAPE. (Parents' Closing at 6) While the walker may be classified as an assistive technology device,¹¹ such items must be provided only if necessary for ensuring the provision of FAPE. 20 U.S.C. § 1412(12)(B)(i); 34 C.F.R. § 300.105(a). Having concluded that providing a walker at school is not necessary for Student to receive FAPE, this argument must be rejected.

Finally, both the Parents and District present arguments on whether a walker should be considered a medical or educational device in this case. (Parents' Closing at 8; District's Closing at 14) Having concluded that the District's program is reasonably calculated to provide FAPE, there is no need to address these opposing contentions, nor the remaining issues related to the content of the IEP and compensatory education that were dependent on a contrary conclusion.¹²

¹¹ 20 U.S.C. § 1401(1); 34 C.F.R. § 300.5.

¹² The Parents also asserted in their Closing that the District's IEPs during the relevant time period were flawed on other bases; and that pendency should have attached to the language of the specially designed instruction in the

CONCLUSION

Based on the foregoing findings of fact and for all of the above reasons, this hearing officer concludes that the District did not deny FAPE to Student, and that no remedy is due.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** as follows.

1. The District did not deny FAPE to Student by failing to procure a walker for Student's use at school and provide for its use in Student's IEP.
2. The District is not ordered to take any action.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

Cathy A. Skidmore

Cathy A. Skidmore
HEARING OFFICER

Dated: January 10, 2015